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IN RE ESTATE OF HAZEL H. FEHRENKAMP, DECEASED. MYRTLE BAUER ET AL., APPELLANTS, V. CHAUNCEY HABIG, APPELLEE.

48 N. W. 2d 421

Filed June 22, 1951. No. 32993.

1. **Appeal and Error.** Section 25-1315.03, R. R. S. 1943, vests the power here on appeal to review the action taken by the trial court in any action taken under section 25-1315.02, R. R. S. 1943, and to enter here the judgment in favor of the party who was entitled to the judgment in the trial court.
2. ———. Where a motion for a directed verdict at the close of all the evidence is overruled and the trial court gives no reason for its decision, and where the moving party appeals here and contends that there is no evidence in the record that would sustain a jury's verdict on the issues presented, and the appellee claims that there is such evidence, the duty then rests upon the appellee to point out here the evidence upon which he relies to sustain the action taken by the trial court.
3. **Wills.** A person who understands the nature of his acts, the extent of his property, the proposed disposition of it, and the natural objects of his bounty, is competent to make a will.
4. ———. It must appear that the witness in giving his or her opinion as to mental capacity must have in mind the quality of mental capacity essential to the making of a valid will, that is whether or not the testator understood the nature of the acts, knew the extent of the property, understood the proposed disposition, and knew the objects of the bounty.
5. ———. The question of testamentary capacity relates exclusively to the time when the will was made, and although competent evidence of the testator's condition of mind long before, closely approaching, and shortly after the time of its execution is admissible, it is received only to assist in revealing his state of mind at that time.
6. ———. Whether or not a testator was justified in making the provisions of a will is of no concern to the courts, provided the testator had the mental capacity to make a valid will.
7. ———. In a will contest on the ground of undue influence the burden is on the contestant to prove by a preponderance of the evidence (1) that the testator was a person who would be subject to such influence, (2) that there was opportunity to exercise such influence, (3) that there was a disposition to exercise such influence, and (4) that the result was the effect of such influence.

8. ———. Undue influence cannot be inferred alone from motive or opportunity. There must be evidence, direct or circumstantial, to show that undue influence not only existed, but that it was exercised at the very time the will was executed.

9. ———. Mere suspicion, surmise, or conjecture is not enough to warrant a finding of undue influence. There must be a solid foundation of established facts upon which to rest an inference of its existence.

10. ———. There may be influences directing the will-maker's attention to proper obligations which it might be thought ought to be satisfied by testamentary provisions. Such influences may be persuasive and effective, but, so long as not coercive, they are not undue. Circumstances often arise where such conduct is wholly justifiable.

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

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

13. ———. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict.

APPEAL from the district court for Hall County: WILLIAM F. SPIKES, JUDGE. *Reversed and remanded with directions.*

B. J. Cunningham, E. Merle McDermott, and *Paul C. Holmberg,* for appellants.

Suhr, Pierce & Cronin, for appellee.

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

SIMMONS, C. J.

This is a will contest. Issues were made and trial was had. At the close of all the evidence proponents moved that the jury be instructed to return a verdict in favor of proponents and to find that the will offered in evidence was the last will and testament of the deceased. The court overruled the motion and submitted the issues to the jury. The jury did not agree upon a verdict and was discharged. Thereupon the proponents moved for judgment in accordance with their motion for a directed verdict. The court overruled the motion. The proponents appeal from that order. We reverse the judgment of the trial court and remand the cause with directions.

Contestant moves for a dismissal of the appeal on the ground that the order entered by the trial court is not an appealable order under sections 25-1315.02 and 25-1315.03, R. R. S. 1943. His contention is that section 25-1315.03, R. R. S. 1943, authorizes an appeal only from an order entering judgment, or from an order granting or denying a new trial, and that no such order has been entered.

Section 25-1315.02, R. R. S. 1943, provides: "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. * * * if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. * * * If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Section 25-1315.03, R. R. S. 1943, provides that "An

order entering judgment as provided in section 25-1315.02, or granting or denying a new trial, is an appealable order * * *."

Contestant's position is that the statute authorizes an appeal from an order sustaining such a motion as was made here and entering judgment thereon but does not authorize an appeal from an order overruling the motion for a judgment. We find no merit in the contention.

We had these sections before us in Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N. W. 2d 609, and there held: "Clearly section 25-1315.03, R. R. S. 1943, vests the power here on appeal to review the action taken by the trial court *in any action* taken under section 25-1315.02, R. R. S. 1943, and to enter here the judgment in favor of the party who was entitled to the judgment in the trial court." (Emphasis supplied.) The appeal brings here all matters which were considered by the trial court and which were in effect determined by the trial court under section 25-1315.02, R. R. S. 1943.

The order of the trial court overruling the motion determined the right of the proponents to a directed verdict. The question of the sufficiency of the evidence to sustain a verdict for contestant was determined. The order had the effect of granting a new trial although the specific granting of a new trial was not contained in the order.

Accordingly we hold that the merits of the motion for a directed verdict are here for determination. See Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130.

This brings us to the issues here presented in this case, which are whether or not there was evidence sufficient to take the questions of mental competence and undue influence to the jury.

The contestant is Chauncey Habig, a brother of testatrix. The will involved was executed on May 23, 1947.

We summarize the evidence in the light most favorable to the contestant, resolve controverted facts in his

favor, and give him the advantages of any reasonable inferences. In re Estate of Hunter, 151 Neb. 704, 39 N. W. 2d 418.

It appears from the evidence that testatrix and the contestant became residents of and resided in Grand Island for some 40 years before the execution of the will in question. Testatrix became a member of the Christian Science Church and for years was a reader and organist in the church. She was a practitioner in the faith. Her death occurred on July 22, 1948. Her friends and close associates were members of that church.

The contestant was not a member of testatrix's church or of her particular faith. They had contacts but once or twice a year during the approximate 40-year period prior to 1946.

Contestant and testatrix had a sister who was ill and a patient in a state institution from 1946 on. This sister had four children. One, a son, lost his life in World War II; the others lived in California. Contestant had five children, one of whom lived in Grand Island. Where the others lived does not appear in the record.

Testatrix's husband was also a member of the Christian Science Church. They lived together for many years. Their lives were close. He did everything for her and, in the words of one witness, "spoiled her." He died in February 1946.

Testatrix was a woman of intelligence and refinement. Her interests were largely in her church. She journeyed to Boston and elsewhere on church and religious matters. She is described, apparently as of her later years, as being 5 feet, 5 or 6 inches tall, and weighing 240 pounds.

Following the death of her husband she grieved much, cried often, was lonesome, did not like to be alone, and asked her friends to render many services for her. She became forgetful, would misplace things, and suspect her friends in some instances of taking her personal property, as the evidence shows without cause. She

became irritable and lost her temper at times. She drove a car habitually on the wrong side of the street, and on one occasion in March 1948, backed her car into another car.

In 1947, she was relieved of her duties as organist at the church. Thereafter she attended church less frequently, particularly the Wednesday evening meetings. She enjoyed going to picture shows and would ask friends to accompany her. She would quite often fall asleep in shows, church, and elsewhere. In conversations she would change the subject apparently without cause. She complained that her friends had discarded her. Her health began to fail in 1946, but she continued active as a practitioner until the spring of 1948. She handled her own business affairs, except that she would ask friends to check bills for groceries, read meters, and deliver payments for current accounts.

Following the death of her husband, her contacts with her brother became more frequent. He was often with her. The brother's wife died in March 1947. Their contacts increased but because of his use of medicines and tobacco, he did not live with her although he was then living alone.

In June 1946, testatrix executed a will in which she left bequests to several friends and to her church. She provided a sum for the benefit of her sister, made a bequest to contestant, her brother, and made a substantial bequest and devise of her home to a Miss Tangerman. She made Miss Tangerman a contingent beneficiary of certain bequests. She named her as executrix of her will.

It appears that for many years prior to the making of this will Miss Tangerman had been an attentive companion and friend, and had given much of time and service to testatrix. It appears also that Miss Tangerman in April 1947, because of other responsibilities, advised testatrix that she no longer could give of her time and energy to testatrix to the extent that she formerly had

done. A Miss Bauer, a friend of long standing, began to care actively for testatrix in the fall of 1946. Testatrix then called for and received the continued attention and services of Miss Bauer.

In the May 23, 1947, will, testatrix made no changes in some of the bequests provided in the 1946 will, changed others, and in part made Miss Bauer contingent beneficiary. She provided a cash bequest to Miss Tangerman, continued the bequest for the benefit of her sister, changed and increased the bequest to her brother, and devised her home to Miss Bauer.

The same attorney prepared both wills. On all occasions testatrix came to his office unaccompanied. Before the will in question was prepared, she consulted the lawyer on a number of occasions and told him of changes which she wanted made in the 1946 will. He prepared a proposed will. She took it away with her and several days later returned, approved the contents, and the final draft was prepared and executed. On or about the day she executed the will she told one of her friends that she was changing her will and remembering her friends, and asked that friend if she wanted to be remembered and was told that she did not. She left the will with her lawyer who retained it until her death. That the will was executed as provided by law is not challenged here.

There is evidence that both before and after the execution of the will in question, testatrix told contestant and others she had left all her property and also the home to him. This evidence will be referred to later in this opinion.

There also is evidence that in the period after the execution of the will the characteristic actions of the testatrix became more noticeable. She suffered a speech difficulty beginning in July 1947, and later a paralysis of the throat. Her friends continued to help her. Toward the last of her life, a lady, with whom contestant was keeping company, was called in to help as a practical

nurse and, at testatrix's suggestion, contestant and the lady were married July 1, 1948, and thereafter assisted in caring for testatrix.

Testatrix kept money and valuable jewelry about the home. In May 1948, Miss Tangerman consulted testatrix's lawyer and at his suggestion Miss Bauer and another took these valuables to the bank and placed them in testatrix's safety box. It was done without testatrix's knowledge. She did not approve. Contestant protested.

The proponents bring this case here with the contention that there is no evidence in the record that would sustain a verdict that the testatrix lacked sufficient mental capacity to make the will or that the will was the result of undue influence. The contestant here contends that the evidence is sufficient to sustain a verdict on either or both of those grounds. The trial court gave no reasons for its decision. This presents a situation analogous to that which we had in Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772. Under these circumstances the proponents are not required to establish a negative. The duty rests upon the contestant to point out the evidence here that he contends exists in the record and which he contends justifies the submission of either or both of these issues to a jury. The contestant here has undertaken to do that.

Contestant cites the rule that "A person who understands the nature of his acts, the extent of his property, the proposed disposition of it, and the natural objects of his bounty, is competent to make a will." In re Estate of Witte, 145 Neb. 295, 16 N. W. 2d 203, on rehearing, 145 Neb. 305, 17 N. W. 2d 477. Contestant contends that there is an issue of fact based on the evidence as to each of these elements.

Contestant contends that textatrix did not understand the nature of her act in making the will. Here contestant relies upon the testimony of a nonexpert witness who was permitted to testify over objection that in her

opinion testatrix "didn't know what she was doing" in making the will.

The foundation evidence for this opinion is along the general lines of the characteristics of the testatrix hereinbefore recited. It does not in anywise meet the test that "* * * it must appear that the witness in giving his or her opinion as to mental capacity must have in mind the quality of mental capacity essential to the making of a valid will, that is whether or not the testator understood the nature of the acts, knew the extent of the property, understood the proposed disposition, and knew the objects of the bounty." In re Estate of Witte, *supra.*

As in the Witte case so here this witness gave her opinion without anything to indicate that she was informed as to the qualities of mind constituting mental capacity to make a will. As we held there so we hold here that the opinion of this witness has no weight as evidence in determining the question here.

Contestant contends that there is evidence that testatrix did not know the extent of her property. Testatrix provided in her will for a number of cash bequests, specific bequests of other personal property, and devised her home specifically. The will indicates a full knowledge of her property. In addition to specific items she had cash, bank and building and loan accounts, insurance, and bonds. There was a debt secured by mortgage on the home. Contestant argues that as of the date of her death there were not sufficient assets to pay the expenses of her last illness, and probate, the mortgage, and specific bequests. We need examine this contention no further than to point out that assets as of the date of death do not establish assets as of the date of the will. In addition to this fact is the testimony on recross-examination by contestant of the attorney who drew the will that to his recollection testatrix at the time the will was being prepared had sufficient property to pay the mortgage and specific bequests.

It is also argued that testatrix had cash, credits, and

deposits sufficient to pay the mortgage on her home and did not do so. Obviously that is not sufficient to establish mental incompetency.

It is further pointed out that the witness who expressed the opinion last above discussed also was asked if testatrix knew the extent of her property and answered, "That I just couldn't say. I wouldn't believe she did." For the reasons above given the opinion has no weight in determining the issue presented here.

Contestant contends that there is evidence, sufficient to go to the jury, that testatrix did not understand the disposition she was making of her property. Reliance is made upon the contestant's testimony that testatrix told him several times "* * * she had left everything to me"; that she "indicated" that to him in 1946, and said in 1948, "I have left everything to you." The date of the 1948 statement is not fixed but connecting it with other evidence this statement appears to have been made about July 1, when testatrix was asking contestant to marry so that he and his wife could move in and help care for testatrix. There also is evidence of another witness that testatrix said in the first part of 1947, right after contestant's wife died, that contestant was all "* * * she had left and everything was his that she had." The contestant's wife died March 4, 1947. It is apparent that two of these statements were made prior to the execution of the contested will on May 23, 1947, and one long after, when there was discord in testatrix's home between contestant and the friends of testatrix.

The evidence here is that testatrix knew the contents of her will when it was executed. "The question of testamentary capacity relates exclusively to the time when the will was made, and although competent evidence of the testator's condition of mind long before, closely approaching, and shortly after the time of its execution is admissible, it is received only to assist in revealing his state of mind at that time." In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37. The statements

here made do not go to her knowledge of the disposition made of her property at the time the will was executed.

Contestant contends there is evidence that the testatrix did not know the natural objects of her bounty. The will itself is the best answer to that contention. She gave bequests to her brother (the contestant); she provided for her sister (and there is no indication of financial needs of the sister); she did not provide for nieces and nephews. The will shows a pattern of a desire to compensate for services and kindnesses to testatrix. With the exception of one nephew, there is no showing that the paths of the nieces and nephews ever met those of the testatrix. There is no showing of any indication of a reason for a bequest to that nephew. We know of no rule of law that requires bequests to relatives and are cited to none. Nor do we know of any rule that requires a testator to mention all relatives in a will. Whether or not testatrix was justified in making the provisions of the will which she did is of no concern to the courts, provided she had the mental capacity to make a valid will. The evidence is ample to sustain her mental capacity to do so. We find no evidence of mental incapacity at the time the will was executed sufficient to sustain a verdict of a lack of testamentary capacity. See In re Estate of Thomason, 144 Neb. 300, 13 N. W. 2d 141.

This brings us to the question of whether or not there was evidence sufficient to take the case to the jury on the issue of undue influence. On this question the rules are:

"In a will contest on the ground of undue influence the burden is on the contestant to prove by a preponderance of the evidence (1) that the testator was a person who would be subject to such influence, (2) that there was opportunity to exercise such influence, (3) that there was a disposition to exercise such influence, and (4) that the result was the effect of such influence."

"Undue influence cannot be inferred alone from motive or opportunity. There must be some evidence,

direct or circumstantial, to show that undue influence not only existed, but that it was exercised at the very time the will was executed."

"Mere suspicion, surmise, or conjecture is not enough to warrant a finding of undue influence. There must be a solid foundation of established facts upon which to rest an inference of its existence. This proposition applies with peculiar force when the result of drawing such an inference is to destroy the effect of a written instrument prepared with deliberation and signed and attested with all the formalities required by law for the execution of a will."

"There may be influences directing the will-maker's attention to proper obligations which it might be thought ought to be satisfied by testamentary provisions. Such influences may be persuasive and effective, but, so long as not coercive, they are not undue. Circumstances often arise where such conduct is wholly justifiable." In re Estate of Thompson, 153 Neb. 375, 44 N. W. 2d 814.

Contestant contends that testatrix was at the time of making the will "susceptible to influence" and relies upon the testimony hereinbefore recited and in particular upon the changes made in the 1947 will, when contrasted with the 1946 will, to show that she was influenced by the changing events, friends, and conditions, and upon one witness who testified that she could be influenced in her decisions. The rule, however, is: "In order to invalidate a will, undue influence must be of such a character as to destroy the free agency of the testator and substitute another person's will for his own." In re Estate of Heineman, 144 Neb. 442, 13 N. W. 2d 569.

We find no evidence and are cited to none which would sustain a finding that testatrix was susceptible to influence to the extent that another person's will could be substituted for her own. There is ample evidence that such could not be done, such as the repeated efforts of friends to have testatrix take her brother into her home.

The evidence shows ample opportunity by several

beneficiaries, including Miss Bauer, to exercise undue influence.

Contestant contends that the evidence shows a disposition of Miss Bauer to exercise undue influence. Here reference is made to testimony of Miss Bauer which shows only that she was insistent on carrying out the wishes of testatrix in paying accounts when testatrix was ill. Reference also is made to the taking of money and valuables to a place of safekeeping shortly before testatrix's death. This was done on the advice of testatrix's lawyer. It was obviously to conserve the estate. This evidence does not tend to show undue influence at the time the will was executed.

Contestant contends that the fact that the second will reduced materially the benefits to Miss Tangerman and that Miss Bauer became a substantial beneficiary under the second will, shows a disposition of Miss Bauer to exercise undue influence. Concededly those things are results which might follow undue influence, but there is an absence of a solid foundation of established facts upon which such an inference can be based.

Contestant contends that the result appears to be the result of undue influence. The argument here is from result to suspected cause.

We recognized in the case of In re Estate of Bainbridge, 151 Neb. 142, 36 N. W. 2d 625, that "In evaluating the testimony and proper inferences therefrom, it is not always possible to apply the evidence tending to establish improper influence which is referable to the will solely to one of the essential elements. * * * It is permissible therefore not to strive to separate each fact supported by evidence offered as proof of undue influence and allocate it under one or more of the four essential elements requisite to establish the exercise of undue influence, but to view the entire evidence offered by the contestants as proof of this issue and rest the decision upon whether or not the evidence as a whole is of such a substantial nature as to contain some proof of

each of the essential elements, and to require that the issue of undue influence be submitted to and determined by a jury."

Whether we view this record as to each of the elements or as a whole, the fact remains that there is an absence of a solid foundation of established facts upon which to rest an inference of undue influence. There is mere suspicion, surmise, and disappointment. These are not enough to support a verdict of undue influence.

The rule is: "In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict." In re Estate of Scoville, 149 Neb. 415, 31 N. W. 2d 284.

Pursuant to section 25-1315.03, R. R. S. 1943, the judgment of the trial court is reversed and the cause is remanded with directions to sustain proponents' motion made at the close of all the evidence and to enter judgment in accord therewith in favor of proponents.

REVERSED AND REMANDED WITH DIRECTIONS.

EMMERT A. TRUMAN, APPELLANT, V. HERBERT H. HANN, WARDEN OF NEBRASKA STATE PENITENTIARY, APPELLEE.

48 N. W. 2d 418

Filed June 22, 1951. No. 33018.

1. **Habeas Corpus.** In a petition for a writ of habeas corpus if relator sets forth facts which, if true, would entitle him to discharge then the writ is a matter of right and relator should be produced and a hearing held thereon to determine questions of fact presented; but if relator shows by the facts alleged in his petition for the writ that he is not entitled to relief then the writ should be denied.
2. ———. Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment

sentencing a defendant and cannot be used as a substitute for a writ of error.

3. ———. In order to release a person from a sentence of imprisonment by habeas corpus it must appear that the sentence was absolutely void. It will not lie to discharge a person from a sentence of penal servitude when the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and if the sentence was within the power of the court to impose.

4. ———. The regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for a writ of habeas corpus. If the court had jurisdiction of the defendant and the authority to try the charge against him, its action can be assailed only in a direct proceeding.

5. **Constitutional Law.** A constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

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

Emmert A. Truman, pro se.

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

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

WENKE, J.

Emmert A. Truman filed this action in the district court for Lancaster County against Herbert H. Hann as Warden of the Nebraska State Penitentiary. The purpose thereof is to obtain the issuance of a writ of habeas corpus in order to have determined whether or not petitioner is being unlawfully held in the penitentiary.

The district court found that the petition failed to allege facts sufficient to state grounds for the issuance of a writ. It therefore denied the request and dismissed the action. Petitioner thereupon filed a motion asking the court to reconsider his petition and from the overruling thereof took this appeal.

For convenience in writing this opinion we shall refer to Emmert A. Truman as the petitioner.

Petitioner was sentenced and committed to the Nebraska State Penitentiary for a period of six years pursuant to his conviction by the district court for Lancaster County of the crime of rape. His conviction and sentence were, on error proceedings to this court, affirmed. See Truman v. State, 153 Neb. 247, 44 N. W. 2d 317. Petitioner is being held in the penitentiary pursuant to this commitment.

"In a petition for a writ of habeas corpus, if relator sets forth facts which, if true, would entitle him to discharge, then the writ is a matter of right and relator should be produced and a hearing held thereon to determine questions of fact presented, but if relator shows by the facts alleged in his petition for the writ that he is not entitled to relief, then the writ should be denied." In re Application of Dunn, 150 Neb. 669, 35 N. W. 2d 673.

As a basis for requesting that the writ be issued the petitioner alleged as follows:

"He was arrested in Osage County Oklahoma Jan. 9, 1950 for contributing to juvenile delinquency, in the instant case, and for another charge, removing mortgaged property, which was without evidence, and was dismissed. The arresting officer had no warrant for his arrest. Your petitioner waived extradition from Oklahoma on the aforementioned charge of contributing to juvenile delinquency, and removing mortgaged property. After being returned to Nebraska your petitioner was not permitted to obtain or talk to an attorney in his defense, prior to his appearance before Judge Fisher Jan. 13, 1950 for contributing to juvenile delinquency. Upon telling Judge Fisher he wished to consult an attorney your petitioner was told, if he entered a plea of not guilty he could change his plea to guilty, after consulting an attorney, if he so wished. However; after entering a plea of not guilty he was returned to jail and not permit-

ted to change his plea to guilty, on contributing to juvenile delinquency, but, was held several days, then told by a county official, that if he would sign a statement he would be allowed to change plea. After signing the said statement on or about Jan. 24, 1950 he was returned to jail and held several more days, then was charged with Statutory Rape. The contributing charge was dropped, as was the removing mortgaged property charge, thus by so doing, the state did not allow him due process of the law. The state obtained legal custody of your petitioner through false, and unlawful pretenses, the arresting officer had no authority to arrest your petitioner, because he had no warrant. Your petitioner was returned to Nebraska on a lesser charge, in the instant case than the one he was tried and convicted on. Your petitioner was induced to sign a statement, which was used as evidence to obtain a conviction on Statutory Rape, which said charge was not filed until the state had obtained the aforementioned statement, through false pretenses and deception.

"The county attorney's office with-held a statement given by the prosecutrix Jan. 13, 1950, which completely exhonerated (exonerated) your petitioner of Statutory Rape.

"The state refused to subpoena some witnesses ordered by and essential to the defense of your petitioner, however, he was not told, prior to the time he was called to testify, that he would not be allowed these witnesses.

"Your petitioner further alleges, because of contradictory evidence and testimony there was insufficient evidence to establish any substantial basis for the claim of 'previous chastity' made by the prosecutrix, at the trial for the said cause.

"Your petitioner further alleges, the court violated his rights by recessing and allowing the jury to retire to their respective homes or associate with the public, after all evidence both for and against him had been submitted. The jury should have been instructed forth-

with and ordered to reach a verdict, before being allowed to disband and talk to anyone outside the court.

"Your petitioner further alleges, the court erred in not properly instructing the jury, before ordering them to retire and reach a verdict, they were not instructed, that, they could recommend leniency, or, that the minimum sentence, for the said offense, was three years.

"Your petitioner further alleges, since his conviction, he has learned a witness for the defense, with-held evidence in his favor, because, said witness had been threatened with prosecution if the said witness did not cooperate fully with the state.

"Your petitioner further alleges, because of incompetant (incompetent) or uninterested representation by court appointed attorneys, his motion for a new trial and his timely appeal to the Nebraska Supreme Court failed to obtain a new trial, he further alleges he has obtained new information, bearing directly on the previous chastity of the prosecutrix and other issuable material facts."

Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant and cannot be used as a substitute for a writ of error. In re Havlik, 45 Neb. 747, 64 N. W. 234; Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007; Hulbert v. Fenton, 115 Neb. 818, 215 N. W. 104; In re Carbino, 117 Neb. 107, 219 N. W. 846; Alexander v. O'Grady, 137 Neb. 645, 290 N. W. 718; Hawk v. Olson, 146 Neb. 875, 22 N. W. 2d 136; Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, 165 A. L. R. 932; In re Application of Bruno, 153 Neb. 445, 45 N. W. 2d 178.

In order to release a person from a sentence of imprisonment by habeas corpus it must appear that the sentence was absolutely void. It will not lie to discharge a person from a sentence of penal servitude when the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant,

and the sentence was within the power of the court to impose. See Hulbert v. Fenton, *supra;* In re Carbino, *supra;* Alexander v. O'Grady, *supra;* Hawk v. Olson, *supra;* Jackson v. Olson, *supra;* In re Application of Dunn, *supra.*

"The regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for a writ of habeas corpus. If the court had jurisdiction of the defendant and the authority to try the charge against him, its action can be assailed only in a direct proceeding." In re Application of Carper, 144 Neb. 623, 14 N. W. 2d 225. See, also, Hawk v. Olson, *supra;* Jackson v. Olson, *supra.*

"A constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." Hawk v. Olson, *supra.* See, also, Jackson v. Olson, *supra.*

Applying these principles to the facts pleaded we find the trial court was correct in refusing to issue the writ.

AFFIRMED.

MARION A. DANNER, APPELLEE, V. WILLIAM H. WALTERS, APPELLANT.

48 N. W. 2d 635

Filed June 29, 1951. No. 32937.

1. **Evidence: Trial.** Physical facts may not be accepted as a matter of law or as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted question of fact, unless they are demonstrable to a degree that reasonable minds cannot disagree as to their existence, and unless the results flowing therefrom are demonstrable to the same degree agreeable to the known and immutable laws of physics, mechanics, or mathematics.
2. **Trial: Appeal and Error.** Where there is a reasonable dispute as to the pertinent physical facts, the conclusions to be drawn therefrom are for the jury, and a verdict based thereon will not be disturbed unless clearly wrong.

3. **Evidence: Appeal and Error.** Where evidence is objected to which is substantially identical with evidence admitted and not objected to, prejudicial error will not lie.
4. **Evidence: Trial.** A witness may describe the marks that he observed near the place of an accident. The inference to be drawn from the testimony regarding such tire marks or scratches is solely the province of the jury.
5. **Trial.** An instruction, which correctly advises the jury that the plaintiff must prove all the material elements of his case by a preponderance of the evidence and that if it fails to so establish any one of them the verdict should be for the defendant, is not erroneous in that it fails to inform the jury as to what their verdict should be if the evidence was evenly balanced.
6. **Trial: Appeal and Error.** Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.
7. ———: ———. A judgment will not be set aside because a more accurate statement of the law might have been made than that contained in certain instructions, when from a consideration of the instructions as a whole no prejudicial error appears.
8. **Evidence: Appeal and Error.** Where erroneous evidence is admitted by a court, and in the instructions to the jury such evidence is withdrawn by the court from their consideration, such withdrawal by the court ordinarily cures the error committed in the admission of the evidence.
9. ———: ———. Where evidence improperly received is afterwards stricken out and expressly withdrawn from the consideration of the jury, the error involved in its reception is ordinarily cured.

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

Gross, Welch, Vinardi & Kauffman, and *Harry A. Hall,* for appellant.

Wear & Boland, Van Pelt, Marti & O'Gara, Warren K. Dalton, and *Robert D. McNutt,* for appellee.

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

MESSMORE, J.

This is an action at law brought by the plaintiff,

Marion A. Danner, against the defendant, William H. Walters, to recover property damage to a truck owned by the plaintiff and driven by his brother Richard Danner, as a result of a collision between the truck and an automobile owned and operated by the defendant. The defendant filed an answer and counterclaim seeking damages for personal injuries sustained by him as a result of the collision, and for his and his wife's medical expenses. The case was tried to a jury which returned a verdict in favor of the plaintiff and assessed the amount of the plaintiff's recovery in the sum of $2,900. Judgment was entered on the verdict. The defendant's motion for a new trial was overruled, and the defendant appeals.

For convenience we will refer to the parties as originally designated in the district court, and will refer to Richard Danner as the truck driver.

The defendant contends the trial court committed reversible error in determining that the evidence, including the physical facts, was sufficient to sustain the verdict and judgment for the plaintiff, and in refusing to grant the defendant a new trial for insufficiency of the evidence to sustain the verdict.

Where a verdict is assailed for the reason that the record discloses that there is not sufficient evidence to support it, in an investigation of that character it becomes the duty of the appellate court to analyze the testimony of the witnesses and the physical facts in connection therewith.

It appears from the record that the plaintiff is engaged in the trucking business and is the owner of a 1946 Diamond T tractor, and trailer of the approximate length of 28 feet. The outside of the trailer part of the unit is 8 feet in width. This truck was in good mechanical condition, equipped with vacuum brakes over hydraulic that work on the ten wheels of the vehicle, six in the front part thereof and four in the back. The weight of the truck empty is 13,000 pounds. The plaintiff's brother Richard Danner, employed by the plain-

tiff, left Pomeroy, Iowa, enroute to Blackwell, Oklahoma, with a load of oats weighing ten tons, at 8 a. m., on April 19, 1949. The day was clear and the pavement dry. Prior to the accident which occurred at approximately 2 p. m., the same day, he was proceeding on U. S. Highway No. 6 to Lincoln. This highway runs north and south along the east side of Gretna where there is a sweeping curve which turns to the right or west through the edge of Gretna. The pavement on the curve slants from the south to the north. The highway at this point is 20 feet in width, and the shoulders on each side thereof are 4 feet wide. On the south side of the curve, 2 or 3 feet from the pavement, is a wire-fence guardrail which runs almost completely around the curve a distance of 600 feet. Before arriving at the scene of the accident the truck driver maintained a speed of 35 miles an hour and was proceeding on his own side of the highway. Down the embankment on the south side of the highway there was a fire burning which, due to the wind blowing toward the north, caused the highway to be covered with dense smoke. The truck driver saw the smoke when he was at a distance of 150 feet from it. He was driving in fourth and low-ratio gear which gives more power and reduces the speed. He took his foot off of the gas and entered into the smoke at a speed of approximately 25 miles an hour. The truck was equipped with a large red light on the back of the trailer. When he proceeded a distance of approximately 5 feet or so into the smoke it thinned out a little and he saw a car which was in the smoke "astraddle of the black center line" of the highway which he could see, at a distance of approximately 20 feet from him. He applied his brakes and the car, which later developed to be the car owned and operated by the defendant, struck the truck a foot or a foot and one-half inside of its left front corner. He testified that half of the defendant's car was over the center line of the pavement. He was unable to see whether or not the defendant turned his

car in either direction. The left front wheel of the truck was 2 feet from the center line of the highway when the defendant's car struck the truck. Defendant's car was proceeding at about 50 miles an hour. The left front wheel of the truck was knocked off. The truck, after being struck, made a 45-degree turn to the south side of the highway, went through the guardrail, and down the embankment into the bottom of the ditch and rested on its side with the wheels tipped up.

A witness, driving her daughter from Omaha to Lincoln to attend the University of Nebraska after the Easter vacation, testified that they followed the truck for a distance of 10 miles. The truck was traveling at a rate of speed of 35 miles an hour, which speed was maintained as was also their speed. The truck was on its own right side of the highway proceeding south. When they proceeded toward the curve they came to an oil station on the west side of the highway, endeavored to pass the truck by increasing their speed, and pulled up along side of it. They then saw a cloud of smoke and the driver, looking into the rear-view mirror to see if anyone was behind them, slowed the car and pulled in behind the truck, and proceeded to follow it. She believed she saw a red light flash as the truck proceeded into the smoke where it disappeared from her view. She was about 30 feet behind the truck at that time. She drove into the smoke and had proceeded a short distance when she saw the rear part of the truck go over the embankment on the south side of the road. She stopped her car and went across the highway to the left or south side. The truck was lying in the bottom of the ditch with the tractor wheels turned toward the highway. The trailer part was turned just the opposite. She estimated that the truck had proceeded possibly 12 feet into the smoke. She was unable to see the truck when she was in the smoke. She was driving blind, and was concerned as to whether or not she was on her own right side of the highway. Her evidence was corrobo-

rated by that of her daughter who was riding with her and seated to her right.

The defendant's evidence is to the effect that he was employed by Crane & Company, a Massachusetts corporation engaged in the manufacture of paper, with his headquarters at Kansas City, Missouri. The State of Nebraska constituted a part of his territory. He had been in Lincoln and called on a customer. He left Lincoln with his wife, who was accompanying him on the trip, to go to Omaha to call on some customers there. They left Lincoln in a 1948 Chevrolet coupe owned and operated by the defendant. After they had proceeded on U. S. Highway No. 6 along side of Gretna and had gotten over the top of a hill and started down a slight grade, defendant noticed smoke which was about a block and a half ahead of him. He estimated the curve started 300 or 400 feet from what is designated as the Lincoln end of the guardrail. The smoke was dense, white in color with a sort of yellow tinge, and looked to him to be very thick. He was proceeding on the right side of the highway intending to negotiate the curve turning to the left to proceed north on U. S. Highway No. 6, thence on to Omaha. He was traveling at a rate of speed of 25 miles an hour when passing the Chrysler-Plymouth garage at Gretna, and continued that speed to within a distance of 35 to 40 feet from the smoke on the highway. He then slowed his car down and remarked to his wife that no one was tending the fire. He shifted the car into second gear and was then proceeding at a rate of speed of 5 or 10 miles an hour. After he approached the smoke and had passed a few wisps of it he pulled as far as he could over to the right side of the highway and was then about 5 to 7 feet away from the dense part of the smoke when he saw the plaintiff's truck. He noticed the guardrail, and estimated the accident happened at a point about 400 feet past the starting of the guardrail to the west. He could see the top of the hood, the bumper, the lights, and the fenders of the truck

which was on defendant's side of the highway and coming toward his car. He could not estimate the speed of the truck, but it loomed up in front of him all at once. The left front part of the truck hit the left front section of his car. This was the extent of the defendant's testimony with reference to the accident.

Defendant's wife testified to substantially the same set of facts with this variation: That there was a crest of a hill when the defendant slowed down his car to enable them to see what they were getting into, and the defendant had pulled over to the right side of the highway as far as he could go. As they were approaching the smoke she saw the lower part of the truck loom up ahead of their car, and the truck was on the defendant's side of the highway. The left side of the truck seemed to be heading straight for the middle or left side of the defendant's car. She estimated they were 5 or 6 feet from the smoke when the truck came out of it. She knew the truck was going to strike their car and the next thing she knew somebody was trying to open the door of their car.

It appears from the record that two days after the accident, on April 21, 1949, the defendant's wife, in a statement taken by a court reporter, stated that when she saw the truck it was over on its own side of the road, and that she could see the truck when they entered the bank of smoke. She stated they "were going 45 miles an hour but I wouldn't even know what the speed was when we were hit, it all happened so fast. In fact, if I had been driving I would have paid more attention."

The defendant gave a statement on the same date in which he stated he was going about 50 miles an hour when he noticed the smoke, and slowed down to 40 miles an hour. He did not see the truck until they collided. He had just entered the smoke at the time the accident happened, and could not have been in the smoke a distance of more than 10 yards.

The defendant and his wife could not remember the

interview in the hospital on April 21st. Each of them was in a semiconscious condition when the statements were made, and the condition of each was dangerous. They were under the influence of morphine and other opiates.

A witness who was traveling out of Lincoln on the same highway arrived at the scene of the accident shortly thereafter. He saw the defendant's car, the back end of which was protruding through the guardrail fence. It was sitting at a right angle to the pavement with the front of the car 2 or 3 feet on the pavement. The truck was lying on its side in the ditch, headed west. This witness testified that he saw a mark which started about 2 feet on the north side of the center line of the highway, 20 to 25 feet in length, or approximately the width of the pavement, which indicated that the pavement had been torn by a sharp object. The direction of these marks was from the north side of the highway at a 45-degree angle to the south side of the highway and proceeded to a large opening in the guardrail fence which was adjacent to the position of the truck which was in the ditch. This mark continued south across and off of the pavement. There was also a mark in the dirt on the south shoulder through the hole in the guardrail fence. The Chevrolet was sitting about 15 feet to the east of the larger hole in the guardrail fence. The tire marks on the north side of the pavement were about 10 feet west of the Chevrolet. There was some broken glass in front of the Chevrolet.

The witness who was riding with her mother in the car that followed the truck testified she heard a loud crash, and when they had gotten out of the smoke the defendant's car was sitting in a perpendicular angle to the black center line of the highway, the guardrail fence had been flattened, and the back wheels of the defendant's car were resting on this fence. She testified to seeing tire marks on the left or north side of the highway leading toward Omaha. These tire marks went across

the pavement at a 50-degree angle. She observed some chip marks which started on the north side of the pavement and seemed to run toward the south, the same as the tire marks.

Nebraska Safety Patrol officers who arrived at the scene of the accident about 2:30 p. m. testified to seeing some scratches running in the direction of the Chevrolet car, which started 1 foot 11 inches from the center line on the defendant's side of the pavement and ran back to the Chevrolet a distance of 8 or 10 feet.

A witness who arrived at the scene of the accident to furnish tow-in service testified that he observed a mark about 2 feet from the center line of the highway on the defendant's side thereof, which indicated to him that that was the place where the wheel of the truck was knocked off and the axle of the truck fell. This mark gradually faded out on the highway. He noticed no tire marks in the direction of the defendant's car.

Other evidence has to do with the position and condition of the parties after the accident, the severity of the injuries suffered, the expert medical testimony with reference thereto, the expenses incurred by the defendant in such respect, and the fair and reasonable value of the vehicles before and after the accident.

It is the rule in this jurisdiction that physical facts may not be accepted as a matter of law or as a ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted fact question, unless they are demonstrable to a degree that reasonable minds cannot disagree concerning their existence, and unless results flowing therefrom are demonstrable to the same degree agreeable to the known and immutable laws of physics, mechanics, or mathematics. See, Jones v. Union P. R. R. Co., 141 Neb. 112, 2 N. W. 2d 624; Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766; Pruitt v. Lincoln City Lines, 147 Neb. 204, 22 N. W. 2d 651; Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236.

The following authority is also pertinent to the instant

case: " 'Where, however, there is a reasonable dispute as to the pertinent physical facts, the conclusions to be drawn therefrom are for the jury, and a verdict based thereon will not be disturbed unless clearly wrong.' " Rueger v. Hawks, *supra*. See, also, Moore v. Krejci, 139 Neb. 562, 297 N. W. 913; Pruitt v. Lincoln City Lines, *supra*.

We conclude the foregoing assignment of error of the defendant cannot be sustained.

The defendant contends the trial court committed reversible error in admitting over objection of the defendant, testimony of a safety patrolman that he made no arrest at the scene of the accident. The safety patrolman testified that a form was filled out in accordance with the information obtained at the scene of the accident and that page 2 of this form or report showed that both vehicle drivers were driving straight ahead. Without objection, he testified there was nothing to indicate a violation on the part of the truck driver. He was asked whether or not he indicated on the report that the truck was doing anything improper in passing the other car. Objection was made and sustained. He was then asked if he made any arrests. This question was objected to and overruled. He answered that he made no arrests.

We believe the admission of the evidence complained of was error, however, it was error without prejudice. Where evidence is objected to which is substantially identical with evidence admitted and not objected to, prejudicial error will not lie. See Olmstead v. City of Red Cloud, 86 Neb. 528, 125 N. W. 1101.

The defendant contends that the trial court committed reversible error in excluding the testimony of a safety patrol officer as to where the point of impact between the two vehicles occurred.

This patrolman arrived at the scene of the accident approximately half an hour after it occurred. He gave evidence as to the tracks or other marks made by the

truck and the defendant's car, what he observed with reference to the same, and other circumstances surrounding the accident which he was in a position to know and testify about. He testified that he investigated about 50 to 100 accidents a year, gathered evidence, and made reports of the accidents to the state. He did not take measurements on all accidents. He was asked, from his experience as a traffic investigator, where the point of impact between the two vehicles occurred, to which there was an objection which was sustained, and an offer to prove that if the witness were permitted to testify he would say that the approximate point of impact was 1 foot 11 inches south and east of the center line of the pavement. The offer to prove was objected to and the objection sustained.

One of the objections most frequently raised against the admission of expert opinion testimony is that the opinion offered invades the province of the jury. This objection is indeed the basis of the general rule of evidence that the testimony of witnesses must be confined to concrete facts perceived by the use of their senses as distinguished from opinions and conclusions deducible from evidentiary facts. In many cases it is asserted as a broad general rule, often assumed to be an inflexible rule of law, that while an expert may be permitted to express his opinion, or even his belief, he cannot give his opinion upon the precise or ultimate fact in issue before the jury, which must be determined by it. See, 20 Am. Jur., Evidence, § 782, p. 653, and cases cited under note 16 thereof; Neal v. Missouri P. Ry. Co., 98 Neb. 460, 153 N. W. 492; Gross v. Omaha & C. B. Street Ry. Co., 96 Neb. 390, 147 N. W. 1121, L. R. A. 1915A 742.

A witness may describe the marks that he has observed near the place of an accident. The inference to be drawn from the testimony regarding such tire marks, skid marks, or scratches is solely the province of the jury. See Thornbury v. Maley, — Iowa —, 45 N. W. 2d 576, and cases cited therein.

The physical facts from which this question was to be answered were all presented to the jury. The issue did not call for the opinion of an expert. The jury was as competent to decide from the facts the point at which the impact took place as was the officer. We find no reversible error in the ruling of the trial court as contended for by the defendant.

The defendant contends the trial court failed to inform the jury on the burden of proof as to whom the verdict should go in the event that the evidence was equally balanced, or in the event that the evidence preponderated in favor of the defendant, relying on Fitzsimons v. Frey, 153 Neb. 124, 43 N. W. 2d 531, and Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436.

In Kristufek v. Rapp, *ante* p. 343, 47 N. W. 2d 923, this court said: "An instruction, which correctly advises the jury that plaintiff must prove all the material elements of his case by a preponderance of the evidence and that if it fails to so establish any one of them the verdict should be for the defendant, is not erroneous in that it fails to inform the jury as to what their verdict should be if the evidence was evenly balanced."

The instruction on the burden of proof complained of in the instant case is very similar to the instruction on the same subject complained of in Kristufek v. Rapp, *supra.* In substance the instruction says that the plaintiff must prove all of the material elements of his case by a preponderance of the evidence, and that if he fails to so establish any one of them by a preponderence of the evidence, the verdict should be for the defendant. It is the plain import of the instruction that if the evidence is evenly balanced the verdict shall be for the defendant. On this assignment of error Kristufek v. Rapp, *supra,* is decisive.

While the defendant complains of other instructions given by the trial court, from an examination of these instructions and considering the instructions as a whole we conclude that the same are sufficient and adequate

to properly inform the jury of the matters complained of by the defendant, and the assignment of error with reference thereto is without merit.

Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. See, Gallagher v. Law, 135 Neb. 381, 281 N. W. 806; Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217; In re Estate of Wahl, 151 Neb. 812, 39 N. W. 2d 783.

A judgment will not be set aside because a more accurate statement of the law might have been made than that contained in certain instructions, when from a consideration of the instructions as a whole no prejudicial error appears. See, Wright v. Cameron, 148 Neb. 292, 27 N. W. 2d 226; Pauli v. State, 151 Neb. 385, 37 N. W. 2d 717.

The defendant contends that the trial court committed prejudicial error in permitting the plaintiff, over objections, to introduce evidence that the employer of the defendant paid him compensation, also paid his doctor bills, medical bills, and other expenses.

The plaintiff's position is that within the contemplation of section 48-118, R. S. 1943, the defendant-counterclaimant was obligated to make his employer a party for the reason that the employer paid him compensation and also paid his doctor bills, medical bills, and other expenses, therefore the employer must be made a party to the suit for the purpose of reimbursement under the right of subrogation provided for in this section of the statutes. The plaintiff moved to dismiss the first cause of action alleged in the counterclaim principally for the noncompliance with section 48-118, R. S. 1943, which motion was overruled.

The Workmen's Compensation Act recognizes common-law liability of third persons for negligent injury to employees. See Tralle v. Hartman Furniture & Carpet Co., 116 Neb. 418, 217 N. W. 952.

Section 48-118, R. S. 1943, has been held to be for the benefit of the employer, so that he might recover from a third party, who negligently injured his employee, the amount he was required to pay by the compensation statute. See Oliver v. Nelson, 128 Neb. 160, 258 N. W. 69.

The employer of the defendant is not involved in this tort action for damages, and the only right that could accrue, insofar as this case is concerned, to the benefit of the employer would be the right of subrogation for compensation paid by it to its employee as provided for in section 48-118, R. S. 1943.

We are not required, in the state of the record, to pass upon the question as to whether or not the defendant-counterclaimant should have made his employer a party or was required to do so under section 48-118, R. S. 1943. While we believe the admission of the evidence complained of by the defendant was error, it was error without prejudice. The trial court withdrew its consideration from the jury. The trial court, in an instruction on the measure of damages, stated: "If you find for the defendant you will not make any deduction for any amount of wages advanced to the defendant by his employer or any payments made for medical or hospital expense by the latter."

In this connection the following authorities are applicable.

Where erroneous evidence is admitted by a court and in the instructions to the jury such evidence is withdrawn by the court from their consideration, such withdrawal by the court ordinarily cures the error committed in the admission of the evidence. See American Building & Loan Assn. v. Mordock, 39 Neb. 413, 58 N. W. 107.

Where evidence improperly received is afterwards stricken out and expressly withdrawn from the consideration of the jury, the error involved in its reception is ordinarily cured. See, Bush v. James, 152 Neb. 189, 40 N. W. 2d 667; Conley v. Hays, 153 Neb. 733, 45 N. W.

2d 900; Kuhlman v. Farmers Union Co-Operative Assn., 152 Neb. 597, 42 N. W. 2d 182; Nelson v. Jenkins, 42 Neb. 133, 60 N. W. 311.

For the reasons given in this opinion, the judgment entered on the verdict by the trial court is affirmed.

AFFIRMED.

ELLA LOIS BIZE, APPELLEE, V. DAVID BIZE, APPELLANT.
48 N. W. 2d 649

Filed June 29, 1951. No. 32961.

1. **Divorce.** The decree of a district court in a divorce action, insofar as a minor child is concerned, is never final in the sense that it cannot be changed but is subject to review at any time in the light of changing circumstances.
2. ———. The district court has a continuing power, after decree of divorce, alimony, and child support has been granted, to review and revise the provisions of child support at its subsequent terms on petition of either of the parties.
3. ———. An application to modify the terms of a decree of divorce is not an independent proceeding. It is not the commencement of an action. It is simply a proceeding supplementary or auxiliary to an action in which certain matters theretofore determined are by the very terms of the statute subject to modification.
4. **Courts.** Courts of general jurisdiction have the inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction.
5. **Parent and Child.** When the custody of minor children is involved their custody is to be determined by the best interests of the children with due regard for the superior rights of fit, proper, and suitable parents.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Reversed and remanded with directions.*

Max Kier and *Charles Bocken,* for appellant.

Towle, Young & Mattson, and *Roy A. Sheaff,* for appellee.

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

WENKE, J.

This is an appeal from an order of the district court for Lancaster County which continued the custody of the parties' minor son, Dale Bize, with the mother, but which increased the amount the father is to pay for the child's support and fixed the terms upon which such custody is conditioned.

Chronologically the sequence of events in this case is as follows: Originally Ella Lois Bize, who is now Ella Lois Bize Pegram, having married B. J. Pegram on May 13, 1949, brought this action for divorce in the district court for Lancaster County; on July 5, 1944, she was granted an absolute divorce from her husband, the defendant David Bize; this decree found that both parties were fit and proper persons to be entrusted with the custody of their minor children but awarded their custody to the plaintiff, the mother; the children are David Bize, a son, who was then 17 years of age and Dale Bize, a son, who was then 11 years of age; to help support these children the father was directed to pay the sum of $50 a month; and the custody awarded the plaintiff was conditioned that she should not remove either of the children from the State of Nebraska unless authorized to do so by the court or consented to by the father.

Appeal was taken to this court from the decree of July 5, 1944. Insofar as the decree appealed from related to awarding the custody of these minor children to the mother and the allowance made for their support, it was affirmed. See Bize v. Bize, 145 Neb. 722, 18 N. W. 2d 75.

The son David Bize entered the military service of his country on March 18, 1945. Subsequent thereto, on October 15, 1945, the district court ordered the father to pay $40 a month, effective as of October 5, 1945, for the support of the minor son Dale.

On January 9, 1947, plaintiff filed her petition in this action asking for an increase in the amount allowed for child support. This application was based on the fact that David had returned from the military service on September 28, 1946, and also because of an increase in the cost of living. To this petition the defendant filed an answer and cross-petition. Therein he set forth that David would soon be 21 years of age and was self-supporting. He also asked that he be given the custody of Dale because the plaintiff was not giving him proper supervision or providing him with proper living conditions and, because thereof, he was becoming a delinquent. Hearing on this petition and cross-petition was commenced on March 12, 1947, but, after one witness had testified, the hearing was continued.

On November 16, 1949, the plaintiff filed another petition in which she asked for an increased allowance for Dale. This application was based on the fact that Dale desired to and was attending a military academy and also on the increased cost of living. After having filed a special appearance and demurrer thereto, both of which were overruled, the defendant filed a supplemental answer and cross-petition. Therein he asked that he be given the custody of Dale. The grounds for a change in custody were the same as in his previous cross-petition filed herein. Hearing on these applications by the plaintiff was commenced on March 13, 1950. The court considered it a continuation of the hearing of March 12, 1947. On April 12, 1950, decree was entered which modified the previous orders of the court relating to the son Dale and provided that Dale's custody was to remain with the plaintiff but conditioned as follows: That he is not to be taken outside the jurisdiction of the state except that he may be permitted to continue his schooling at Wentworth Military Academy located at Lexington, Missouri; that during his vacations Dale may stay with his father as much as he chooses but shall stay with him for a period of not less than two days at least twice during

each month while not attending school but that during such periods he shall not be required to stay with his father at nights unless he chooses to do so; that if, on these occasions, he stays with his father for a period of a week or more at any one time that then the amount herein ordered paid by the father for the son's support is to be proportionately reduced; and that either parent may visit the son while he is attending school. It also provides, effective April 5, 1950, that the defendant is to pay $80 a month for the son's support and education.

Defendant filed a motion for new trial and has appealed from the overruling thereof.

For the purpose of writing this opinion we shall refer to the parties here as they appeared in the action in the district court, that is, to Ella Lois Bize as plaintiff and to David Bize as defendant.

The first contention made by the defendant is that the court erred in denying his special appearance and in overruling his demurrer directed to the plaintiff's second petition for modification of the decree, which petition was filed on November 16, 1949. This contention is based on the proposition that another action was pending between these same parties on the same cause of action by reason of the first petition filed by the plaintiff for that purpose on January 9, 1947, which application remained undisposed of.

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

"The decree of a district court in a divorce action insofar as a minor child is concerned is never final in the sense that it cannot be changed but is subject to review at any time in the light of changing conditions." Miller v. Miller, 153 Neb. 890, 46 N. W. 2d 618.

The district court has a continuing power, after decree of divorce, alimony, and child support has been granted, to review and revise the provisions of child support at its subsequent terms on petition of either of the parties. See Miller v. Miller, *supra.*

"An application to modify the terms of a decree of divorce is not an independent proceeding. It is not the commencement of an action. It is simply a proceeding supplementary or auxiliary to an action in which certain matters theretofore determined are by the very terms of the statute subject to modification." Miller v. Miller, *supra.*

"Courts of general jurisdiction have the inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction." Miller v. Miller, *supra.*

From the foregoing authorities it is apparent that no other action was commenced between the parties hereto by reason of the petition filed by plaintiff on January 9, 1947, seeking to have the court modify its previous order as to child support. It was all part of the same action over which the court had continuing jurisdiction. We find the contention to be without merit.

Before discussing the factual situation we think it advisable to set out one other applicable principle in addition to those already set forth, namely: When the custody of minor children is involved their custody is to be determined by the best interests of the children with due regard for the superior rights of fit, proper, and suitable parents. See, Gorsuch v. Gorsuch, on rehearing, 143 Neb. 578, 11 N. W. 2d 456; Hodges v. Hodges, *ante* p. 178, 47 N. W. 2d 361; McNamee v. McNamee, *ante* p. 212, 47 N. W. 2d 383.

Since the trial court in its decree of July 5, 1944, found both parents to be fit and proper persons to be entrusted with the custody of their children we shall discuss only those events that have taken place since then which

relate to the issue of who should now be given the custody of the minor son Dale.

Dale was born on October 11, 1932. At the time his custody was awarded to the plaintiff by the decree of July 5, 1944, he was 11 years of age. In December 1946 Dale got into trouble and was brought before the juvenile authorities. He was found to be a delinquent and placed on probation to Frank Chase. Mr. Chase directed Dale to report to him every other Saturday. This he failed to do. Dale was again in trouble and brought before the juvenile authorities in March 1947.

On September 28, 1946, David, the parties' other minor son, had returned from serving in the military services of his country. In view of David's return the plaintiff, on January 9, 1947, filed a petition herein. The purpose of filing the petition was to obtain an increase in the amount defendant was being required to pay for the children's support. Defendant filed an answer and cross-petition thereto asking, among other things, that he be given the custody of Dale. On March 12, 1947, a hearing was had on this petition and cross-petition. After one witness had testified the hearing was continued and Dale, who was then being held in the detention home, was permitted to go home with his father. Dale was to stay with his father for a week, which he did, after which he returned to his mother with whom he had been placed on probation. Nothing further was done about the continuation of this hearing until after the plaintiff filed a second petition to increase the amount of the support defendant was being required to pay. This second petition was filed on November 16, 1949.

Dale was again in trouble and brought before the juvenile authorities in November 1947. He was again placed on probation with his mother.

In September 1949 plaintiff entered Dale in Wentworth Military Academy located at Lexington, Missouri. She did so without authorization from the court or consent

of defendant. This was contrary to the provisions of the decree of July 5, 1944.

It appears that Dale likes attending the academy very much and that he is getting along very nicely. At the hearing in March 1950 he expressed the desire that he would like to continue to attend the academy as he felt he had been and would be materially benefited thereby.

On November 16, 1949, plaintiff filed her second petition which has already been referred to. In this petition she asked for an increase in the amount that defendant should be required to pay for Dale's support and education. Defendant filed an answer and cross-petition thereto wherein he again asked for Dale's custody. After hearing thereon the trial court entered the order from which this appeal was taken.

The record shows that defendant is a fit person to be entrusted with the custody of his son Dale, particularly so in view of the fact that he is now remarried and has a home in which the boy can stay. However, whether or not he is a proper or suitable person to have such custody the record leaves much doubt. His only apparent effort to get such custody awarded to him has been whenever plaintiff has made application for an increased allowance. His failure to force a further hearing after the continuation of the hearing on March 12, 1947, at a time when his son was in trouble, shows a rather indifferent attitude on his part.

It appears from the record that Dale was in rather serious trouble during the period from December 1946 to November 1947, while in the custody of plaintiff, although nothing of that nature appears to have happened since; that plaintiff has little or no regard for the truth; that she has little or no respect for authority, including the orders of the court; and that she has endeavored to alienate whatever affections the two sons had for their father, although not successful in doing so. However, we do not think the record as a whole is sufficient to say that now, after she has had the custody of

the boy for almost seven years and he is 18 years of age, that she is totally unfit and not a proper and suitable person to have his custody. This is particularly so in view of Dale's request that his custody be left with his mother. There is no question but what the plaintiff is deeply interested and concerned in the welfare of her two sons.

We find the custody of Dale should be left with the plaintiff but subject to these conditions: That Dale shall continue to attend Wentworth Military Academy located at Lexington, Missouri, until such time as he shall have either fully completed the courses of study which the school offers, arrived at the age of 21 years, or entered the military services of his country; that he shall attend all sessions of the academy, including those offered during the summer; that except for the purpose of attending Wentworth Military Academy he shall not be removed from the State of Nebraska without approval of the court; that during any vacation period if Dale returns to Nebraska he shall divide his time equally between his parents, spending half of such time with plaintiff and half with defendant, and should such stay with the defendant result in his being there for a week or more at any one time then defendant shall be entitled to reduce the amount of his payment for that period proportionately; that either parent shall be permitted to visit Dale while attending the academy provided it is done in accordance with the rules thereof; and that each of the parents shall be entitled to receive a copy of all the reports from the school regarding Dale, including reports of his grades.

The trial court directed defendant, commencing April 5, 1950, to pay the sum of $80 a month for the support and education of Dale. We shall not review the record herein as to the financial status of either party but suffice to say both are of sufficient wealth and have sufficient income that the amount each will be required to pay for Dale's support and education will not burden

either of them. We find the amount defendant was directed to pay to be reasonable and not excessive and within his ability to pay.

The lower court ordered the defendant to pay the costs in that court including an attorney's fee of $100 allowed plaintiff. We find such to be proper and do the same with reference to the costs in this court which costs shall include the sum of $150 which amount is allowed the plaintiff for the services of her attorneys in this court.

We order that the decree of the trial court of April 12, 1950, be modified as herein set forth and direct the trial court to enter an order accordingly.

REVERSED AND REMANDED WITH DIRECTIONS.

CORNELIUS VERMAAS ET AL., APPELLANTS, V. CULBERTSON, ROE & BELL, INC., APPELLEE.
48 N. W. 2d 674

Filed June 29, 1951. No. 32980.

1. **Brokers: Frauds, Statute of.** The conditions of section 36-107, R. S. 1943, to entitle a broker or agent to exact a commission for the sale of lands, may be satisfied only by an agreement evidenced by a writing or writings subscribed by the agent or broker and the owner wherein is set forth the compensation to be allowed.
2. ———: ———. In the absence of agreement entered into agreeable to section 36-107, R. S. 1943, a commission may not be exacted or retained by a broker or agent in the absence of voluntary consent or acquiescence of the owner of the land sold.

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

Davis, Stubbs & Healey, for appellants.

Sterling F. Mutz, for appellee.

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

YEAGER, J.

This is an action at law by Cornelius VerMaas and Norma VerMaas, plaintiffs and appellants, against Culbertson, Roe & Bell, Inc., a corporation, defendant and appellee, for money had and received. Trial was had to the court without a jury. At the close of the trial the court found in favor of defendant and rendered judgment accordingly. Alternative motions for new trial or for judgment in favor of plaintiffs notwithstanding the judgment entered at the trial were filed which were overruled. From the judgment and the order overruling the motions the plaintiffs have appealed.

The action grows out of a sale negotiated by the defendant of residence property jointly owned by the plaintiffs who are husband and wife. The property is known as 3434 Orchard Street, Lincoln, Nebraska, the legal description of which is not necessary in the determination of this case.

On January 11, 1946, the defendant obtained a written purchase agreement for the property in question from the Elgin National Watch Co. for $10,000. At the time the agreement was obtained it received and accepted a down payment of $500. The payment was by promissory note payable to the defendant. The note was paid by check also to the defendant on or about January 14, 1946.

At the time the purchase agreement was obtained the defendant had no written or oral brokerage or agency agreement for the sale of this property with the plaintiffs or either of them, and no such agreement was later obtained. It may also be said that there was no competent evidence of an oral agreement thereafter.

After much effort on the part of an agent of defendant the plaintiff Norma VerMaas was induced on January 21, 1946, to accept the agreement of purchase made by the Elgin National Watch Co. The acceptance is in the following terms:

"1-21 1946

"I hereby accept the foregoing proposition on the terms above stated, and agree to execute the conveyance upon the terms and conditions above set forth.

Norma VerMaas"

The agreement contains no reference to agency or brokerage agreement, none in any manner to any kind or character of incident to any such agreement, and particularly none to brokerage or agency commission. There is not even any mention of these plaintiffs as owners or otherwise.

The sale was concluded and the defendant retained the $500 down payment as its brokerage or agency commission for making the sale. It still retains it. The action here is for the recovery of this amount. It is from the judgment of the district court denying a recovery that the plaintiffs have appealed.

The theory of plaintiffs is that the defendant, not having a written brokerage or agency agreement for the sale of this land, was not entitled under law to retain this amount or to receive any compensation for making the sale.

As disclosed by the answer the substantial theory of the defendant is that though it had in the first instance only an oral brokerage or agency agreement, the acceptance of the purchase agreement amounted to a brokerage or agency agreement, that it received the $500 as a commission with the consent of the plaintiffs who ratified and confirmed the oral agreement, and that it was the intention of the parties that the money received as a down payment should be retained as commission.

The appropriate statute is the following: "Every contract for the sale of lands between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent. Such contract shall describe the land to be sold, and set forth

the compensation to be allowed by the owner in case of sale by the broker or agent." § 36-107, R. S. 1943.

The validity and enforceability of the above statute have been repeatedly upheld by the decisions of this court. Danielson v. Goebel, 71 Neb. 300, 98 N. W. 819; Covey v. Henry, 71 Neb. 118, 98 N. W. 434; Nelson v. Webster, 83 Neb. 169, 119 N. W. 256; Howell v. North, 93 Neb. 505, 140 N. W. 779; Nelson v. Woodhouse, 112 Neb. 359, 199 N. W. 811; Sohler v. Christensen, 151 Neb. 843, 39 N. W. 2d 837. The last case cited is not directly in point here but in it is cited this statute as basic in actions involving agency or brokerage commission.

The defendant concedes by pleading and proof that there was no written agreement entered into conformable to the statute. The record discloses no instrument or instruments which could be construed to amount to such an agreement. The instrument on which the defendant relies does not amount to such an agreement. In it brokerage or agency commission is in nowise mentioned and nowhere on it appears the signature of the defendant for any purpose except as a receipt in its own behalf for the down payment. Essentials of validity of a brokerage or agency agreement are the signatures of the parties and the compensation to be paid the broker or agent.

It must be said therefore that the record conclusively precludes the defendant from at any time claiming the benefit of a brokerage or agency agreement within the meaning of the statute.

If therefore the judgment is to be sustained this must be done on the basis of evidence that the down payment was received or retained as commission by voluntary consent and acquiescence of the plaintiffs. Morrison v. Gosnell, 84 Neb. 275, 121 N. W. 236.

That it was not so received is certain. The evidence conclusively shows that it was received without consent and even without the knowledge of the plaintiffs. The first knowledge they had was when an agent of defend-

ant offered the purchase agreement for acceptance by the plaintiff Norma VerMaas.

There is no evidence that the plaintiffs voluntarily or otherwise consented to or acquiesced in the retention of the money by the defendant. There is evidence that the defendant laid claim against the plaintiff Norma VerMaas to it and sought to induce her to consent to its retention but none whatever that she did so consent and none that she ever by word or act acquiesced in its retention. Moreover there was never any effort whatever to obtain consent of the other plaintiff who was a joint owner of the money with Norma VerMaas as is disclosed by the record, and no word or circumstance is pointed to indicating acquiescence in retention of the money. The record wholly fails to sustain the contentions of the defendant in these respects.

The record fails conclusively to sustain each and all defenses interposed by the defendant. On the other hand the evidence of plaintiffs fully sustains their cause of action.

The judgment in the first instance should have been in favor of plaintiff as prayed. For failure to so adjudicate the district court should have, pursuant to motions of the plaintiffs duly made, set aside the judgment rendered and entered judgment in favor of plaintiffs.

The judgment of the district court is therefore reversed and the cause remanded with directions to enter judgment in favor of plaintiffs in accordance with the prayer of their petition.

REVERSED AND REMANDED WITH DIRECTIONS.

SAFEWAY CABS, INC., A CORPORATION, ET AL., APPELLANTS, v. MICHAEL O. HONER, APPELLEE.

48 N. W. 2d 672

Filed June 29, 1951. No. 33000.

1. **Public Service Commissions.** The abeyance provision contained in section 75-416, R. R. S. 1943, applies only to orders of the Nebraska State Railway Commission based on complaints filed pursuant to sections 75-412, 75-413, and 75-415, R. R. S. 1943. It has no application to an order made pursuant to section 75-240, R. R. S. 1943.
2. **Appeal and Error: Public Service Commissions.** The inherent power of the Supreme Court to stay an order of the railway commission will not be invoked except for cogent reasons requiring the preservation of the status quo pending the determination of the appeal on its merits.

APPEAL from the Nebraska State Railway Commission: *Rehearing denied.*

Kennedy, Holland, DeLacy & Svoboda, Swenson, Viren & Turner, and *Frost, Peasinger & Meyers,* for appellants.

Pilcher & Haney, and *Loyal G. Kaplan,* for appellee.

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

CARTER, J.

Appellants have filed a motion for a rehearing of an order of this court which denied their application for a stay and abeyance order pending the final determination of the appeal on its merits. The importance of the litigation requires that the court clarify its order by the filing of an opinion setting out the reasons therefor.

On February 15, 1938, the Nebraska State Railway Commission issued a certificate of convenience and necessity to Michael O. Honer to operate a taxicab in Omaha as a part of the Checker Cab fleet of taxis. Honer was injured in an accident and was unable to operate his taxi for more than a year. Safeway Cab Company and others sought the cancellation of the Honer certificate

of convenience and necessity before the railway commission for nonuse. One Gillard negotiated for the purchase of Honer's taxicab and filed an application for Honer's operating rights. The railway commission sustained Gillard's application. Gillard immediately completed his deal with Honer and proceeded to operate under his certificate. Appellants appealed to this court from the granting of the certificate of convenience and necessity to Gillard, which appeal is now pending.

On January 16, 1951, the appellant cab companies filed an injunction suit against Gillard by which they attempted to restrain his operations pending the appeal. A temporary injunction was denied and, after filing an answer, the cab companies dismissed the suit.

The record shows that Gillard was not permitted to operate as a part of the Checker Cab fleet of taxis because of some difficulty with the Checker Cab Company. He then undertook to operate independently. On January 16, 1951, the Checker Cab Company secured an injunction restraining the use by Gillard of the name and color scheme of the Checker Cab Company. Gillard thereupon removed the name and color scheme of the company from his cab and applied to the railway commission for an order approving such removal, pending the final disposition of the company's injunction suit. This application has been heard by the railway commission and remains under advisement so far as the record shows.

The appellant cab companies, after completing their appeal to this court from the commission order refusing to cancel the Honer certificate for nonuse and approving the transfer of Honer's operating rights to Gillard, filed a motion in this court for a stay and abeyance order pending the outcome of the appeal. The motion was overruled by this court and that matter is again before us on a motion for a rehearing.

The appellants contend that a stay and abeyance order is authorized by section 75-416, R. R. S. 1943, which provides: "The order or orders provided for in

sections 75-412, 75-413 and 75-415 shall be in force and effect from and after the date fixed by the State Railway Commission, and shall so remain until annulled, modified or revised by the commission, or until finally adjudged to be unreasonable and unjust in a court of competent jurisdiction, and no further hearing need be had before the commission with reference to the order or orders; Provided, if the railway company, common carrier, person or persons affected by the order or orders shall commence any proceeding or proceedings, as hereinbefore provided, affecting any decision, rule or order of the commission, such order or orders shall be held in abeyance until finally determined in such court." It will be noted that section 75-416, R. R. S. 1943, applies only to orders provided for in sections 75-412, 75-413, and 75-415, R. R. S. 1943. An examination of these sections reveals that they apply to hearings on complaints by the public filed against a carrier (75-412), complaints filed by the railway commission against carriers (75-413), and the procedures to be followed in disposing of such complaints (75-415). They do not in anywise pertain to orders of the commission entered pursuant to section 75-240, R. R. S. 1943, under which the order granting a certificate of convenience and necessity to Gillard was issued. It is clear the Legislature intended that the abeyance orders authorized by section 75-416, R. R. S. 1943, should be available only in cases where complaints were filed against existing operators and that adverse orders growing out of complaints should not be placed in effect until their validity was finally determined. The very fact that section 75-416, R. R. S. 1943, specifies the sections to which it is to apply indicates that it was not to apply to others.

Appellants urge that an abeyance order is proper under the holdings of this court in Hooper Telephone Co. v. Nebraska Telephone Co., 96 Neb. 245, 147 N. W. 674; Hill v. Union P. R. R. Co., 96 Neb. 205, 147 N. W. 681; and Byington v. Chicago, R. I. & P. Ry. Co., 96 Neb.

584, 148 N. W. 520. The foregoing cases are complaint cases. They were controlled by section 10 (b), Chapter 90, Laws 1907, which is, in substance, the same as section 75-416, R. R. S. 1943. Consequently, the abeyance statute (75-416) was properly applied in those cases and they do not constitute a precedent for the abeyance of an order of the railway commission issued pursuant to section 75-240, R. R. S. 1943.

The only supersedeas provided for in appeals from the railway commission is contained in section 75-408, R. R. S. 1943. No supersedeas bond was given in the present case and no claim is made that an abeyance order should be allowed by virtue of that section of the statute.

It is urged by appellants that this court has inherent power to stay the order granting a certificate of convenience and necessity to Gillard pending an appeal from the order in which it is granted. In a proper case, when cogent reasons require, the court has the inherent power to stay an order of the commission pending the determination of the merits of the order on appeal. The granting of a certificate of convenience and necessity is an administrative act by the railway commission. The order is presumptively valid. The function of this court is to determine only if its issuance was arbitrary and unreasonable. This court is not a superior railway commission with authority to substitute its judgment for that of the commission. The staying of an order granting a certificate of convenience and necessity, especially when it involves a transfer of the property of an existing carrier to a new owner, could cause great damage. The evidence before us does not indicate that a stay order maintaining the status quo is required to protect the parties from great loss or injury. Unless such reasons are shown to exist, this court will not ordinarily assert its inherent power to stay a railway commission order pending the determination of an appeal on its merits. For the reasons stated we decline to stay the order

granting a certificate of convenience and necessity to Gillard pending the appeal.

For the reasons stated we find that the order of this court overruling appellants' application for a stay and abeyance order was in all respects correct. The motion for a rehearing is therefore denied.

REHEARING DENIED.

JAMES S. ARRIGO ET AL., APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, ET AL., APPELLEES.

48 N. W. 2d 643

Filed June 29, 1951. No. 33003.

1. **Municipal Corporations: Sunday.** A municipal corporation may legislate reasonably with respect to Sunday observance within its corporate area.
2. **Sunday.** A prohibition of activities on Sunday is for the promotion of health, peace, and good order of society by requiring a periodical day of rest and is generally sustained on the ground that it is within the domain of police power.
3. **Municipal Corporations: Constitutional Law.** A city ordinance to meet constitutional requirements must respond to the tests required of statutory enactments.
4. **Statutes.** The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated.
5. **Statutes: Municipal Corporations.** Within the jurisdiction of each there is no distinction between an unreasonable and arbitrary statute and an ordinance containing these characteristics.
6. **Constitutional Law.** To establish arbitrary discrimination inimical to constitutional equality, there must be more than an intentional and repeated failure to enforce legislation against others as it is sought to be enforced against the person claiming discrimination.
7. **Municipal Corporations.** Failure to consistently enforce or abuse

in the enforcement of an ordinance does not destroy it or affect its validity.

8. ———. If a city ordinance contains valid and void provisions, the valid portion will be upheld if it is a complete law, capable of enforcement, and is not dependent upon that which is invalid.

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

Charles W. Phillips, for appellants.

John E. Jacobson and *C. Russell Mattson,* for appellees.

R. A. Vestecka, amicus curiae.

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

BOSLAUGH, J.

This appeal concerns the validity of a Sunday closing ordinance of the city of Lincoln. A general demurrer of appellees to the petition of appellants was sustained, the case was dismissed, and a motion for new trial was denied. The appeal tests the correctness of the rulings and conclusion of the district court.

The substance of the petition is that: Appellants own and operate in the city of Lincoln grocery stores and markets known respectively as Jim Arrigo's Market, Midwest Fruit Company, Ranch Market, and Bob's Fruit Market. The city is a municipal corporation of Nebraska of the primary class and has a home rule charter. The individual appellees, except Beck, the Attorney General, are the mayor, councilmen, city attorney, director of public welfare, and chief of police of the city. The parts of the ordinance complained of are set out. The drug stores, fruit stores, cigar stores, bakeries, dairy stores, and ice cream parlors in the city stock and sell in competition with appellants articles and items of merchandise ordinarily handled and sold in grocery stores, and the sale thereof is not forbidden by the ordinance. The ordinance prohibits appellants from having their respective places of business open and from selling

any of the articles or items on Sunday. Their business activity is not unlawful in itself and the sale by and from their places of business of such items and articles is no more injurious to the health, comfort, and safety of the public, no more offends public morality, and no more disturbs the observance of Sunday than does the sale thereof by businesses exempted from or excepted by the ordinance. Two of the appellants and others similarly situated have been charged with violation of the ordinance. They have been advised by officers of the city that a multiplicity of prosecutions will be instituted against them for violations, and they will be caused great expense and irreparable loss and injury unless the validity of the ordinance is adjudicated and appellees are enjoined from attempting to enforce it. The ordinance is unreasonable, arbitrary, discriminatory, class legislation, and violates the federal and state constitutions. Appellants seek an adjudication of invalidity of the ordinance and an injunction prohibiting its attempted enforcement.

The parts of the ordinance pertinent to a consideration and disposition of the case are: "It shall be unlawful for any business house, bank, store, or any office to be open, or for any person, or persons, to be admitted thereto for general business on the first day of the week commonly called Sunday; and it shall be unlawful on said day to open any grocery store to the public, or to sell, offer to sell, give away, or dispose of in any way from any store, or building, where groceries are sold, any groceries or articles ordinarily sold in a grocery store, or to open any meat market, or to sell, offer to sell, give away, or dispose of in any way any meats or other products ordinarily sold or handled in meat markets, and all such stores and meat markets shall be closed on said day; provided, that nothing herein contained shall apply to drug stores, office of physicians, telegraph offices, express offices, photograph galleries, railroad offices, telephone offices, hotels, restaurants, cigar stores, eat-

ing houses, ice cream parlors, fruit stores that serve and sell, during the week, only refreshments, fresh fruits, bread and milk, places for the vending of ice, bread and milk, street cars, railway passenger trains, livery stables, automobile service stations and garages, all of which may be open for necessary purposes; but, nothing herein contained shall be construed to permit on Sunday any of the places herein excepted to sell, offer to sell, give away, or dispose of in any way any groceries or articles ordinarily sold from a grocery store, or any meat or other products ordinarily sold from and handled in meat markets, except fresh fruits, ice, bread and milk, * * * that works of necessity and charity are excepted from the operation of this ordinance; and * * * (it) shall (not) extend to those who conscientiously observe * * * and keep closed their * * * place of business on the seventh day of the week * * *." § 42-103, Lincoln Municipal Code of 1936. "Any person violating any of the provisions of the foregoing * * * shall on conviction thereof, be fined * * * not less than Twenty-five ($25.00) Dollars, nor more than One Hundred ($100.00) Dollars * * * and shall stand committed to the city jail until such fine and costs are paid." § 42-104, Lincoln Municipal Code of 1936.

A municipal corporation by virtue of its police power may legislate reasonably with respect to Sunday observance within its corporate limits, and such an ordinance is valid if it does not violate any constitutional guarantee or does not conflict with the general laws of the state. The prohibition of specified acts on Sunday is for the promotion of health, peace, and good order of society by requiring persons to have a periodical day of rest and is generally sustained on the ground that it is within the domain of the police power. Such a regulation is essentially civil and not religious. Stewart Motor Co. v. City of Omaha, 120 Neb. 776, 235 N. W. 332; State v. Somberg, 113 Neb. 761, 204 N. W. 788; Liberman v. State, 26 Neb. 464, 42 N. W. 419, 18 Am. S. R. 791; Ernesti

v. City of Grand Island, 125 Neb. 688, 251 N. W. 899; Levering v. Williams, 134 Md. 48, 106 A. 176, 4 A. L. R. 374; 50 Am. Jur., Sundays and Holidays, § 7, p. 805, § 10, p. 809.

An ordinance of the character of the one involved in this case must be based upon a classification which is not unreasonable or arbitrary. It cannot be class legislation. The demand of the organic law is that all similarly situated must be included and none may be excluded whose relationship to the subject matter cannot by reason be distinguished from that of those included. There is a legal presumption in favor of the reasonableness of a city ordinance unless the contrary inheres therein or is shown by evidence. It is competent for a city by ordinance to make a classification, but to be valid it must rest upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. A city ordinance to meet constitutional requirements must respond to the same tests as are required of statutory enactments. Webber v. City of Scottsbluff, 141 Neb. 363, 3 N. W. 2d 635. In State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835, it was determined that: "The legislature may make a reasonable classification of persons, corporations and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated." See, also, Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317.

The problem of immediate concern is whether or not persons engaged in activities which threaten to disturb the subject matter sought to be protected by the ordinance are unreasonably and arbitrarily conceded

rights and privileges withheld from and denied to appellants as the owners and operators of grocery stores and markets.

The ordinance prohibits any business activity or transaction on Sunday usual in the conduct and operation of grocery stores and meat markets "and all such (grocery) stores and meat markets shall be closed on said day." This is not true as to many businesses similarly situated. It expressly states that "nothing herein contained shall apply to" drug stores, restaurants, cigar stores, ice cream parlors, fruit stores, and places for vending of ice, bread, and milk, which may be operated on Sunday for necessary purposes "but, nothing herein contained shall be construed to permit on Sunday any of the places herein excepted to sell * * * any groceries or articles ordinarily sold from a grocery store, or any meat or other products ordinarily sold from and handled in meat markets, *except fresh fruits, ice, bread and milk,* * * *." (Emphasis ours.)

The effect and result of these provisions are that the places of business excepted from the ordinance may be open on Sunday and may transact with the public business "for necessary purposes," and any or all of them may on Sunday without restriction sell as they do on any other day "fresh fruits, ice, bread and milk." The privileges and rights conceded to them are denied to grocery stores and meat markets. The places of business exempted and grocery stores and meat markets are shown by the record in competition in areas conceded to the former and prohibited to the latter. The businesses favored by the ordinance affect the permissible subject matter of this legislation in very much, if not in identically, the same way as the business activities of appellants. The keeping open and operation of each requires like attention and efforts, and each furnish to the public in many instances similar or identical items of merchandise. Reason cannot explain how the health, peace, and good order of society is promoted by per-

mitting the sale on Sunday of articles and items usual to a cigar store "for necessary purposes" and by prohibiting the sale thereof on Sunday upon the same qualification by and in grocery stores. It is unreasonable and arbitrary to allow the unrestricted sale on Sunday by fruit stores and the other exempted places of "fresh fruits, ice, bread and milk" and to deny this privilege and right to grocery stores or meat markets. There is no reason that justifies the regulation of grocery stores and meat markets in this regard which does not apply in equal force to the businesses exempted from the ordinance. They are, within the showing made in this case, similarly situated with reference to the permissible subject matter sought to be dealt with by the ordinance. Legislation involving similar improper classification has been condemned by this court. Ernesti v. City of Grand Island, *supra,* considered an ordinance specifying the time when barber shops were authorized to open and required to close and prohibiting them from conducting business on Sundays and five designated holidays. It exempted from the provisions thereof beauty shops or hair dressing parlors patronized by women and children. The attack on the ordinance was based upon the contention that barber shops and beauty parlors were similarly situated, that the ordinance made an unlawful classification, and that it was unreasonable and arbitrary. In denying the validity of the ordinance, this court said: "Within the jurisdiction of each there is no constitutional difference between a discriminatory statute and a discriminatory ordinance. Under the Constitution, persons in the same class, or who should be considered as included within the relations and circumstances provided for, must be governed by the same rules; otherwise the legislation is unconstitutional." See, also, Webber v. City of Scottsbluff, *supra;* State ex rel. Dawson County v. Farmers & Merchants Irrigation Co., 59 Neb. 1, 80 N. W. 52.

The ordinance involved herein, section 42-103, Lincoln

Municipal Code of 1936, is invalid to the extent and in these respects: (a) That appellants are required to keep their respective places of business in Lincoln—grocery stores and markets—closed on Sunday; (b) that they are excluded from the proviso of the ordinance permitting businesses of a similar nature to be open on Sunday "for necessary purposes"; and (c) that they are barred from the unrestricted sale in their respective places of business on Sunday of fruits, ice, bread, and milk.

It is not contemplated that there shall be on Sunday business as usual. Places of business activity excepted by the proviso of the ordinance and appellants may have their places of business open on Sunday only "for necessary purposes" and for the sale of fresh fruits, ice, bread, and milk. Prior expressions of this court support this conclusion. It is said in Liberman v. State, *supra:* "We apprehend that the ordinance under consideration must be given a reasonable construction, and that while a druggist is allowed to keep his place of business open 'for necessary purposes,' he would not be allowed to engage in the sale of soaps, canes, combs, toilet boxes, and cigar holders, without being held to have violated the provisions of the ordinance. While a drug store may be kept open for necessary purposes, yet it is not provided that the proprietor may engage in indiscriminate trade on Sunday, but, evidently, that he may sell such medicines, and only such, as are necessary to relieve the actual necessities of the public on that day." To the same effect is State v. Somberg, *supra.*

Appellants contend that there has been continuous and intentional discrimination by the city and its officers in the enforcement of the ordinance against them and in favor of others engaged in similar business activities; and that this has not given them the equal protection of the law as required by federal and state constitutional mandate. The petition shows and the demurrer admits nothing more than intentional non-enforcement of the

ordinance against violators thereof. To establish arbitrary discrimination inimical to constitutional equality, there must be more than a showing that a law or ordinance has not been enforced against others as it is sought to be enforced against the person claiming discrimination. Mackay Telegraph Co. v. City of Little Rock, 250 U. S. 94, 63 L. Ed. 863, 39 S. Ct. 428. The failure to consistently enforce an ordinance does not destroy it. Abuse in its enforcement does not affect its validity. State v. Somberg, *supra*; Liberman v. State, *supra*; 62 C. J. S., Municipal Corporations, § 428, p. 823.

The partial invalidity of the ordinance, as previously set forth herein, does not necessarily make the remaining provisions of the ordinance ineffective. An ordinance may be void in part and valid in part, and the valid part may be given effect if what remains, after the invalid part is eliminated, contains the essential elements of a complete ordinance. In re Langston, 55 Neb. 310, 75 N. W. 828, determined that: "When a city ordinance contains valid and void provisons, the valid portion will be upheld if it is a complete law in itself, capable of enforcement, and is not dependent upon that which is invalid." See, also, Zimmerer v. Stuart, 88 Neb. 530, 130 N. W. 300; State v. Wiggenjost, 130 Neb. 450, 265 N. W. 422. It is not reasonable to conclude that the objectionable parts of the ordinance stated herein formed inducement for the passage of the ordinance by the mayor and council of the city. With these provisions eliminated from it, the remainder thereof contains the essential elements of a complete ordinance.

The judgment should be, and is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CARL C. CARTNEY, EXECUTOR OF THE ESTATE OF SARAH JANE RANDS, DECEASED, APPELLANT, V. LELAND V. OLSON ET AL., APPELLEES.

48 N. W. 2d 653

Filed July 5, 1951. No. 32996.

1. **Trial.** Upon a motion for a directed verdict at the conclusion of the plaintiff's evidence, the motion must be treated as an admission of the truth of all of the material and relevant evidence admitted and all proper inferences to be drawn therefrom.
2. **Evidence.** When a letter is read, the evidence of other letters on the same subject between the same parties may be given, and when a detached writing is given in evidence, any other writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.
3. **Money Lent.** A loan of money is the delivery by one party and the receipt by the other party of a given sum of money, upon an agreement, express or implied, to repay the sum loaned, with or without interest.
4. ———. A prima facie case is established by plaintiff in an action for money lent, by evidence that the money was delivered to the defendant, that it was a loan, and has not been repaid.
5. **Trial.** Evidence examined, and held sufficient to make a prima facie case for the jury.

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

Perry & Perry, for appellant.

Davis, Stubbs & Healey, and *Gerald J. Hallstead,* for appellees.

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

MESSMORE, J.

The executor of the estate of Sarah Jane Rands, deceased, brought this action at law to recover the sum of $500 alleged to have been loaned to the defendants by the plaintiff's decedent on May 5, 1948, and the further sum of $1,700 alleged to have been loaned by the plaintiff's decedent to the defendants on November 1, 1948. At the conclusion of the plaintiff's evidence the

defendants moved to dismiss the two causes of action alleged in the plaintiff's amended petition. This motion was sustained. The trial court then directed the jury to return a verdict in favor of the defendants and against the plaintiff. Upon the overruling of the plaintiff's motion for a new trial, the plaintiff appeals.

The plaintiff assigns as error the failure of the trial court to find that the plaintiff had made a prima facie case against the defendants on the two causes of action for money loaned by plaintiff's decedent to the defendants.

It is well established in this jurisdiction that upon motion for a directed verdict at the conclusion of all of the evidence, the motion must be treated as an admission of the truth of all of the material and relevant evidence admitted and all proper inferences to be drawn therefrom. See In re Estate of Benson, 153 Neb. 824, 46 N. W. 2d 176.

There are several exhibits in evidence, some of which identify the handwriting and the signature of the defendant Rose M. Olson. These exhibits are as follows: Exhibit 9 is a bank check stub,

"No. ____ $500.00
Date Apr. 30 1948
To Rose Olson
For (Note)
Amt. this check $500.--"

Exhibit 10 is also a bank check stub,

"No. ____ $1700.00
Date Nov. 1 1948
To
For Note
Amt. this check $1700.--"

Both of these exhibits are in the handwriting of the defendant Rose M. Olson.

Exhibit No. 11 is a ledger sheet of the First National Bank of Lincoln of the account of Sarah J. Rands for the months of April and May 1948, and shows a nota-

tion "Rose Olson 500.00 Loan," in her handwriting.

Exhibit No. 12 is a ledger sheet of the First National Bank of Lincoln of the account of Sarah J. Rands, and shows a notation in ink "$1700.00 L. V. Olson." This balance sheet is for October and November 1948.

An expert on handwriting identified exhibits, compared handwriting from the exhibits, and testified that on exhibit No. 12, the October and November 1948 statement of the First National Bank of the Sarah J. Rands account, the $1,700 item thereon shows that it was followed by the word "gift," and a pencil line drawn through the word "gift" and inserted was "automobile" "loan for car." He further testified that the word "loan" was difficult to discern, the "l" and "o" were apparent, but the "a" and "n" took close examination, and it so appears from an enlargement of the exhibits in evidence.

Leland V. Olson testified that he endorsed the $1,700 check in evidence in the handwriting of the defendant Rose M. Olson, and signed by Sarah J. Rands.

There is no check in evidence with reference to the $500 item claimed to be a loan. No notes appear in evidence, as indicated on exhibits Nos. 9 and 10, and no evidence that notes were prepared, executed, or delivered.

There also appears in evidence a letter written by the defendant Rose M. Olson to a relative of the deceased, to the effect that the defendants were to be sued by the executor for $2,200, and an explanation that the $1,700 check was a gift for the sole purpose of purchasing a better car; the $500 check was a gift as gratitude of Sarah J. Rands for the defendants living with her; and other explanatory matter with reference to the care and work done in behalf of the deceased Sarah J. Rands. The plaintiff offered in evidence a reply by the relative of Sarah J. Rands, to Mrs. Olson from Washington, D. C., dated October 23, 1949. This letter constituted a denial that the amounts here involved were gifts, and affirmatively stated the writer was convinced

that they were loans and had evidence to that effect. The balance of the letter is the writer's opinion with reference to the care provided by the defendants to his aunt. This letter was objected to and not admitted in evidence.

Section 25-1215, R. S. 1943, provides: "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence."

In Jensen v. Romigh, 133 Neb. 71, 274 N. W. 199, it was held: "When a letter is read in evidence, all other letters on the same subject between the same parties may be given. And when a detached writing is given in evidence, any other writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence." See, also, Wilson & Co., Inc. v. Fremont Cake & Meal Co., 153 Neb. 160, 43 N. W. 2d 657.

This court in State ex rel. Spillman v. Central Purchasing Co., 118 Neb. 383, 225 N. W. 46, defined the loan of money as follows: " 'A loan of money is the delivery by one party and the receipt by the other party of a given sum of money, upon an agreement, express or implied, to repay the sum loaned, with or without interest.' 38 C. J. 126, sec. 1."

It is apparent in the instant case that there was no express agreement between the plaintiff's decedent and the defendants that the sums of money advanced to the defendants during her lifetime were loans, or that the defendants agreed to repay such sums. Therefore, it becomes necessary to determine whether or not under the evidence adduced it was sufficient to present to a jury the question as to whether or not there was, on the part of the defendants, an implied agreement to re-

pay the sums so advanced by Sarah J. Rands during her lifetime.

"A prima facie case is established by plaintiff in an action for money lent by evidence that the money was delivered to defendant, that it was a loan, and has not been repaid." 58 C. J. S., Money Lent, § 7, p. 883. See, also, Siebrecht v. Siebrecht, 153 App. Div. 227, 137 N. Y. S. 1073.

We conclude that the evidence was sufficient to make a prima facie case for the jury, and the trial court committed reversible error in directing a verdict in favor of the defendants.

REVERSED AND REMANDED.

ROLAND DEAN SUNDAHL, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

48 N. W. 2d 689

Filed July 5, 1951. No. 33008.

1. **Venue.** A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed.
2. **Continuances.** An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous, unless an abuse of discretion is disclosed by the record.
3. ———. It is no abuse of discretion for the trial court to refuse defendant a continuance unless it clearly appears that defendant suffered prejudice.
4. **Trial: Juries.** Section 29-2022, R. R. S. 1943, does not require an admonition each time the jury is permitted to separate.
5. ———: ———. Although it is better to admonish in the language of section 29-2022, R. R. S. 1943, substantial compliance therewith is sufficient.
6. **Evidence.** A photograph proved to be a true representation of the person, place, or thing which it purports to represent, is competent evidence of anything of which it is competent and relevant for a witness to give a verbal description.
7. ———. Where a photograph illustrates or makes clear some

controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a gruesome spectacle.

8. ———. Photographs of the person or body of a deceased, proper foundation having been laid, may ordinarily be received in evidence for purposes of identification, or to show the condition of the body, or to indicate the nature or extent of wounds or injuries thereon.

9. **Pardons.** Pardon or parole relates to something that may happen after conviction and to action by the executive department.

10. **Homicide.** The jury's duty in a case involving murder in the first degree is to determine the question of guilt or innocence and, if it finds a verdict of guilty, then to fix the penalty at either death or imprisonment for life. That decision should not rest upon whether parole is easy or difficult to secure.

11. ———. Section 28-401, R. R. S. 1943, does not prescribe or authorize the court to prescribe any rule defining or circumscribing the exercise of the right to determine whether the penalty shall be death or imprisonment for life. The statute commits the whole matter to the judgment and conscience of the jury.

12. **Criminal Law: New Trial.** In the trial of a criminal action, where spectators applaud and counsel for defendant proceed with the trial, without objection and without request for a mistrial, and take chances of a favorable verdict, they will not be heard to complain of such fact, for the first time, on motion for a new trial.

13. **Juries.** Opportunity for prejudice or disqualification of jurors is not sufficient to raise a presumption that they exist.

14. **Trial: New Trial.** Where a defendant, with knowledge of the publication of a newspaper article before trial which he deems prejudicial, elects not to interrogate prospective jurors as to whether or not they have read the article, and it develops that one juror had read the article and others did so during the trial, and the question is not raised until on motion for a new trial, held that the defendant has waived the prejudice, if any.

15. **Trial: Appeal and Error.** In such case a party is not permitted, without objection, to take the chances of a favorable result and then, if disappointed, for the first time complain.

16. **Juries.** Sections 25-1623 and 29-2006, R. R. S. 1943, furnish a defendant ample opportunity to establish whether or not prospective jurors have been prejudiced by reading newspaper accounts and statements. The reading of such matters by prospective jurors is not prejudicial per se.

17. ———. Whether or not a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown.
18. **New Trial: Juries.** The district court, in trying the issues presented by the motion for a new trial, had the right, if it was not obliged, to indulge the presumption that the jurors had been mindful of the oaths which they took, and had found the verdict which they had solely upon the evidence introduced on the trial of the case. The law supplied, by presumption, the evidence on the one hand that the jurors had obeyed their oaths.
19. **Homicide.** By the provisions of section 28-401, R. R. S. 1943, the jurors who hear the testimony, observe the witnesses, weigh the evidence, and determine guilt have the primary duty to fix the penalty at either death or imprisonment for life.
20. **Appeal and Error: Homicide.** By the provisions of section 29-2308, R. R. S. 1943, the Supreme Court has authority to reduce the sentence in a criminal case and to render such sentence as in its opinion is warranted by the evidence.
21. ———: ———. The act of reducing the sentence and rendering a new one warranted by the evidence is in no sense a commutation or the exercise of clemency.
22. ———: ———. In determining the question as to whether or not the sentence shall be reduced, the Supreme Court has no right to be deterred from discharging its duty through considerations of mercy or sympathy.
23. ———: ———. In all cases considered under section 29-2308, R. R. S. 1943, a substantial reason or reasons warranted by the evidence must be found to cause either an affirmance or reduction of the sentence.
24. ———: ———. The decision as to whether or not the death sentence shall be reduced to life imprisonment rests upon the facts and circumstances of each case.
25. ———: ———. Where a defendant, after a fair trial, has been convicted of murder in the first degree and the jury, by its verdict, has imposed the death penalty, and the court has passed sentence in conformity with the verdict, this court will not interfere with such sentence on the ground that it is excessive, in the absence of any mitigating circumstances.
26. ———: ———. Whatever repugnance the individual may feel toward capital punishment must be put aside in obedience to the law of the state and in deference to the verdict of the jury.
27. ———: ———. In determining whether or not a sentence of death is to be reduced to life imprisonment, mental abnormality

of the convicted person is to be considered but mental abnormality is not necessarily a controlling factor requiring the reduction of the sentence.

28. **Homicide: Courts.** The Legislature has determined the public policy of this state as to the penalty for murder in the first degree. It is the duty of the courts to enforce the law.
29. **Homicide.** The sentence of death is found to be warranted by the evidence and no substantial legal reason is found for reducing it to life imprisonment.

ERROR to the district court for Platte County: ROBERT D. FLORY, JUDGE. *Affirmed.*

Louis Lightner and *Wilbur L. Johnson,* for plaintiff in error.

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

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

SIMMONS, C. J.

Plaintiff in error, by information in two counts, was charged with murder in the first degree. The first count was that he killed a 16-year-old girl in the perpetration of or an attempt to perpetrate a rape. The second count was that he purposely and of deliberate and premeditated malice killed the girl. To these counts he pleaded not guilty and not guilty by reason of insanity or mental derangement. Trial was had. The jury found the plaintiff in error guilty of murder in the first degree on count one and fixed his punishment at death. Motion for a new trial was made and overruled, and plaintiff in error was sentenced. He brings the matter here on petition in error. We affirm the judgment of the trial court.

The plaintiff in error will be hereinafter referred to as defendant. The girl whom the defendant is accused of murdering will be referred to as deceased.

The crime was committed on the 27th day of August 1950, near Columbus, Nebraska.

We summarize the evidence as it came from the lips of witnesses, from two written confessions of the defendant, and from his own testimony at the trial.

At the time of her death the deceased was 16 years, 8 months old. Her home was in a town near Columbus. She was a normal, intelligent girl. She had finished the eleventh grade in school and expected to go to school the following year. She went to Columbus, and secured employment in a drive-in cafe where she worked in the late afternoon and well into the night as a waitress for about a month preceding her death. She roomed with a lady in a home. Sometimes she went to her own home on the day of each week that she was not working.

The defendant was born in June 1930. His parents lived in Nebraska. At birth he had a cyst on his neck. This was operated on and removed when he was 4 years old and he was again operated on for the same thing in 1949. He had the usual children's diseases. He went to school, completing the eighth grade. He lost interest in school when he was in the ninth grade. In 1946, he enlisted in the U. S. Marines. There is reference to service also in the Army. He was discharged after 18 months' service in the Marine Corps. While in the service and at the age of 17, he was married on October 17, 1947. Two children were born to the marriage. He received a discharge and came to Nebraska and Norfolk in June 1949. His parents then resided there.

Defendant worked at odd jobs. He was unable or unwilling to keep permanent employment. The family lived in an apartment, then a house, and finally, in the summer of 1950, in a garage at the home of the parents. This was because of limited means. The marriage was a happy one until 1950, when there is evidence of discord between defendant and his wife. Beginning about June 1, 1950, defendant was away from home most of the time, working at odd jobs, and on

occasion sleeping in his car wherever he happened to be. During this period his activities centered in and around Columbus, Nebraska, where he established friendships with two other young men. He was an agreeable person to know.

During these months in 1950, there is evidence that he complained often of headaches, took medicine for relief, and became moody and depressed. In telling his life story to a physician who testified as an expert witness, he did not mention headaches.

Two days before the killing of the deceased, defendant's mother went to the county attorney at Norfolk, told him of defendant's absence and her fear for his mind, and asked that he be found and given a mental examination. She testified on cross-examination that her main reason for making this request was that he had not been supporting his family.

On August 26, 1950, defendant had returned from a trip to Oklahoma as the driver of a truck. He was about Columbus with his friends. Early that evening in a conversation about women he told an acquaintance that he was going to have intercourse if he had to rape somebody. Early that evening he undertook to "date" a waitress at the same cafe where deceased worked. They had not theretofore been acquainted. One of defendant's friends knew deceased and "dated" her for that night after she was through work.

Defendant owned a car. That evening defendant and his two friends drove to nearby towns. Defendant testified that if any woman in one town had thrown herself at them, they would have picked her up. They returned to Columbus where one of the friends went home. The defendant and the other went to the cafe where deceased worked and waited for her to be off duty. Defendant states in his confession that his friends told him deceased was a girl who would "put out." About 1:30 a. m., the two men and deceased left the cafe in defendant's car and drove about the park at

Columbus. Defendant stopped the car and left the other man and deceased in the car for about 5 minutes. Defendant testified that this was prearranged and gave the jury to infer that during that time defendant thought deceased and the other man had sexual intercourse in the car. Defendant and deceased then took the other man home. The defendant and deceased drove to Lake Babcock near Columbus. It was then about 2:30 a. m. They drove up on the roadway on the dam and parked the car. Defendant had a hatchet in his car. The evidence as to what happened there is in two self-written confessions of the defendant and the condition of deceased's body when found. In the first confession he stated that they sat in the car; that he made improper advances; that deceased resisted; that he choked her; that she went limp; that he opened the car door and she fell to the ground; that he picked up the hatchet and hit her; that he did not know how many times; that he threw the hatchet in the lake; that he pulled her to the bank and pushed her over; that he kicked some weeds on her and kicked dirt over the spot where she had bled; and that he did not have intercourse with her and did not know that she was dead. According to the testimony of one of the officers, defendant later explained to him that he thought that to constitute rape, the sexual act had to be completed. Defendant then gave the officers a second confession. In it he made the added statements that in addition to improper advances, he told deceased what he had heard about her; that both got mad; that he then choked her; that after she fell out of the car he tore off her clothes; that he hit her with the hatchet; and that he then attempted to rape her but could not do the act.

Defendant then went back to a filling station near Columbus where he arrived about 3:30 a. m. He there got coffee, said he had been fishing, asked to use the washroom to clean up, and was in the washroom for several minutes. He went to his car, returned to the

station later, and had coffee and visited. That morning police officers came to the station. He inquired of the attendant as to why they were there. He left the station about 7 a. m. By 9 a. m., he was back with his friends, spent the day visiting with them, went swimming, and drove that evening to the home of one of them. When asked about deceased he said he had let her out of his car about a block from a downtown hotel in Columbus. He left for Norfolk and his home about 10:30 that evening.

It does not appear that the absence of deceased caused concern to her employer or her landlady. On Thursday afternoon or evening a younger sister of deceased inquiring for her found that she had been absent since Saturday from her work and her room. On Friday deceased's mother went to Columbus, tried to locate her, and related her absence to the police. They investigated.

It was found that deceased was last seen with defendant. The officers went to Norfolk and took defendant into custody. He at first denied knowing deceased and denied that he had ever been in Columbus. He later admitted that he had been with deceased, said there had been an accident, and agreed to go with the officers to locate the body of deceased. He did so.

The water's edge was some 6 or 7 feet below the level of the road. The body was found about halfway down the slope, completely covered by weeds. It was naked, save for shoes and sox. Clothing was near it and one garment partly over it. The head was mashed in so that features were not recognizable and was severed from the body, save for a bit of skin. The blood spot was located about 20 feet from the body. The hatchet was later located and recovered at a point about 150 feet out in the lake.

Defendant testified at the trial. He insisted that parts of his confessions were suggested to him by the officers and that he wrote as they suggested. His testimony

indicates something of the philosophy of a fatalist. He had given study and thought to sex offenses and penalties. He testified as to many of the details of the events before and after the killing and while at Lake Babcock. He did not "remember" the details of the assault and killing.

The State and defendant each produced an expert witness. Both agreed that defendant's intelligence was above normal.

Defendant's expert testified that defendant had the emotional concepts of a child; that he was emotionally immature; that a person so constituted angered easily and without cause; that his thinking and acting were not in harmony; that he had difficulty in developing adult codes of ethics and moral concepts; and that he lived in a world of fantasy. The expert gave it as his opinion that defendant was mentally ill at the date of the killing and that that influenced and was the cause of the killing.

The State's expert witness detailed to the jury the story of defendant's life as related to him. He testified that defendant's memory was normal generally. He gave it as his opinion that the failure of defendant to remember the details of the tragedy was essentially defensive, rather than representative of the true state of his memory. He also gave it as his opinion that defendant was not insane and knew the difference between right and wrong at the time of the killing.

Defendant's wife and his mother testified as to facts of his behavior upon which they based an opinion as to his sanity. They stated, among other things, that he was kindly and considerate to people and animals. His mother stated that in her opinion defendant was not sane at the time of the tragedy. It was his wife's opinion that he did not know right from wrong at the time.

This brings us to defendant's argued assignments of error.

The information was filed in this case on September

28, 1950. On October 3, 1950, the court appointed counsel for defendant. The case came on for trial on November 27, 1950. On November 25, 1950, there was published in the Columbus Daily Telegram, on the editorial page under a caption "Letters to the Editor," a letter signed by a woman referring to this case. The letter referred to the public reaction between the first report of the crime and its prosecution, and stated that it followed the modern trend of becoming less an atrocity in the public mind; that the writer had a daughter and time could not eradicate the guilt of the offender should such a fate befall her; that the writer knew the sorrow of the parents of deceased was as pronounced today as of the time of the crime; and that the press had carried a story that the death penalty for a similar crime had never been meted out in Platte County, asked why not, and questioned that insanity was a factor to be considered. The letter further stated that public sympathy was not aroused for the family of the deceased and people did not want to see a killer die; and that the deceased did not want to die. The writer asked how long the people would go on encouraging such crimes by failing to cause the extreme penalty to be paid and asked if future rapists and murderers would not be more hesitant if they knew what the price of justice would be. The letter stated that in high school the writer had been opposed to capital punishment but now her opinions were reversed. She referred to a Bible statement that God punished two who lied by striking them dead and asked if He would be less severe with the sin of murder. The letter concluded: "I trust that when the Sundahl case comes before the public, there will still be those who remember the facts of the crime itself and the great need for justice in the fullest extent."

The defendant moved for a change of venue on account of the publishing of the letter. Defendant offered the paper as an exhibit. He proved the publication of the article and that the paper had a total paid circulation of

6,750, of which 4,475 was in Platte County. The defendant also stated that he felt there must be a great deal of prejudice on account of the article and asked for a continuance to the next term to make that showing. The two motions were overruled. Defendant assigns this as error.

The statute provides: "All criminal cases shall be tried in the county where the offense was committed unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein; in which case the court may direct the person accused to be tried in some adjoining county." § 29-1301, R. R. S. 1943.

In this case no affidavits were presented and no showing was made otherwise that a fair and impartial trial could not be had. Statement of defendant's counsel does not show an effort to get such affidavits or make such a showing, but rather that they anticipated prejudice on account of the article and asked for time to investigate and make a showing. The rule is: "A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed." Simmons v. State, 111 Neb. 644, 197 N. W. 398. The motion for a change of venue was properly denied.

As to continuances, the rule is: "' "An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous, unless an abuse of discretion is disclosed by the record." * * * It is no abuse of discretion for the trial court to refuse defendant a continuance unless it clearly appears that defendant suffered prejudice.' " Maher v. State, 144 Neb. 463, 13 N. W. 2d 641.

No showing of prejudice suffered is made. The motion for a continuance was properly overruled.

Defendant's next assignment of error is that the court erred in failing to admonish the jury as required by section 25-1110, R. R. S. 1943. The assignment in the

petition in error is not so limited. The statute applicable to criminal procedure is in part: "If the jury are permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person on the subject of the trial, nor to listen to any conversation on the subject; and it is their duty not to form or express an opinion thereon until the cause is finally submitted to them." § 29-2022, R. R. S. 1943.

On the opening day of the trial and before the noon recess and before the jury had been finally selected, the court stated: "* * * I want to caution you that from now on during any recess you must be careful not to discuss this case among yourselves or with anyone else. Neither should you permit anyone to discuss the case in your presence. We do not want the jury to hear discussion or argument about the case outside the court room. Now you have not been sworn as jurors yet and some of the members of the panel may not be on the jury. You must all be careful not to discuss the case with anyone, and if anyone starts to discuss it in your presence tell them you may be a member of the jury and cannot listen to it. If anyone insists on discussing it report their name to the court."

Right after the jury was sworn, the court stated: "Gentlemen of the Jury—and this applies to the alternate—you have been selected to try this case as the jury. I will admonish you again, as I did this morning, to be very careful not to associate with anyone in the halls or allow anyone to talk to you or discuss this case in any way with you. You must also not discuss the case or any of the facts or any of the evidence between yourselves until the case is entirely concluded and you have received the instructions of the Court and retired to the jury room. In other words, keep your minds open until the evidence is entirely in. Do not discuss it with anyone or even among yourselves until you have retired

to the jury room when the case is entirely concluded."

As appears from the bill of exceptions, on other occasions the jury was told before recesses to remember the admonition given and on other occasions the court recessed without giving any admonition. The transcript, however, shows that the jury was "cautioned" or "duly cautioned" as required by law at each noon and evening recess during the four days of the trial. This appears to have been deemed sufficient in Ringer v. State, 114 Neb. 404, 207 N. W. 928. However, because of the variance between the bill of exceptions and the transcript, and because of short recesses where no admonition was given, we examine further into the matter.

The defendant did not ask for additional or different admonitions. The matter was in nowise called to the trial court's attention during the trial.

The contention here is that the admonition given does not meet the terms of the statute and that it should be given at every intermission. The purpose of the admonition is that the jury be informed of its duties in that regard. The statute does not require an admonition each time the jury is permitted to separate. While repeated admonitions might be advisable, it cannot be assumed that they are necessary to impress the jury with its duty in that regard any more than in any other matter. It is not the number of admonitions but the fact of admonition that is important.

The contention is further advanced that the admonition to "keep your minds open until the evidence is entirely in" does not meet the requirements of the statute that "it is their duty not to form or express any opinion thereon until the cause is finally submitted to them." This language must be read in connection with the further admonition not to "discuss the case or any of the facts or any of the evidence between yourselves until the case is entirely concluded and you have received the instructions of the Court and retired to the jury room."

Webster defines "open-minded" as "Having an open

mind; receptive of arguments or ideas." Webster's New International Dictionary, Second Edition, Unabridged, p. 1706. It is further defined as "having an open mind, accessible to new arguments or ideas." The Oxford Dictionary, Vol. VII, Part 1, p. 139. It is also defined as "Having a mind open or accessible to new views or convictions; not narrow-minded; unprejudiced; liberal." The Century Dictionary and Cyclopedia. Vol. VI, p. 4120. Although we deem it better to admonish in the language of the statute, the admonition here given is in substantial compliance therewith and not prejudicially erroneous.

When the body of deceased was discovered, the weeds covering it were partly removed and a picture taken of it. The picture shows the back (from below the shoulders down to and including the hips) of a nude body. A part of one arm is shown. Indistinctly what appears to be an item of clothing is partly shown. The State offered the negative and the enlarged positive picture from the negative. They were received in evidence over objection.

Defendant contends that at all times he had admitted the act; that no issue was raised concerning any fact which the photograph made clear; that the State had ample direct testimony of the finding of the body; and that the only purpose and effect of the photograph were to inflame the passions and prejudice the jury against him. He relies upon Lee v. State, 147 Neb. 333, 23 N. W. 2d 316.

It is to be remembered that defendant pleaded not guilty as well as not guilty by reason of insanity or mental derangement. He put in issue every element of the crimes with which he was charged. It was not until after this picture was in evidence and a ring on the body identified as that of the deceased that defendant admitted that the body found was that of deceased. The State then stopped any further effort of identification. Before the picture was introduced the State's

witnesses had given a verbal description of what the picture represented.

We have recently again stated the rules applicable here:

"A photograph proved to be a true representation of the person, place, or thing which it purports to represent, is competent evidence of anything of which it is competent and relevant for a witness to give a verbal description.

"Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a gruesome spectacle.

"Photographs of the person or body of a deceased, proper foundation having been laid, may ordinarily be received in evidence for purposes of identification, or to show the condition of the body, or to indicate the nature or extent of wounds or injuries thereon." Turpit v. State, *ante* p. 385, 48 N. W. 2d 83.

The assignment is not sustained.

Section 28-401, R. R. S. 1943, provides that a person found guilty of murder in the first degree "* * * shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury."

Several assignments of error relate to the application of this statute. Defendant requested an instruction that the jury had the right, if it imposed a penalty of imprisonment for life, to add a recommendation that defendant shall never be paroled, and that it did not have the right to inflict the death penalty where the facts justified life imprisonment only, for fear that the Board of Pardons might at some future time see fit to parole the defendant. This was followed by a statement of the composition of the Board of Pardons and its procedures. The trial court refused to give the instruction.

The record shows that argument was made to the jury. Counsel for the State in effect asked that the

death penalty be invoked so that the defendant be never again inflicted on society. The jury was instructed and retired from the courtroom. After that the defendant then referred to the closing argument of counsel for the State and objected thereto, and then moved that the instruction be given as requested above and particularly that the jury be instructed that it should not fear what the Board of Pardons might do. Defendant stated that he did not think the argument of counsel for the State was out of line but in view of it thought that the precautionary instruction should be given.

Defendant assigns as error the refusal to give an instruction on the parole procedure. The Board of Pardons is composed of officers of the executive department. § 29-2602, R. R. S. 1943. It shall not assume to act as a court of review "* * * but shall confine itself to a hearing and consideration of those matters only which properly bear on the propriety of extending executive clemency." § 29-2612, R. R. S. 1943.

Pardon or parole relates to something that may happen after conviction and to action by the executive department. The jury had nothing to do with relation to the punishment except to determine whether it should be death or imprisonment for life. In the event the decision was for life imprisonment, whether or not he should be later paroled or pardoned was not a matter for it to decide. The jury's task at that point was to choose between one or the other of the penalties. That decision should not rest upon whether parole was easy or difficult to secure. See, Lovely v. United States, 169 F. 2d 386; State v. Dooley, 89 Iowa 584, 57 N. W. 414; State v. Carroll, 52 Wyo. 29, 69 P. 2d 542. The trial court did not err in declining to so instruct.

Defendant requested an instruction to the effect that even though the jury found the defendant was not insane and was capable of understanding the nature of his act and the difference between right and wrong, yet

if his mind was not normal and no rational motive for the homicide appeared, then the jury would not be justified in inflicting the death penalty if it found him guilty of murder in the first degree.

Defendant also requested an instruction that the matter of the penalty was for the jury's discretion; that it could not act arbitrarily; and that gruesomeness was not a determining factor, but the moral turpitude, depending on mental condition at the time of the homicide, whether death of the victim was contemplated and other facts bearing on moral turpitude, should be considered.

Defendant assigns as error the refusal to give these instructions or some guide to the jury as to the penalty to be determined by them.

Prior to 1893 by our statute the penalty for murder in the first degree was death. § 5579, Cons. St. 1891. In 1893, the Legislature amended the act as above set forth. Laws 1893, c. 44, p. 385. In Winston v. United States, 172 U. S. 303, 19 S. Ct. 212, 43 L. Ed. 456, the Supreme Court of the United States reviewed the reasons for amendments such as that made in 1893 in Nebraska and construed a comparable statute of the United States, and held: "The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and the consciences of the jury." This decision was followed in Andres v. United States, 333 U. S. 740, 68 S. Ct. 880, 92 L. Ed. 1055.

This decision has been approved and followed. See, Vickers v. United States, 1 Okl. Cr. 452, 98 P. 467; People v. Bollinger, 196 Cal. 191, 237 P. 25; Hernandez v. State, 43 Ariz. 424, 32 P. 2d 18; State v. Hunter, 183 Wash. 143, 48 P. 2d 262; State v. Peltier, 21 N. D. 188, 129 N. W. 451. See, also, State v. Van Vlack, 57 Idaho 316, 65 P. 2d 736; People v. Martin, 12 Cal. 2d 466, 85 P. 2d 880.

Defendant cites Commonwealth v. Brown, 309 Pa. 515,

164 A. 726, 86 A. L. R. 892. Language in that opinion gives support to defendant's contention. However, that court has since held that although the trial judge may if he so desires, and subject to the jury's sole power of ultimate decision, point out facts which in his opinion bear upon the question of the penalty, yet the court is not compelled to discuss the question of the penalty at all. Commonwealth v. Wooding, 355 Pa. 555, 50 A. 2d 328.

We are mindful that in Dinsmore v. State, 61 Neb. 418, 85 N. W. 445, the court gave an instruction in which several matters were discussed and, among others, stated that they had nothing to do with questions of mercy, and that that was a power vested in the executive department in the exercise of its authority to pardon. Objection was there made that the instruction invaded the province of the jury. We there held that it did not and that it was a cautionary instruction which the trial court may, in its discretion, give or not.

We find no error in the trial court's refusal to so instruct.

This brings us to matters presented by defendant in his motion for a new trial. He contended that the whole trial was charged with an atmosphere of hate and a desire for revenge and the death penalty.

Specifically he charged and presents here three things: First, that the trial was attended by large numbers of people all having the feeling of hate and revenge.

The trial consumed four days in the presentation of evidence. Our attention is called to one time when the court admonished the audience to "restrain yourselves from these outbursts." A witness was then testifying about an incident that occurred several weeks before the killing of deceased, when defendant, riding with a boy and two girls, drove his fist through a window in the car. What caused the outburst of the audience is not apparent. The admonition was voluntary on the part of the court. We find no record of any request

from the defendant or any occasion for other admonitions.

The rule is: "In the trial of a criminal action, where spectators applaud and counsel for defendant proceed with the trial, without objection and without request for a mistrial, and take chances of a favorable verdict, they will not be heard to complain of such fact, for the first time, on motion for a new trial." Wever v. State, 121 Neb. 816, 238 N. W. 736.

At the close of the trial and before argument to the jury the court expressed its thanks to the audience, stated they had been "very orderly," and cautioned them that there should be no applause or commotion during the argument. There is no showing that the admonition was not followed. In the showings hereinafter referred to, all jurors disclaimed having heard any discussions by spectators or others expressing any attitude or sentiment as to the guilt or innocence of the defendant.

The record showing these facts, we see no basis for a holding of prejudicial error in that regard.

Second: Defendant then offered two detective magazines purporting to recite the facts of this crime. That the recitals contained in them are at marked variance with the evidence in the record is apparent. There was a showing made that there was an unusually large sale of these magazines in Columbus prior to and during the trial. The State, by affidavit of each juror, made a showing that they had not seen or read the magazines. No showing to the contrary was made.

In a case where similar contentions were made with reference to the publication of untrue and inflammatory matter we held that "Opportunity for prejudice or disqualification is not sufficient to raise a presumption that they exist." Fisher v. State, *ante* p. 166, 47 N. W. 2d 349. In that case there was no showing that any juror had read or knew the contents of the publications. Here there was a showing that they had not. The charge

of prejudice based on these magazine articles is not sustained.

Third: The next contention is that several of the jurors had read the letter as published in the Columbus Daily Telegram and hereinbefore summarized. The defendant made a showing that six, or possibly seven, of the jurors were regular subscribers to the Columbus Daily Telegram and reintroduced the paper containing the letter.

The State canvassed the jury and, in the affidavits above referred to, produced a showing which the parties agree demonstrates that one of the jurors had read the letter before he was selected as a juror, and that four, and possibly five, jurors had read the letter in the paper during the progress of the trial while evidence was being taken.

The transcript shows that on November 6, 1950, the defendant made application to plead guilty to murder in the second decree. The penalty for murder in the second degree is imprisonment in the penitentiary for not less than ten years or during life. § 28-402, R. R. S. 1943. A hearing was had on this matter on November 15, 1950, and the application was denied. This occurred before defendant was arraigned and pleaded to the information. At the trial he was asked on direct examination if he had not offered to plead guilty to murder in the second degree and take a life sentence and he answered, "Yes sir."

In his argument defendant's counsel advised the jury that the only purpose of the prosecution was to determine whether or not the defendant should suffer the death penalty, and that he did not expect a verdict of not guilty by reason of insanity. He called attention to the offer to plead guilty and be imprisoned for life, and asked for a verdict that carried with it a life sentence. The State in its closing argument asked for a verdict that carried a sentence of death.

It is patent that the final issue to be decided by the

jury was whether the penalty should be death or life imprisonment. The published letter contained no recital of facts of the killing; it referred to the public apathy as to the atrocity of the offense; it was in effect an argument by an individual for the death penalty.

The record further shows that in ruling on the motions for a change of venue and a continuance, the trial court stated that "* * * probably any juror who can be shown to have read that article can be excused." The voir dire of the prospective jurors is not fully shown. The record contains a statement by counsel for the State (after both the State and defendant had passed the jury for cause) that the defense had not interrogated any of the jurors with reference to whether or not they had seen or read the article in question. Defendant's counsel then stated that the defense did not wish to interrogate in regard to the letter because they believed it would call it to the attention of the jurors and that they would go home and read it. The record further shows that both the State and defendant waived the fifth challenge and did not exhaust the peremptory challenges authorized by section 29-2005, R. R. S. 1943.

Defendant assigns as error the failure to admonish the jury not to read that letter. It is obvious that the defendant in effect advised the court that he did not want it called to the jury's attention. Defendant does not argue that assignment. Pursuant to rule 8 a 2 (4) of this court, the assignment will not be further considered.

Defendant's assignment of error here is that prejudice requiring a reversal and a new trial flows from the fact that four of the jurors read the letter during the trial.

We have here then this situation. Defendant knew of the publication of this article before trial. He urged it as a basis for motions for a change of venue and a continuance. The trial court in denying those motions indicated that if it were disclosed on voir dire that any prospective juror had read the article, it might be ground for challenge for cause. Defendant did not question

any prospective juror as to that matter. He elected to take a chance that the jurors had read it and to take a chance on the prejudice, if any, which might follow, rather than to direct attention to it and to permit the jurors to know of defendant's concern about it. In doing so and advising the court of his reason, he impliedly asked the court not to mention it and produced a situation where, had the court done so, it might then have been subject to the charge of prejudicial conduct. As a result, one juror who had read the letter was passed for cause and served on the jury.

Defendant here concedes that the failure to question that juror was "perhaps a waiver as to him." See Kitts v. State, 153 Neb. 784, 46 N. W. 2d 158. He assigns here as error only the reading of the article by the four jurors after the trial began. The time of the reading is not the important consideration here but the fact of the reading. It is not the number of jurors who read it but the fact that it was known to a juror that constituted the prejudice, if any, that was to follow. When the defendant elected not to interrogate the prospective jurors as to whether or not they had read the article, he waived not as to the one juror who had read this article but the prejudice, if any, that might arise from the fact that one or more of the jurors might have knowledge of the contents of the letter.

Polin v. State, 14 Neb. 540, 16 N. W. 898, involved a first degree murder case and a death sentence. There it was shown that in disobedience of a court order and during trial, three of the jurors separated from the others and engaged in conversation with bystanders. Defendant's counsel knew of it, made no complaint to the court, and trial proceeded. Objection was made in motion for a new trial. We held that it came too late. It was held that if it was thought prejudicial, it should have been called to the court's attention when done. We there said: "Parties litigant, even defendants in criminal cases, must deal fairly by the court. They are not

permitted to withhold information of matters transpiring in the progress of a trial, whether prejudicial or otherwise, and thus, without objection, permit it to proceed to a conclusion, and then take advantage of them. Generally all objections not jurisdictional as to the subject of the litigation must be made at the first opportunity, or they are deemed to be waived. The rule in such cases is, that a party shall not be permitted without objection to take the chances of a favorable result, and then, if disappointed, for the first time complain." This holding was followed in Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868. It is applicable here. See, also, Cochran v. State, 122 Neb. 79, 239 N. W. 471; Hanks v. State, 88 Neb. 464, 129 N. W. 1011; Zorn v. State, 123 Neb. 596, 243 N. W. 841.

Sections 25-1623 and 29-2006, R. R. S. 1943, specifically refer to questions arising where prospective jurors have read newspaper accounts and statements and the conditions under which they may be challenged for cause. As we said in Kitts v. State, *supra,* these provisions manifest that voir dire furnishes defendant ample opportunity to establish whether or not prospective jurors have been prejudiced by such articles. The sections are cited here to show that the reading of such matters is not prejudicial per se.

The rule is: "Whether a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown." Simmons v. State, *supra.* See, also, Murray v. State, 119 Neb. 16, 226 N. W. 793; Matters v. State, 120 Neb. 404, 232 N. W. 781.

In Tracey v. State, 46 Neb. 361, 64 N. W. 1069, in support of a motion for new trial, an affidavit was filed of misconduct of jurors in that in their deliberations they had been told facts not produced in evidence. The statements made in the affidavit were not denied by the

State. We there held: "The district court, in trying the issues presented by the motion for a new trial, had the right, if it was not obliged, to indulge the presumption that the jurors had been mindful of the oaths which they took, and had found the verdict which they had solely upon the evidence introduced on the trial of the case. * * * The law supplied, by presumption, the evidence on the one hand that the jurors had obeyed their oaths." It was further held that the court could weigh the presumption against the showing made in the affidavit. This decision was followed in Savary v. State, 62 Neb. 166, 87 N. W. 34, and in Hanks v. State, *supra.*

For the decisions of other courts dealing with a similar contention see State v. Danner, 70 Mont. 517, 226 P. 475; Langer v. United States, 76 F. 2d 817; Bratcher v. United States, 149 F. 2d 742; United States v. Reid, 12 Howard 361, 13 L. Ed 1023.

We conclude that the trial court did not err in denying the motion for a new trial based on this contention.

Finally defendant contends that he did not have a fair trial because of the matters hereinbefore determined and also charges that the State made a studied effort to emphasize the gruesome details of the homicide and the condition of deceased's body when found, rather than an orderly examination of defendant's mental condition, he "having at all times admitted the killing and all the details thereof." We have heretofore pointed out that the defendant put in issue by his plea of not guilty every material element of the crimes charged. We have examined the State's evidence. It did no more than was required to properly prove the commission of the offenses charged. We have also pointed out that when the defendant made an admission during the trial, the State accepted it and refrained from offering additional proof of the fact admitted. True, defendant had written and signed two confessions. But the not guilty plea stood as against those confessions until the defendant testified. He then un-

dertook to repudiate the confessions in part by contending that statements therein were put into his mouth by officers, and that he did not remember what happened as detailed in the confessions and did not fully realize or clearly remember what he had done.

Defendant had the services of competent and diligent counsel, experienced both at the bar and on the bench of this state. The trial was before an able trial judge. That defendant had a fair trial generally is well illustrated by the fact that he makes here only one assignment of error on the admission or rejection of evidence and no assignments of error on the instructions given to the jury. Our study of this record convinces us that he had the fair trial which the law contemplates and requires.

As hereinbefore pointed out, section 28-401, R. R. S. 1943, provides that upon conviction of a person of murder in the first degree the jury shall in its discretion determine whether the penalty shall be death or imprisonment for life. By that act the Legislature provided that the jurors who heard the testimony, observed the witnesses, weighed the evidence, and determined the guilt should have the primary duty to fix the penalty.

Section 29-2308, R. R. S. 1943, provides: "In all criminal cases that now are, or may hereafter be pending in the Supreme Court on error, the court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence."

Defendant, relying on this section, asks that the sentence be reduced to life imprisonment. This is based on either of two general propositions. He appeals for clemency and mercy for himself and more particularly for his family. His second contention is that his evidence as to his age, his previous life, his good qualities, the changes that came over him in the months before the

killing, and his mental condition prior to and at the time of the offense do not justify the extreme or death penalty.

Shortly after the adoption of the act we had this section before us for construction and application in Anderson v. State, 26 Neb. 387, 41 N. W. 951. As to the first proposition we there held that the act of reducing the sentence and rendering a new one in accordance with the evidence is in no sense a commutation nor the exercise of clemency and that that was a matter of executive discretion. This decision was quoted with approval in Cryderman v. State, 101 Neb. 85, 161 N. W. 1045. In Dinsmore v. State, *supra,* we held that although a jury had the right to fix the penalty in cases of this character, it had no right to be actuated by considerations of mercy but should be guided alone by the evidence, the facts, and the circumstances disclosed by the record, under the instructions of the court, and that if the evidence revealed a case in which the death penalty should be fixed, the jury had no right to be deterred from discharging its sworn duty through sympathy for the accused. The same rule applies to this court in determining the issue now before us. Accordingly we must put aside appeals to sympathy or mercy.

This brings us to defendant's second proposition for the reduction of the sentence.

In Anderson v. State, *supra,* we held that the statute made it the duty of this court, when the proper proceedings were had, to review the evidence and prevent the imposition of punishment which the evidence would not warrant, and that we were empowered to reduce the sentence and render such a one as was justified by the evidence. In subsequent cases we have applied the act and in several cases have reduced the sentence.

We have examined all cases called to our attention by counsel and others found by our own research. In all of them we have found a substantial reason, warranted by the evidence, to cause either an affirmance or re-

duction of the sentence. We recognized in Rogers v. State, 141 Neb. 6, 2 N. W. 2d 529, that precedents were of little value in determining a question such as we have here, and yet our decisions show an effort to sustain a consistent application of the act. The proper administration of justice according to law requires it. However, we have recognized that the answer rests upon the facts and circumstances in each case. In Charles v. State, 27 Neb. 881, 44 N. W. 39, a burglary case, we held that it was never intended to impose the full penalty of the law unless a case of great atrocity was shown. However, in Peterson v. State, 115 Neb. 302, 212 N. W. 610, a robbery case, we held that we will not often reduce the sentence of the trial court where the crime involved great moral turpitude and was one of violence. See, also, Jackson v. State, 133 Neb. 786, 277 N. W. 92; Pauli v. State, 151 Neb. 385, 37 N. W. 2d 717.

In Simmons v. State, *supra,* without reference to the statute we held that it was our duty to administer the law as it exists and "Where a defendant, after a fair trial, has been convicted of murder in the first degree and the jury, by its verdict, has imposed the death penalty, and the court has passed sentence in conformity with the verdict, this court will not interfere with such sentence on the ground that it is excessive, in the absence of any mitigating circumstances."

In Wesley v. State, 112 Neb. 360, 199 N. W. 719, we held that there was nothing to urge in extenuation of the act "* * * and whatever repugnance the individual may feel toward capital punishment must be put aside in obedience to the law of the state and in deference to the verdict of the jury."

Defendant's counsel argues here that the only explanation of his act is that he went violently insane, had no conception of what he was doing, and, even if not insane, his mind was not a reliable regulator of his conduct. He relies here specifically upon three of our decisions.

In Hamblin v. State, 81 Neb. 148, 115 N. W. 850, we held that there "may be grave doubts as to his responsibility for his acts at the time of the tragedy," and there was no justification for taking the defendant's life. The penalty of death was changed to life imprisonment.

In Muzik v. State, 99 Neb. 496, 156 N. W. 1056, we found that while the evidence showed that defendant understood and comprehended the nature of the deed he committed and the difference between right and wrong "his mind was nevertheless abnormal." Following Hamblin v. State, *supra,* the sentence of death was reduced to life imprisonment.

In Cryderman v. State, *supra,* a death sentence was reduced to life imprisonment where the evidence showed that defendant understood the nature of his act and the difference between right and wrong, but that his mind was not normal and was not entirely reliable as a regulator of his conduct.

However, in subsequent cases we have dealt with evidence of insanity and abnormality in considering the question here presented and arrived at a different result. In Carter v. State, 115 Neb. 320, 212 N. W. 614, an expert witness for defendant there described the mind of the defendant in considerable similarity to the testimony of defendant's expert witness here, and expressed it as his opinion that he did not know the difference between right and wrong with respect to the act charged. As we read this record, defendant's expert witness did not go that far in his testimony in this case. There is no similarity in the facts of the killings in the two cases. We there held: "If reliance is to be placed upon the verdict of the jury as to the insanity of the defendant, his crime was deliberately planned and executed in cold blood. If the extreme penalty is justified at all, it would seem that the facts before us are amply sufficient to call for the exercise of such penalty."

In Sherman v. State, 118 Neb. 84, 223 N. W. 645, we

were petitioned to and refused to set aside a death penalty. There the motive was in part that of sex desires. There insanity was presented. There we found that there was nothing strange or queer in the defendant's personal history that would condone his act and no circumstance in his life to impeach his sanity and refused to set aside the sentence of death.

MacAvoy v. State, 144 Neb. 827, 15 N. W. 2d 45, was the last case involving this question to be determined here. There expert testimony was that defendant was abnormal and at the time of the crime unable to distinguish between right and wrong. There was expert evidence to the contrary. The jury resolved that question. We there said we thought the defendant abnormal when he committed the crime and "The legislature, in drafting and enacting our homicide law and in providing the penalties for its violation, must have felt that crimes would be committed by such abnormal persons as would warrant the infliction of the death penalty. The test is whether defendant had sufficient mental ability to distinguish between right and wrong in respect to the particular things he did in causing the death of this girl. The jury found that he was responsible for his acts. We think the evidence shows that the jury were entirely correct in so finding. The crime here committed is so gruesome and depraved in character that a reduction of the sentence prescribed by the jury and imposed by the trial court would amount to a holding that capital punishment will never be enforced in this state, irrespective of the legislative enactments on the subject. We can find no justifiable reason for substituting our judgment for that of the jury and the trial court in prescribing and assessing a penalty which the law authorizes in such cases."

These cases demonstrate that a defendant's mental abnormality is to be considered, but is not necessarily a controlling factor in the decision of this question.

The facts of the crime, the motive, and the defense of

abnormality in the MacAvoy case are quite similar to those of the instant case.

Defendant here urges differences between the MacAvoy case and the instant case. In the MacAvoy case there was evidence indicating that the defendant returned to the scene of the crime on the night following, found his victim alive, and then killed her, and that that placed MacAvoy beyond consideration of clemency. In the instant case defendant stated in both his confessions that he did not know that deceased was dead when he covered her body with weeds. He left her there. The next day he resumed normal activities and contacts. He did not go back or seek to find out if death had come or life could be saved to deceased. Defendant points out that there is a difference in the prior lives of the two men, in their family background, and in their evidence as to mental condition. To the extent that those differences exist, we do not deem them controlling.

The Legislature has fixed the public policy of this state and determined what shall be done in cases of this character. It is a policy of long standing. It is a trite statement, but it is our duty to enforce the law. As in the MacAvoy case so here we find no justifiable reason for changing the judgment of the jury in fixing the death penalty. The judgment of the jury is warranted by the evidence. The sentence of death is affirmed.

We have hereinbefore found that there was no prejudicial error in the trial of this case. The judgment of the district court is in all respects affirmed.

Friday, the 26th day of October 1951, between the hours of six a. m. and six p. m. of said day, is fixed as the date for carrying into effect the sentence of the district court.

AFFIRMED.

KATHERINE KUSKA, APPELLANT, V. NICHOLS CONSTRUCTION COMPANY, A PARTNERSHIP, APPELLEE.

48 N. W. 2d 682

Filed July 5, 1951. No. 33020.

1. **Automobiles: Negligence.** The negligence of a person while driving an automobile with another as his guest may not ordinarily be imputable to the guest, but such guest may be responsible for the consequences of his own negligence.
2. ———: ———. The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceives danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily, the guest need not watch the road or advise the driver in the management of the car.
3. ———: ———. It is the duty of an invited guest in an automobile driven by another, with knowledge of approaching danger, to exercise ordinary care to warn the driver of the danger, unless to a reasonably careful, cautious, and prudent person it appears that the warning would be of no avail or go unheeded, or that the driver observed or should have observed the danger, as well as the guest, and for failure to give such warning the guest would be chargeable with contributory negligence.
4. ———: ———. It is the duty of an invited guest, with knowledge of approaching danger, in the exercise of ordinary care to protest to the host if there is time and opportunity, unless it reasonably appears that such protest would go unheeded or would be of no avail, and for failure so to do the guest would be chargeable with contributory negligence.
5. **Negligence.** In a jury case involving issues of negligence, where different minds may draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, the question is of law for the court.
6. ———. Where separate independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, although one of them alone might not have caused the injury.
7. ———. If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite

or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence.

8. **Highways: Negligence.** It is the continuing duty of a road contractor engaged in constructing, grading, or graveling a highway, to use ordinary care and erect barricades or signs or otherwise adequately warn the traveling public if the highway is dangerous to travel or if obstructions are placed thereon. A failure to so warn the traveling public is continuing negligence as distinguished from a condition, and if reasonable minds could conclude from the evidence that such negligence proximately caused an accident, then the issue should be submitted to a jury for its determination.

9. ———: ———. A traveler may ordinarily occupy and use any part of a public highway he desires when not needed by another whose rights thereto are superior to his own.

10. ———: ———. The presence of a well-traveled track, obviously in recent use, situated within the confines of a regularly established rural highway, and connecting with a public highway open to travel, with no barricades thereto, and no warning signs thereon, constitutes a continuing invitation to the traveling public to use the same, and justifies the assumption that those chargeable with its maintenance have performed their duties, and that the portion of the highway occupied by such traveled tracks is reasonably safe for the accommodation of the public while using ordinary care.

11. **Trial.** A motion for directed verdict or dismissal must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.

APPEAL from the district court for Fillmore County: STANLEY BARTOS, JUDGE. *Reversed and remanded with directions.*

Keenan & Corbitt, for appellant.

Gross, Welch, Vinardi & Kauffman, and *Waring & Waring,* for appellee.

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

CHAPPELL, J.

Plaintiff, a guest in a car owned and operated by her husband, brought this action against defendant to recover damages for personal injuries resulting from an automobile accident alleged to have been proximately caused by negligence of defendant who dumped a pile of gravel on the traveled portion of a county highway without barricading the same or erecting any signs warning the public of the obstruction. At conclusion of plaintiff's evidence, the trial court sustained defendant's motion to direct a verdict or dismiss the case, upon the ground that as a matter of law defendant was not negligent and did not commit any negligent act which contributed to or was a proximate cause of the accident. Motion for new trial was overruled and plaintiff appealed, assigning that the trial court erred in sustaining defendant's motion and refusing to submit the issues of negligence to the jury for its determination. We sustain the assignment.

Concededly, plaintiff was a guest in her husband's car, and his negligence, if any, which under the circumstances presented we are not required to discuss, would not be imputed to her. As held in Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178: "The negligence of a person while driving an automobile with another as his guest may not ordinarily be imputable to the guest, but such guest may be responsible for the consequences of his own negligence."

In that connection: "The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceive danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily, the guest need not watch the road or advise the driver in the management of the car.

"It is the duty of an invited guest in an automobile

driven by another, with knowledge of approaching danger, to exercise ordinary care to warn the driver of the danger, unless to a reasonably careful, cautious, and prudent person it appears that the warning would be of no avail or go unheeded, or that the driver observed or should have observed the danger, as well as the guest, and for failure to give such warning the guest would be chargeable with contributory negligence.

"It is the duty of an invited guest, with knowledge of approaching danger, in the exercise of ordinary care to protest to the host if there is time and opportunity, unless it reasonably appears that such protest would go unheeded or would be of no avail, and for failure so to do the guest would be chargeable with contributory negligence." Hendrix v. Vana, 153 Neb. 531, 45 N. W. 2d 429. See, also, Hamblen v. Steckley, *supra,* a case involving issues of negligence, wherein it was held: "In a jury case where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, the question is of law for the court." See, also, Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367.

Under the evidence as now presented to us, it could not be reasonably concluded that plaintiff was guilty of any contributory negligence. The sole question presented then, as we view it, is whether or not the evidence adduced in plaintiff's behalf required a submission of defendant's alleged negligence to the jury for its determination. In that connection, we may assume for the purpose of argument only, that plaintiff's driver, who was required to use ordinary care, was guilty of negligence proximately causing the accident, yet the rule is that if defendant was also guilty of negligence proximately causing the accident, plaintiff may still recover, because the applicable rule is that: "Where separate independent

acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, although one of them alone might not have caused the injury.

" 'Tort-feasor is liable for all consequences which, in natural course of events, flow from unlawful or negligent acts, although results were brought about by intervening agency of others, provided intervening agents were set in motion by tort-feasor or were natural consequences of original wrongful acts.' Paup v. American Telephone & Telegraph Co., 247 N. W. 411 (124 Neb. 550)." McClelland v. Interstate Transit Lines, 142 Neb. 439, 6 N. W. 2d 384.

That case also held: "If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence."

In Simonsen v. Thorin, 120 Neb. 684, 234 N. W. 628, 81 A. L. R. 1000, it was held: "When one engaged in the proper use of a highway causes an obstruction to be placed upon it in such a manner as to be dangerous to traffic, he must use ordinary care to prevent injury to others where he knows that such obstruction is calculated to do an injury to travelers upon said highway.

"The negligence in such a case is, after having placed an obstruction in the highway, to leave it in such a manner as will be dangerous to others using the highway.

"Whoever places an obstruction in a public highway, even by an involuntary act and without negligence, is under obligation to remove such a nuisance from the highway or is required to use ordinary care to warn the traffic on said highway of the dangers incident to said obstruction."

In Grantham v. Watson Bros. Transportation Co., 142 Neb. 362, 6 N. W. 2d 372, on rehearing, 142 Neb. 367, 9 N. W. 2d 157, it was held: "When one engaged in

the lawful use of a highway causes an obstruction to be placed upon it in such a manner as to be dangerous to traffic, he must use ordinary care to prevent injury to others where he knows, or in the exercise of ordinary care should know, that said obstruction is calculated to do injury to travelers upon said highway."

As stated in McClelland v. Interstate Transit Lines, *supra,* quoting from Lisle v. Anderson, 61 Okl. 68, 159 P. 278, L. R. A. 1917A 128, and citing Zimmer v. Brandon, 134 Neb. 311, 278 N. W. 502, as approving the statement: " 'Thus, it is to be seen that the rule is: "Whenever the circumstances attending a situation are such that an ordinarily prudent person could reasonably apprehend that, as the natural and probable consequences of his act, another person, rightfully there, will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises; and, if such care is not exercised by the party on whom the duty rests and injury to another person results therefrom, liability on the part of the negligent party to the person injured will generally exist, in the absence of any other controlling element or fact, and this, too, without regard to the legal relationship of the parties." ' "

Generally, it is the continuing duty of a road contractor engaged in constructing, grading, or graveling a highway, to use ordinary care and erect barricades or signs, or otherwise adequately warn the traveling public if the highway is dangerous to travel or if obstructions are placed thereon. A failure to so warn the traveling public is continuing negligence as distinguished from a condition, and if reasonable minds could conclude from the evidence that such negligence proximately caused an accident, then the issue should be submitted to a jury for its determination. Simonsen v. Thorin, *supra;* Grantham v. Watson Bros. Transportation Co., *supra;* Sharp v. Chicago, B. & Q. R. R. Co., 110 Neb. 34, 193 N. W. 150; 40 C. J. S., Highways, § 262, p. 306. As stated in the last-cited case: "It is elementary that the public may assume

that those who are charged with the maintenance of highways have performed their duty."

It must also be borne in mind that: "A traveler may occupy and use any part of a public highway he desires when not needed by another whose rights thereto are superior to his own." Klaus v. Soloman Valley Stage Lines Co., 130 Neb. 325, 264 N. W. 747.

In King v. Douglas County, 114 Neb. 477, 208 N. W. 120, it was held: "The presence of a well-traveled track, obviously in recent use, situated within the confines of a regularly established rural highway, and connecting with a public highway open to travel, with no barriers thereto, and no warning signs thereon, constitutes a continuing invitation to the traveling public to use the same, and justifies the assumption that those chargeable with its maintenance have performed their duties, and that the portion of the highway occupied by such traveled tracks is reasonably safe for the accommodation of the public."

It is well established in this jurisdiction that a motion for directed verdict or dismissal, "must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Pahl v. Sprague, *supra.*

In the light of the foregoing rules, we have examined the evidence adduced in plaintiff's behalf, which, briefly summarized, disclosed that: Plaintiff and her husband lived on a farm about ½ mile east and 1¼ miles north of the point of accident. About 4:30 p. m. on Sunday, November 13, 1949, a bright, sunny, dry day, they decided to visit one of their farms located a few miles southwest of where they lived. The husband drove his almost new Plymouth sedan, and plaintiff rode with him. He drove south about 1¼ miles, to an intersection of

county highways. Ordinarily they would have continued on south at such point, but such south road was rough and rolling, with a "kitty-cornered" bridge. They knew that the east and west road had been graded some time before, but they did not know that it was then being graveled. That road, of light clay dirt, with no gravel upon it and apparently open generally to the public, looked good, with smooth, well-traveled center tracks. It was a little rough at the edges of the road bordering upon ditches about 6 feet or more deep. There were no barricades or warning signs at the intersection, and none between it and the point of impact about one-half mile west, so, assuming that it was safe to proceed, as they had a right to do, the driver turned west. The sun was about at point of setting, and, although they put down the visors, its glare from the hood interfered with their normal vision. They could see at the sides of the road better than straight ahead, so the driver traveled a track approximately in the center of the highway. Driving at 25, not more than 30 miles an hour, at a point about one-half mile west of the intersection, along and over which there had been no gravel, the left front wheel of their car, then traveling a little left of the left center track, struck a pile of gravel 29 feet 3 inches long, 6 feet 9 inches wide, and 1 foot 9 inches high at its deepest point after the accident, which had been dumped but not spread in and south of the left center traveled track. The gravel was the same color as the road and neither plaintiff nor her husband saw the gravel before striking it. At the point where the impact occurred, the road sloped slightly downward for a short distance, and then up over a sloping hill to the west. Photographs received in evidence, particularly exhibit No. 7 taken the next morning, clearly reflect the entire situation and support the evidence adduced in plaintiff's behalf. When the impact occurred, the car was thrown to the left into the ditch about 8 feet deep, striking the south bank thereof almost head-on, in a southwesterly direction.

Then and there plaintiff was thrown against and about in the car, thence out through the right door to the ground. As a result she was injured, the extent of which need not be discussed. Defendant's answer admitted that it was under contract with Fillmore County to gravel the road and that it had unloaded the gravel preliminary to spreading same upon the traveled portion of the highway.

In the light of such evidence, and the law heretofore cited, we conclude that the trial court erred in sustaining defendant's motion and refusing to submit the alleged issues of negligence and proximate cause to the jury. Therefore, the judgment should be and hereby is reversed and the cause is remanded with directions to grant a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. CLARENCE S. BECK, ATTORNEY GENERAL, RELATOR, V. BLAINE YOUNG, RESPONDENT.
48 N. W. 2d 677

Filed July 5, 1951. No. 33055.

1. **Constitutional Law.** The supreme executive power in the state is lodged in the Governor.
2. ———. The power of the Governor to remove an officer or employee of the executive branch of the government, appointed by him, is an executive function, limited only by Article IV, section 12, of the Constitution.
3. **Constitutional Law: Statutes.** The power of the Governor to remove a member of the Nebraska Liquor Control Commission is derived from Article IV, section 12, of the Constitution. The authority granted by section 53-106, R. S. 1943, is declaratory of the power granted by the Constitution and its provisions do not operate as a limitation upon the supreme executive power.
4. **Constitutional Law.** The power of the Governor to remove an officer of the executive branch of the government, appointed by him for a definite term, is defined by Article IV, section 12, of the Constitution and requires a sufficient specification of charges, notice, hearing, and adequate competent evidence to

sustain the order made. The proceedings and order are subject to review by the courts to assure compliance with such constitutional provision.

5. **Constitutional Law: Statutes.** A violation of section 53-111, R. S. 1943, affords an adequate basis for a charge upon which an order of removal by the Governor can be based.
6. **Constitutional Law.** The power of the Governor to remove an officer of the executive branch of the government, appointed by him for a definite term, is derived from the Constitution and is self-executing.
7. **Constitutional Law: Statutes.** The acceptance of insurance commissions by a member of the liquor control commission on policies of insurance issued to persons subject to the regulation and control of the liquor control commission is a "gift, gratuity, emolument or employment" within the meaning of section 53-111, R. S. 1943, and constitutes malfeasance in office within the meaning of Article IV, section 12, of the Constitution.
8. ———: ———. The receipt of such commissions by a member of the liquor control commission involves a question of public morals in the administration of government of which the Governor could take cognizance in the performance of his constitutional duties, irrespective of the existence of section 53-111, R. S. 1943, a penal statute enacted by the Legislature upon the subject.

Original proceeding in quo warranto: *Judgment of ouster.*

Clarence S. Beck, Attorney General, and *Bert L. Overcash,* for relator.

Gaines, Shoemaker & Crawford, Tyler B. Gaines, and *Joseph R. Moore,* for respondent.

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

CARTER, J.

This is an original action in quo warranto instituted by the Attorney General to test the right of respondent, Blaine Young, to hold the office of member of the Nebraska Liquor Control Commission.

The record shows that the respondent was appointed as a member of the liquor control commission on May 7,

1946, for the term ending May 25, 1947, and on the latter date he was reappointed to the office for the statutory term of six years. Respondent accepted the appointment, qualified as required by law, and became liquor control commissioner during the times herein mentioned.

On April 16, 1951, the Governor of Nebraska, after giving notice thereof to respondent, held a hearing to determine whether or not respondent should be removed from the office of liquor control commissioner for having accepted gifts, gratuities, emoluments, and employment from liquor licensees by selling insurance to such licensees and by accepting commissions on insurance placed by such licensees with insurance brokers or agents, in violation of section 53-111, R. S. 1943. After said hearing and on April 21, 1951, the Governor directed the removal of respondent as a member of the liquor control commission. Respondent refused to surrender the office and this action in quo warranto was brought to determine by what warrant, if any, the respondent now holds the office of liquor control commissioner.

The facts are not in dispute. The respondent for many years before becoming a member of the liquor control commission was engaged in the insurance business in Omaha. For some years he operated his own agency, but during the times here involved he was brokering his business with general agents. By this manner of handling he turned the insurance business that came to him to the general agency which issued the policy, collected the premium, and remitted his commission to him. A number of respondent's insurance clients were liquor licensees who operated under the control of the liquor control commission. When respondent became a member of the liquor control commission he discontinued the solicitation of liquor licensees for insurance. It appears, however, that approximately 30 liquor licensees purchased insurance from the general agencies and directed that the account of respondent be credited with the commissions. Respondent received

approximately $2,400 in such commissions in 1949. It is the acceptances of these commissions that brought about the notice, hearing, and order of removal by the Governor.

The supreme executive power in the state is lodged in the Governor. Art. IV, § 6, Constitution. Except as limited by the Constitution itself the supreme executive power is to be exercised by the Governor and, under the division of powers devised by the Constitution, neither the Legislature nor the courts may exercise the powers thus conferred upon the executive branch. The power to remove an officer or employee in the executive branch of the government is an executive function. The lodging of the supreme executive power in the Governor by the Constitution reposes in the Governor the power to remove executive officers and employees of the government appointed by him, except as limited by the Constitution itself. The only limitation placed upon the executive power of the Governor in connection with the removal of executive officers and employees appointed by him is Article IV, section 12, of the Constitution, which provides: "The Governor shall have power to remove any officer, whom he may appoint, in case of incompetency, neglect of duty, or malfeasance in office, and he may declare his office vacant, and fill the same as herein provided in other cases of vacancy." Under this section of the Constitution we think it is clear that the Governor must specify charges against an officer or employee falling within its provisions, give notice and hearing, allege a ground of removal set forth in the constitutional provision, and produce evidence sufficient to sustain the action taken. Whether or not the provisions of Article IV, section 12, of the Constitution, have been complied with, is in the final analysis a question for the courts. As to all officers and employees in the executive department appointed by the Governor who do not fall within the class designated by Article IV, section 12, of the Constitution, they are removable at

the will of the Governor by virtue of the grant of the supreme executive power to him by Article IV, section 6, of the Constitution.

One of the primary questions to be here determined is whether or not a member of the liquor control commission is within the classification of officers and employees designated in Article IV, section 12. It is clear, we think, that the latter provision was intended to include all officers and employees in the executive department which were appointed by the Governor for a definite term. If this were not so the power of the Legislature to fix the terms of offices which it creates would be form without substance. Although not an executive department, the liquor control commission is an executive agency and its members are subject to the provisions of Article IV, section 12, of the Constitution. State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1.

We have not overlooked the early decision of State ex rel. Hastings v. Smith, 35 Neb. 13, 52 N. W. 700, 16 L. R. A. 791. We think that the holding of the fifth paragraph of the syllabus in that case correctly states the rule. It provides: "Where the incumbent is elected or appointed for a definite term, and is removable only for specified cause, the power of removal cannot be exercised until there has been preferred against him specific charges of which he shall have notice, and an opportunity afforded him to be heard in his defense." Such holding is pursuant to the limitation contained in Article IV, section 12, of the Constitution, rather than under the grant of the supreme executive power of the Governor by Article IV, section 6, of the Constitution, in which latter event removal would be wholly at the will of the Governor without notice or hearing. We disapprove that part of State ex rel. Hastings v. Smith, *supra,* which purports to hold that Article IV, section 12, of the Constitution applies only to officers appointed by the Governor which are mentioned in the Constitution.

In creating the Nebraska Liquor Control Commission the Legislature provided in part as follows: "The Governor shall appoint three members of the commission, one of whom he shall designate as chairman. One member shall be appointed every two years and shall hold office for a period of six years. Any appointee may be removed by the Governor, after an opportunity to be heard, for malfeasance, misfeasance or neglect in office." § 53-106, R. S. 1943. It further provided: "No commissioner, secretary or person appointed or employed by the commission shall solicit or accept any gift, gratuity, emolument or employment from any person subject to the provisions of this act, or from any officer, agent or employee thereof, nor solicit, request from or recommend, directly or indirectly, to any such person or to any officer, agent or employee thereof, the appointment of any person to any place or position; and every such person, every officer, agent or employee thereof, is hereby forbidden to offer to any commissioner, secretary, or to any person appointed or employed by the commission, any gift, gratuity, emolument or employment. If any commissioner, secretary or any person appointed or employed by the commission shall violate any of the provisions of this section, he shall be removed from the office or employment held by him. Every person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars, or shall be imprisoned in the county jail not less than sixty days nor more than six months, or be both fined and imprisoned." § 53-111, R. S. 1943.

The power of the Legislature in the creation of an office, admittedly a legislative function, is limited to those matters which are defined as ingredients of the office. The general rule is that the power to appoint carries with it the power to remove, and even if the occupant may be subject to impeachment, the power of the Governor to remove remains wholly unaffected

by such fact. It is within the power of the Legislature to create an office, define its powers, limit its duration, and provide for the compensation of the occupant. The power of appointment and removal is in the Governor except as limited by Article IV, section 12, of the Constitution, and the legislative or judicial branches may not properly trench upon the executive power thus granted. Myers v. United States, 272 U. S. 52, 71 L. Ed. 160, 47 S. Ct. 21; State ex rel. Churchill v. Hay, 45 Neb. 321, 63 N. W. 821; Munk v. Frink, 75 Neb. 172, 106 N. W. 425.

It is asserted that the power of the Governor to remove a member of the liquor control commission is to be found in section 53-106, R. S. 1943. We do not think so. The power of the Governor to remove an executive officer or employee, appointed by him for a definite term, is found in Article IV, section 12, of the Constitution. The provisions of section 53-106, R. S. 1943, dealing with the power of removal, are merely declaratory of powers granted by this section of the Constitution and such provisions do not operate as a limitation upon the constitutional power conferred.

The charge here made is that respondent violated section 53-111, R. S. 1943, a penal statute, by accepting insurance commissions on policies issued to persons subject to the regulation and control of the liquor control commission. The evidence shows, and the respondent admits, that he received such commissions. It being an offense subject to punishment under the penal provisions of section 53-111, R. S. 1943, it affords ample grounds for removal by the Governor, since the charge constitutes malfeasance within the meaning of Article IV, section 12, of the Constitution.

By section 53-111, R. S. 1943, the Legislature evidenced an intention to prohibit a member of the liquor control commission to deal with persons subject to the regulation and control of the commission. The pertinent language used is: "No commissioner * * * shall

solicit or accept any gift, gratuity, emolument or employment from any person subject to the provisions of this act." The receiving of insurance commissions on policies issued to persons under the regulation and control of the liquor control commission is within the purview of the act. The purpose of the statute is to remove the temptation on the part of a commissioner to use his influence with those under the regulation and control of the commission for private gain. Experience shows that to permit such dealings has a tendency to create partiality and discrimination on the part of the officer in administering the functions of his office. It involves a question of public morals in the administration of government of which the supreme executive power could properly take cognizance in the performance of his constitutional duty to take care that the laws be faithfully executed and the affairs of the state efficiently and economically administered. This power flows from the Constitution itself and is self-executing. It exists whether or not the Legislature acts within its constitutional authority with reference to it. The right of the Governor to remove exists outside of the power of the Legislature to make the acts constituting the basis of the removal punishable under a penal statute.

The record shows that respondent had notice, a specification of charges, and a hearing. The specification of charges is sufficient and the evidence supports the charges made. The order of removal by the Governor is in all respects regular and binding. The respondent has not been an occupant of the office of liquor control commissioner since the issuance of the order of removal by the Governor. A judgment of ouster against respondent is hereby entered. The proper writ will be allowed to oust respondent from the office of liquor control commissioner if it be necessary in order to secure a vacation of the office by respondent.

JUDGMENT OF OUSTER.

STATE OF NEBRASKA EX REL. FRED EBKE, APPELLANT, V. BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA ET AL., APPELLEES.

47 N. W. 2d 526

Filed July 10, 1951. No. 32907.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. On oral argument on motion for rehearing. See *ante* p. 244, 47 N. W. 2d 520, for original opinion. *Former opinion modified and motions for a rehearing denied.*

Paul W. White, for appellant.

Clarence S. Beck, Attorney General, *Robert A. Nelson,* and *Peterson, Devoe & Ackerman,* for appellees.

SUPPLEMENTAL OPINION

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

CARTER, J.

In the motions for a rehearing filed by the respondents and the interveners it is contended that the opinion of this court, State ex rel. Ebke v. Board of Educational Lands and Funds, *ante* p. 244, 47 N. W. 2d 520, is in error in holding that "the relator, under the circumstances shown, was entitled to the lease of said section for the amount bid by him."

The record shows that relator offered a cash bonus of $2,500 over and above the annual rent provided for in the lease. The bid was a private one, the lease not having been offered at public auction. On further consideration of the case we have concluded that the contentions advanced by respondents and interveners in their motions for a rehearing are correct and that the words "and that relator, under the circumstances shown, was entitled to the lease of said section for the amount bid by him," should be deleted from the last paragraph of our opinion. In so doing, the final disposition of the

case is made consistent with the holdings of the opinion and requires that the lease involved be sold at public auction and not at a private sale.

With our former opinion so modified, no merit exists in the motions for a rehearing and they are denied.

FORMER OPINION MODIFIED AND MOTIONS FOR REHEARING DENIED.

RAY H. LOUCKS, APPELLEE, V. RUTH H. SMITH, APPELLANT.
48 N. W. 2d 722

Filed July 10, 1951. No. 32947.

1. **Usury.** To constitute usury it is essential that an excess of the legal maximum be exacted in consideration of the loan.
2. ———. To make a contract usurious there must be an agreement between the borrower and lender by which the latter receives or reserves a greater rate of interest than the law allows. There must be an intent on the part of the borrower to give and of the lender to receive interest in excess of the legal limit.
3. ———. In order to constitute usury, there must be (1) a loan, express or implied; (2) an understanding between the parties that the money lent shall or may be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid, as the case may be; and (4) a corrupt intent to take more than the legal rate for the use of the money loaned.
4. ———. The intent which is necessary to constitute usury is not a specific intent to violate the statute but an intent to exact payments which exceed the amount of interest allowed by the statute.
5. ———. To determine whether all of the elements constituting usury are present the court will disregard the form which the transaction may have taken and look only to its substance. If all the elements are present the transaction will be condemned as usurious but if any one of the elements is lacking the transaction is not usurious.

APPEAL from the district court for York County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

Kennedy, Holland, DeLacy & Svoboda, and *Harry R. Henatsch,* for appellant.

Kirkpatrick & Dougherty, for appellee.

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

WENKE, J.

Ray H. Loucks brought this action in the district court for York County against Ruth H. Smith. The purpose of the action is to obtain a declaratory judgment fixing the rights of the parties under an agreement entered into on June 30, 1948, and to recover all moneys due plaintiff thereunder. The court found generally for the plaintiff and fixed the total amount of his recovery at $12,194.39 with interest thereon as in the judgment set forth together with costs. Defendant filed a motion for new trial and has appealed from the order overruling it.

The question involved is, is the amount herein sought to be recovered an accumulation of usurious interest? If so, do the Nebraska statutes governing usury operate as a bar to its recovery?

"Usury has been defined as 'the excess over the legal rate charged to a borrower for the use of money. Taking illegal profit for the use of money.' [Bouvier's Law Dictionary; Maccrackan v. Bank, 164 N. C. 24, 80 S. E. 184, 49 L. R. A. (N. S.) 1043.] Also 'as contracting for or receiving something in excess of the amount allowed by law for the loan or forbearance of money.' [39 Cyc. 888.]" Allen v. Newton, 219 Mo. App. 74, 266 S. W. 327.

" 'To constitute usury, it is of course essential that an excess of the legal maximum be exacted in consideration of the loan.' 27 R. C. L. 223, sec. 24." Western Securities Co. v. Naughton, 124 Neb. 702, 248 N. W. 56.

"To make a contract usurious there must be an agreement between the borrower and lender by which the latter receives or reserves a greater rate of interest

than the law allows. There must be an intent on the part of the borrower to give and of the lender to receive interest in excess of the legal limit." Rose v. Munford, 36 Neb. 148, 54 N. W. 129. See, also, Menzie v. Smith, 63 Neb. 666, 88 N. W. 855; Stuart v. Durland, 115 Neb. 211, 212 N. W. 31, 53 A. L. R. 739.

The prime contract of the parties being dated April 30, 1941, section 45-101, Comp. St. 1929, is here applicable. See Lefferdink v. Schmutte, 149 Neb. 695, 32 N. W. 2d 194. This section provides that any rate exceeding ten dollars per year upon one hundred dollars shall be invalid.

As stated in Tyler on Usury, p. 110: "* * * in order to constitute usury, there must be (1) a loan, express or implied; (2) an understanding between the parties that the money lent shall or may be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid, as the case may be; and (4) a corrupt intent to take more than the legal rate for the use of the money loaned." The author then goes on to state: "Unless these four things concur in every transaction, it is safe to affirm that no case of usury can be declared; and this may be regarded as a rule universally recognized in all of the States." See, Jenkins v. Dugger, 96 F. 2d 727, 119 A. L. R. 1484; 66 C. J., Usury, § 65, p. 174; In re Bibbey, 9 F. 2d 944; 55 Am. Jur., Usury, § 12, p. 331.

The intent which is necessary to constitute usury is not a specific intent to violate the statute but an intent to exact payments which exceed the amount of interest allowed by the statute. See, Manchester Realty Co. v. Kanehl, 130 Conn. 552, 36 A. 2d 114; Jenkins v. Dugger, *supra.*

The effect of making a contract providing for usurious interest is fixed by section 45-105, R. S. 1943, as follows: "If a greater rate of interest than is allowed in section 45-101 shall be contracted for or received or reserved, the contract shall not on that account be void, but if

in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall recover only the principal, without interest, and the defendant shall recover costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid; * * *." See Detweiler v. Forman, 120 Neb. 780, 235 N. W. 330.

To determine whether all of the elements constituting usury are present the court will disregard the form which the transaction may have taken and look only to its substance. If all the elements are present the transaction will be condemned as usurious but if any one of the elements is lacking the transaction is not usurious. See, In re Bibbey, *supra;* 66 C. J., Usury, § 65, p. 174; Blaisdell v. Steinfeld, 15 Ariz. 155, 137 P. 555; Batchelor v. Mandigo, 95 Cal. App. 2d 816, 213 P. 2d 762.

As stated in Blaisdell v. Steinfeld, *supra*: "'In deciding whether any given transaction is usurious or not, the courts will disregard the form which it may take and look only to the substance of the transaction in order to determine whether all the requisites of usury are present.' (39 Cyc. 918.)"

The record shows that the business out of which this litigation arose had its inception in 1936. At that time Frank G. Thorp, appellee, and Eldon H. Hatch entered into an agreement dated May 14, 1936, whereby Thorp and appellee were to furnish the money to establish a cash and carry grocery and meat market in York, Nebraska, and Hatch was to operate it. Hatch, for operating the store, was to receive a fixed salary and a share of the profits. These profits were to be applied on his purchase of an interest in the business. Thorp was at that time the general manager of Nash-Finch Company located in Grand Island and appellee was the buyer and sales manager of the dry groceries department of the same firm. Nash-Finch Company is a wholesale grocer. Both Thorp and appellee then lived in Grand Island.

These parties, to accomplish their purpose, organized a corporation known as Grand Central, Incorporated. The incorporators were Hatch, his wife Verda, and Harold A. Prince. Prince is a lawyer located in Grand Island and at the time was acting for all of the parties. Hatch was issued one share of stock, his wife one share of stock, and the balance, or 18 shares, was issued to Prince. Prince held all the stock in trust for the parties subject to the terms of their agreement, he having no interest in the business whatsoever.

Thorp and appellee originally furnished $2,000 of capital but later, in 1937, paid in an additional $2,900. The store was opened and Hatch was in charge. He continued to operate it until in 1938 when, because of an automobile accident, he was no longer able to remain in charge. That is when Mearl D. Smith came into the picture.

Mearl D. Smith and his wife, appellant, were at that time living in Palmer, Iowa. He owned and operated a small grocery store there. They had formerly lived in Grand Island. Hatch recommended Smith to Thorp and appellee. Smith, like Hatch, had no money to put into the business but, by agreement with Thorp and appellee, came in and took over under an assignment of Hatch's agreement. The assignment was dated March 10, 1938. The two shares of stock that had been issued to the Hatches were placed, one each, in the names of the Smiths. The Smiths then moved to York where he took charge of the store.

Smith's operation of the business was very successful. The business repaid to appellee and Thorp $2,000 of the $4,900 they had put into it so that as of March 27, 1940, they had $2,900 invested therein. At that time Smith's share of the profits was sufficient to pay for the share of the business it was provided in the agreement he could buy. Consequently the parties entered into an agreement, as of that date, which provided that the stock which was being held in trust by

Prince should be canceled and new stock issued to the parties as their interests were therein fixed but subject to certain conditions. The details of these conditions are not here material. As a result of this agreement Smith became the owner of certain shares of stock in the corporation as did appellee and Thorp.

After the income tax on the corporation's profits had been computed and paid for 1940 and the parties realized the amount thereof and in view of a change or proposed change raising the future income tax to be paid by corporations, appellee, Thorp, and Smith came to the conclusion that a corporate structure was not desirable for their business. In addition Smith thought, for business reasons, it would be best if the business was conducted in his name. To accomplish these purposes an agreement dated April 30, 1941, was entered into. This agreement, approved by appellant, was never intended as a sale of the business to Smith. Appellee and Thorp had no desire or intention of selling their interest therein. It was entered into for the purpose of doing away with the corporate structure of the business and to put the business in Smith's name for business reasons only. Otherwise the parties intended to leave the interests and rights of all the parties as they had been.

The agreement resulted in the corporation being dissolved and the business being placed in Smith's name. They also, by their subsequent agreement of March 3, 1942, fixed the amount of appellee's and Thorp's invested capital at $2,832.56 instead of $2,900. This figure was arrived at by an agreed-to appraisal of the furniture and fixtures on April 30, 1941, and a subsequent fixing of the value of the merchandise and other items of a similar nature as of April 30, 1941, by the agreement dated March 3, 1942. The agreement of April 30, 1941, also fixed the extent of appellee's and Thorp's interest in the business by establishing the share of the profits they were to receive from the business, which was one-half. This is the same as it had been under

their previous agreements. It also sought to limit appellee's and Thorp's liability for any losses of the business to the extent of their investment which was fixed at $2,832.56. Just what the nature of appellee's and Thorp's relationship to the business really was under this agreement we need not decide. Suffice to say that while we realize the language used by the parties would indicate a sale and a loan with interest to be paid on the loan in the form of one-half of the profits the business earned each year, we are, nevertheless, of the opinion that the profits which were to be paid were not paid as interest on any loan but paid upon the basis of the interest which each of the parties then owned and retained in the business.

That Smith so understood the contract is fully evidenced by his subsequent conduct. Smith is acknowledged by all parties to have been a very successful business man and very capable in his business dealings. The record shows that under the terms of the agreement of April 30, 1941, he paid to appellee and Thorp for the balance of the year 1941 $2,526.80; for 1942 $3,152.02; for 1943 $5,392.02; for 1944 $8,151.43; and for 1945 $7,531.08, or a total of $26,753.35; that after the payment to appellee and Thorp of their share of the profits for 1946 had been deferred by the parties' agreement dated January 21, 1947, hereinafter more fully referred to, Smith, in the forepart of 1948, agreed to pay to Thorp $4,270.08 for his one-fourth share of the profits for 1946 and $4,197.28 for 1947. During these negotiations, in February 1948, Thorp wrote Smith that when Smith had made these payments that he, Thorp, would assign to Smith all his interest in the store at York. Thorp's correspondence relating to this settlement leaves no doubt of the fact that Thorp, at that time, thought he was the owner of an interest in the business.

In addition to the payments of $4,197.28 which Smith agreed to make to Thorp from the 1947 profits of the store appellant, because of a deduction of $3,000 taken

from the inventory at the end of 1947 and which had not been taken into account in computing Thorp's share of the profits for that year, paid to Thorp an additional $750. This was paid after Smith had been accidentally killed in an automobile accident on March 31, 1948.

It is inconceivable to believe that if Smith had ever thought that by the agreement of April 30, 1941, he had bought appellee's and Thorp's share of the business from them for $2,832.56 and the profits he was paying them was only interest thereon and he could have paid them that amount and avoided all future obligations thereunder that he would not have done so. His actions in agreeing to pay and paying these amounts speak louder than words can express that he fully understood and knew that appellee and Thorp retained their interest in the business and that he was legally obligated to pay them their share of the profits based thereon.

The agreement of Smith, appellee, and Thorp, entered into on January 21, 1947, with reference to the agreement of April 30, 1941, is not here material. It deferred the payment to appellee and Thorp of their share of the profits of the business for the year 1946 subject to certain conditions based on a remodeling of the store by Smith. It also provided for a cancellation of the $2,832.56 in case of Smith's death but that provision does not become material here as appellee does not seek to recover any part thereof. Its purpose indicates appellee and Thorp still had an interest in the business.

When Smith was accidentally killed in a car accident he died intestate. He left as his only heirs appellant, his wife, and their daughter Naomi. Appellant obtained from her daughter all the interest she inherited in the business. Thereby she acquired all of her husband's interest therein. Appellant then entered into an agreement with appellee executed June 30, 1948. While the language used in the agreement does not so provide, it is apparent these parties sought by this agreement to carry forward the plan of the previous agreements and

thereby put appellant in the place of her late husband. That she so understood the purpose of this agreement is admitted by appellant.

Appellant therein agreed that at the time of his death Smith owed appellee $9,423 under the various agreements which were all based on the agreement of April 30, 1941. This amount appellant agreed to pay, however, she desired time for that purpose as she did not have sufficient money available in the business with which to pay it. By the agreement payment was deferred. Therein they provided that $2,923 was to be paid on or before October 1, 1948, and the balance to be paid not before April 1, 1950, and only upon six months' notice by either party.

In regard to the one-fourth share of the profits of the business being payable to appellee the agreement continued that feature of the previous plan although referring to it as interest on the $6,500, payment of which was deferred. Consequently, this item has, since the death of Smith, continued upon the same basis as before, that is, upon appellee's interest in the business. As such it does not fall within any category to which the principle of usury is applicable.

The trial court determined the amount which appellee should recover. Neither of the parties has taken any exception thereto. In view thereof we will not concern ourselves as to the correctness thereof.

In view of the findings herein we come to the conclusion that the judgment of the trial court is correct and it is affirmed.

AFFIRMED.

JERRY TODD ET AL., APPELLANTS, V. BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

48 N. W. 2d 706

Filed July 10, 1951. No. 33002.

1. **Appeal and Error.** A stipulation concerning matters in litigation may only be presented to and considered by this court on appeal when identified, offered in evidence, and preserved in a bill of exceptions.
2. **Pleadings: Trial.** In deciding the correctness of a ruling on a demurrer to a pleading, only allegations of fact in the pleading to which it is directed may be considered.
3. **Public Lands.** The statute relating to recording of an assignment of a school land lease, at the time the lease involved herein became effective, made an assignment ineligible for record if at the time the assignment was tendered for record the assignor was in default of payment of some amount required by the lease to be paid.
4. ———. If the assignor was not in default of any payment required by the lease when the assignment was tendered for record, it was entitled to be recorded.
5. ———. The statute was essentially a recording act, and its purpose was to furnish information and notice of the identity of the owner of the lease and was for the benefit and convenience of the state.
6. ———. The rights of a lessee of school land are determined by the law as it was at the time the lease was made and the lessee may not be deprived of any substantial right resulting from the lease in his favor by subsequent legislation.
7. **States.** The state by entering into a contract abandons its attributes of sovereignty and binds itself, to the extent of its power to contract, substantially as an individual does who becomes a party to a contract.
8. **Landlord and Tenant.** In the absence of statutory or contractual restrictions, a lease for a definite term may generally be assigned by the lessee without the consent of the lessor.
9. **Constitutional Law.** The right of an owner to dispose of property is substantial and valuable. It is incident to and inheres in the constitutional right to acquire and own title to every species of property recognized by law. It may not be impaired or defeated by legislation after the right is vested.
10. ———. Sections 72-240 and 72-240.01, R. R. S. 1943, contravene Article VII, section 9, of the Constitution of Nebraska, and are invalid.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Reversed and remanded with directions.*

Henry W. Curtis, for appellants.

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

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

BOSLAUGH, J.

This is an action for a declaratory judgment in which appellants seek to have their rights determined and enforced relative to a school land lease made to Jerry Todd and by him sold and assigned to C. C. Maxted, and his rights because of his application to the Board of Educational Lands and Funds for a renewal of the lease to him. A general demurrer of appellees to the petition of appellants was sustained. They elected not to plead further, and a judgment of dismissal resulted.

The substance of the petition is that: Jerry Todd was the owner of a school land lease of a section of land in Kimball County, the term of which expired on December 31, 1949. In October 1948, he contracted to sell and assign it to C. C. Maxted for $12,000.00. Todd agreed to make an assignment of the lease to Maxted and to join in an application to the Board of Educational Lands and Funds for an approval by it of the assignment. On or about September 14, 1949, Todd executed an assignment of the lease to Maxted. He, by endorsement thereon, accepted it, and Todd made an application to the board to assign the lease. Maxted executed an application to the board for approval of the assignment and an application for a renewal of the lease to him. These instruments were on forms furnished by the board and were delivered to the secretary of the board on September 16, 1949. The board at its meeting on November 14, 1949, ordered that unless Todd made payment to

it of $6,000.00, one-half of the consideration for the assignment of the lease, not later than December 1, 1949, the lease would be advertised for sale at public auction, as provided by law. Appellants allege Legislative Bill 490, appearing as Laws 1949, Chapter 212, and especially section 8 thereof, is not applicable to the lease and assignment described, and if intended to apply thereto, is retrospective in operation, invalid, and unconstitutional because it violates federal and state constitutional mandates and prohibitions. The ultimate relief sought was a declaration of the rights and obligations of the parties and a decree compelling the board to approve the assignment of the lease and to issue to C. C. Maxted a renewal lease of the land for a new term commencing January 1, 1950.

Counsel, during the argument and in the printed discussion of the case, referred to a stipulation of the parties. A purported copy of it is exhibited by the transcript. Its appearance therein is without authority of law and it may not be noticed on this appeal. The procedure for presenting such an instrument to this court for its consideration is by identification, introduction in evidence, and preservation thereof in a bill of exceptions. State Ins. Co. v. Buckstaff Bros. Mfg. Co., 47 Neb. 1, 66 N. W. 27; Younie v. Specht, 99 Neb. 621, 157 N. W. 336; Prokop v. Mlady, 136 Neb. 644, 287 N. W. 55. This appeal presents for determination the correctness of the ruling of the district court on the demurrer to the petition and the judgment of dismissal of the case. In passing on a demurrer, only the allegations of fact in the pleading to which it is directed may be considered. The court must accept the facts as asserted therein and may not notice extrinsic matters in determining whether the pleading states a cause of action or defense. The court may not look beyond the pleading against which the demurrer is directed. Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874.

The pertinent provision concerning an assignment of

a school land lease existing at the time the lease involved in this case was made was that: "No assignment of a school land lease * * * shall be valid until recorded in the office of the commissioner of public lands and buildings and shall not be eligible to such record if there are any payments of interest or rental due at the time the assignment is offered for record." Laws 1923, c. 60, § 1, p. 183, appearing as § 72-220, Comp. St. 1929. The Commissioner of Public Lands and Buildings was eliminated as a constitutional executive officer of the state by constitutional amendment effective December 15, 1936. Swanson v. State, 132 Neb. 82, 271 N. W. 264. The office of Commissioner of Public Lands and Buildings was abolished, and all the rights, powers, and duties thereof, except as custodian of the Nebraska State Capitol, were transferred and delegated to the Board of Educational Lands and Funds by act of the Legislature approved May 13, 1937. Laws 1937, c. 160, p. 624.

The single fact specified therein affecting the eligibility of the assignment of a lease for record was existing default in the payment of some amount required by the lease at the time the assignment was tendered for record. If there was then a default, an assignment could not be lawfully recorded, and if there was not, there was no discretion vested in anyone to refuse to record an assignment when tendered for record. This provision was essentially a recording act, the purpose of which was to give information and notice as to the identity of the owner of the lease. It was for the protection and convenience of the state. In State ex rel. Johnson v. Commercial State Bank, 142 Neb. 752, 7 N. W. 2d 654, it was decided that: "Assignments of school-land leases are permitted, but in order to be effective against the state the state must be informed of them in the manner which the statute prescribes. Langan v. Binfield, 49 Neb. 857, 69 N. W. 123; Hile v. Troupe, 77 Neb. 199, 109 N. W. 218. As between the parties, therefore, the assignment of the school-land lease to Smith, after the payment of the

loan, was valid, although, in the event of default, the state could enforce the remedies contained in the statute without regard to such assignment."

The quoted provision of the statute existed from 1899 to 1947 without change. Laws 1899, c. 69, § 18, p. 310, appearing as § 72-241, R. S. 1943. There was during that period no statutory prohibition and no other condition of an assignment of a school land lease. In the absence of statutory or contractual restrictions, a lease for a definite term may be assigned by the lessee without the consent of the lessor. Towle v. Morrell, 129 Neb. 398, 261 N. W. 827; Annotation, 70 A. L. R. 486; Annotation, 23 A. L. R. 135; 32 Am. Jur., Landlord and Tenant, § 319, p. 293.

This is true of a lease made by the state. It, by entering into a contract, abandons its attributes of sovereignty and binds itself, to the extent of its power to contract, substantially as an individual does when he makes a contract. The state may not impair any of the substantial rights secured by its contract to a citizen with whom it contracts. Poindexter v. Greenhow, 114 U. S. 270, 29 L. Ed. 185, 5 S. Ct. 903; Carr v. State ex rel. Coetlosquet, 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370, 22 Am. S. R. 624; Woodruff v. Trapnall, 10 Howard 190, 13 L. Ed. 383; 12 Am. Jur., Constitutional Law, § 400, p. 32.

The insertion in the act of 1947 of the provisions that "No lease shall be sublet or assigned without the written approval of the board" (§ 72-233, R. R. S. 1943) and "* * * that the lessee shall not sublease or otherwise dispose of said lands without the written consent of the board * * *" (§ 72-234, R. R. S. 1943) directly and strongly supports the meaning ascribed herein to the provision concerning the assignment of a school land lease as it was before that act was passed.

The Board of Educational Lands and Funds in leasing school land is limited by the authority granted it by the Legislature. It has no other power. The law on the

subject in force at the time of the execution of a lease is a part thereof and determines the rights of the lessee. A lease made in compliance with the direction and permission of the Legislature between the state and the lessee is a contract and is property. The rights resulting from the contract vest on its execution and delivery. The state may not subsequently by legislation deprive the lessee of any substantial right secured to him by the lease. Constitutional guaranties and prohibitions safeguard it. These include the mandate that no state shall deprive any person of property without due process of law; no state shall enact any law impairing the obligations of a contract; and the property of no person shall be taken or damaged for public use without compensation. State v. Platte Valley Public Power & Irrigation Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196; Reavis v. State, 140 Neb. 442, 300 N. W. 344; Stanser v. Cather, 85 Neb. 305, 123 N. W. 316; Hile v. Troupe, *supra;* State ex rel. Patterson v. Wenzel, 55 Neb. 210, 75 N. W. 579; State ex rel. Beer v. Thayer, 46 Neb. 137, 64 N. W. 700; State ex rel. Brown v. McPeak, 31 Neb. 139, 47 N. W. 691.

The right to dispose of property is substantial and valuable. It is incidental to and inheres in the constitutional right to acquire and own property. It may not be impaired or defeated by legislation after the right has vested. To take from property one of its elements of value and deny the owner the right to sell or transfer it in any legitimate manner is as much a deprivation of property as if the physical property itself were taken. In State ex rel. English v. Ruback, 135 Neb. 335, 281 N. W. 607, it is observed that: "The constitutional guaranties of our Bill of Rights contemplate that every person legally possesses the right of acquiring the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent

manner as he pleases, and to sell it at such price as he can obtain in fair barter." See, also, Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729; Bank v. Divine Grocery Co., 97 Tenn. 603, 37 S. W. 390, 34 L. R. A. 445.

When the lease was made the lessee was assured by the state the right to dispose of it and to have the assignment thereof recorded in the office and records of the Commissioner of Public Lands and Buildings, if the lessee was not in default of some payment to the state required of him by the lease at the time the assignment was tendered for record. The state could not and did not detract from or destroy that right by subsequent legislation. Hile v. Troupe, *supra;* School District of Omaha v. Adams, 151 Neb. 741, 39 N. W. 2d 550. There is nothing in the act of 1947 or the act of 1949 to indicate the provisions relating to assignment of school land leases were intended to affect existing leases. In any event, such intention is not "clearly disclosed." Appellants were and are entitled to have the assignment of school land lease No. 62460, made by Jerry Todd to C. C. Maxted and by him accepted, recorded in the office and records of the Board of Educational Lands and Funds as of the 14th day of November 1949.

Appellant C. C. Maxted was not entitled to have issued to him by the Board of Educational Lands and Funds a renewal of the lease assigned to him by Todd or a new lease of the land described in it. The sections of the statute providing this method of leasing school land have been determined to be invalid. State ex rel. Ebke v. Board of Educational Lands and Funds, *ante* p. 244, 47 N. W. 2d 520.

The judgment herein should be and is reversed, and the district court of Lancaster County should be and is directed to enter a judgment in this case setting aside and vacating the order of the Board of Educational Lands and Funds of November 14, 1949, in reference to lease No. 62460 set forth in the petition herein, and

requiring the Board of Educational Lands and Funds and Henry H. Bartling as secretary of the board, appellees, to accept and record in the office and records of the board as of November 14, 1949, the assignment of the school land lease No. 62460 made by Jerry Todd to C. C. Maxted, and to do all things necessary to make the records of the board recite and show that he, as assignee of Jerry Todd, is the owner of the lease.

REVERSED AND REMANDED WITH DIRECTIONS.

WATSON HAY COMPANY, A CORPORATION, APPELLEE, V. BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.
48 N. W. 2d 711

Filed July 10, 1951. No. 32990.

1. **Judgments.** Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in the determination of an action before a court of competent jurisdiction in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein.
2. ———. In an action wherein there has been a judgment or decree on the merits, matters settled by the judgment or decree must be regarded as conclusively settled by this court unless such matters are brought here by appeal or cross-appeal.
3. **Public Lands.** The holder of a school land lease desiring to assign it has the right to assign subject only to the conditions with reference to assignment to which the lease was subject at the time of issuance.
4. ———. Pursuant to the opinion in Todd v. Board of Educational Lands and Funds, *ante* p. 606, 48 N. W. 2d 706, the appellee is found to be entitled to assignment of school land lease No. 62391.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Affirmed.*

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

Matthews, Kelly, Fitzgerald, Matthews & Delehant, for appellee.

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

YEAGER, J.

This was an action instituted in the district court for Lancaster County, Nebraska, by Watson Hay Company, a corporation, as plaintiff in error, against the Board of Educational Lands and Funds and the individual members of the board, as defendants in error. In this court the Board of Educational Lands and Funds and the members of the board are appellants and the Watson Hay Company is appellee. For the purposes of this opinion the Board of Educational Lands and Funds will be referred to as the board and the Watson Hay Company as the appellee. By reason of the questions to be considered, further reference to the members of the board will not be required.

In order that the matters under consideration herein may be understood and the issues determined it is necessary to set forth the historical background of the controversy and the various steps which have been taken to bring the action here for review and determination.

Henry J. Abrahams obtained a lease from the Board of Educational Lands and Funds of the State of Nebraska of the northwest quarter and the west half of the northeast quarter of Section 36, Township 28, Range 11, Holt County, Nebraska, consisting of 240 acres. The land is the property of the public schools of the State of Nebraska of which the state is trustee. The lease covered a period of 25 years beginning December 31, 1924, and ending December 31, 1949. Henry J. Abrahams died and Charlotte Eugene Abrahams became executrix of his estate of which this lease was a part.

On July 12, 1949, Charlotte Eugene Abrahams, as executrix, made application for a renewal of the lease, the renewal to become effective at the end of the old

term. The renewal was denied on the ground of ineligibility to have a lease of these lands. The ground of ineligibility is of no importance here. Thereafter on September 28, 1949, she executed an assignment of the lease to the appellee. On the same day the appellee executed an acceptance of the assignment. Also on the same day the executrix executed and forwarded to the board application for the approval of the assignment. The consideration for the assignment was $100, one-half of which was tendered to the board. Also apparently on the same day the appellee and the executrix sent to the board a request in writing that the lease be renewed in the name of the appellee as assignee. Apparently no formal action was taken upon this by the board at that time. At least no record of such action appears herein.

On October 10, 1949, approval of the assignment was denied. Approval was denied on the ground that the consideration was insufficient. On October 21, 1949, the executrix was notified of the disapproval of the assignment and she was also notified that a lease of the lands would be submitted to competitive bidding therefor in November 1949.

Lease of the land was offered for sale and subjected to competitive bidding on December 16, 1949. On that day the appellee made a bid of 6 percent of the appraisal value and $3,510 as a bonus for the lease. Neither the offer nor the bid contemplated anything for the lease expiring on December 31, 1949, which was the lease assigned by the executrix to the appellee. The bid was accepted and lease was issued by the board to this bidder for a period of 12 years beginning January 1, 1950.

The offer contemplated that any bonus paid for the lease should be paid one-half to the board and one-half to the holder of the old lease. This division was, according to the record, caused to be made by the board.

The appellee substantially contended by its petition in error that it was entitled under law to the assign-

ment and that the board improperly and unlawfully refused approval thereof; that it was entitled thereto under the terms and conditions agreed to between it and the assignor; that as assignee it was entitled to a renewal thereof, that the board illegally offered the lease for sale, and that the sale was unlawful; and that the exaction and acceptance of the bonus of $3,510 were unlawful.

To the petition in error responsive pleadings were filed and issues were joined. Thereafter motion for judgment on the pleadings was overruled. However on stipulation of the parties the court on consideration of the pleadings rendered its determination and entered its decree.

By the decree the board was ordered to approve and enter of record the assignment of the lease in question upon payment of $50 to the board that being one-half of the consideration for the assignment and being the amount which had been tendered to and rejected by the board. No other relief was granted by the decree except that the costs were taxed to the board.

It is pertinent to point out here that the court did not adjudicate invalidity of the sale of the lease or of the lease which was issued to appellee for the period beginning January 1, 1950, or any of the proceedings in relation thereto. It did not adjudicate favorably to it any right or claimed right of the company under the joint request that the old lease be renewed in its name. It adjudicated unfavorably to the board the matter of the bonus which was paid pursuant to the bid for the lease.

All of the subjects not directly adjudicated upon were contained in the pleadings and were by the pleadings made issuable matters by the joinder of issues. By the stipulation on which the case was submitted they were subjects for consideration and determination by the court. None of these subjects was by the decree entered reserved for later decision.

Therefore all such matters were disposed of by the decision actually rendered. More particularly the relief requested by the plaintiff in error and not granted by the terms of the decree must be regarded in law as having been denied. Likewise the relief requested by the defendants in error and not granted by the terms of the decree must be regarded as having been denied.

From no part of the subjects thus presumptively decided have the defendants in error appealed, and from none of them has the plaintiff in error appealed or cross-appealed. They must be regarded as not being before this court for consideration.

With regard to the effect of a judgment or decree as to matters which were submitted as issues but not directly adjudicated, in Wheeler v. Brady, 126 Neb. 297, 253 N. W. 338, this court approved the following from 34 C. J., Judgments, § 1154, p. 743: "Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein * * *." This was again quoted with approval in Glissmann v. Bauermeister, 149 Neb. 131, 30 N. W. 2d 649.

The principle here involved is not different from the one involving the right to maintain later action for determination of questions submitted as issues but which questions were not decided by the judgment or decree entered. In those cases this court has uniformly held that the judgment or decree in any such instance is res judicata of such questions. Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108; In re Estate of Vetter, 142 Neb. 167, 5 N. W. 2d 215; Dawson County Irrigation Co. v. Stuart, 142 Neb. 428, 6 N. W. 2d 602; Glissmann v. Bauermeister, *supra;* Pettijohn v. County of Furnas, 150 Neb. 736, 35 N. W. 2d 828. Numerous other citations of authority to the same effect are collected in the cases cited.

In Dawson County Irrigation Co. v. Stuart, *supra,* in the second opinion, in considering this principle, it was said: "No appeal has been taken by either plaintiff or defendants from this part of the decree. *To that extent it becomes the law of the case* and is res adjudicata as to the same issues raised by the answer." (Emphasis ours.)

In the first opinion, which in this respect was not overruled, it was said: "Whether or not this portion of the decree was supported by sufficient evidence may not be considered here. From it, as has been pointed out, no appeal was taken, hence, it, to that extent, becomes the law of the case * * *."

It follows therefore that the only question for consideration is, the appellee having tendered and being willing to pay one-half of the consideration for the assignment, that of whether or not the court erred in adjudicating that the assignment and transfer of the lease No. 62391 was valid and binding upon the board.

In the opinion in Todd v. Board of Educational Lands and Funds, *ante* p. 606, 48 N. W. 2d 706, this question was fully and completely considered, discussed, and decided. The opinion contains the citations and review of the authorities which sustain the decision therein. In that view it appears only necessary to say that on the basis of that opinion and the authority therein set forth the decision here on the question presented for determination will be and is the same as in that case, namely that the assignment of school land lease No. 62391 was valid and the appellee was entitled to have it accepted and recorded in the office and records of the Board of Educational Lands and Funds.

In order that there may be no confusion under the authority of Todd v. Board of Educational Lands and Funds, *supra,* the exaction of the decree herein that the appellee pay $50, being one-half of the bonus paid for the assignment as a condition of its right to have the

assignment accepted and recorded, is an invalid exaction but from this there has been no appeal.

The decree of the district court is affirmed.

AFFIRMED.

CHARLES C. HANNA ET AL., APPELLEES, V. BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.

48 N. W. 2d 715

Filed July 10, 1951. No. 32991.

1. **Public Lands.** Pursuant to the opinion in Todd v. Board of Educational Lands and Funds, *ante* p. 606, 48 N. W. 2d 706, the appellee Sullens is found to be entitled to assignment of school land lease No. 63226.
2. ———. Pursuant to State ex rel. Ebke v. Board of Educational Lands and Funds, *ante* p. 244, 47 N. W. 2d 520, the appellee Sullens is found not to be entitled to assignment of lease No. 69015 nor is he entitled to have a lease issued directly to him for the school lands described in that lease.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Affirmed in part, and in part reversed with directions.*

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

William B. Quigley, Lynn E. Heth, and *Peterson, Devoe & Ackerman,* for appellees.

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

YEAGER, J.

This is an action instituted in the district court for Lancaster County, Nebraska, by Charles C. Hanna and G. H. Sullens, as plaintiffs in error, against the Board of Educational Lands and Funds and the members

thereof, as defendants in error. On appeal to this court the defendants in error are appellants and the plaintiffs in error are appellees. For convenience hereinafter Charles C. Hanna will be referred to as Hanna, G. H. Sullens as Sullens, and the Board of Educational Lands and Funds as the board. Further reference to the members of the board will not be required.

The matter before this court is the propriety of a decree which was entered pursuant to the overruling of a demurrer filed by the defendants in error which was overruled and a decision upon the merits of the cause of action as pleaded in the petition.

The petition set forth substantially, to the extent necessary to state its contents here, that on September 25, 1948, Hanna was the holder of a lease on all of Section 16, Township 31, Range 25, Cherry County, Nebraska, except the northwest quarter of the southeast quarter thereof. The land is school land under the control of the board. The lease was for a 25 year period beginning December 31, 1924, and ending December 31, 1949. On September 25, 1948, Hanna entered into a contract for the assignment of this lease to Sullens. The date fixed for delivery of the assignment was January 10, 1949. The stated consideration for the assignment was one dollar. The contract was a part of a transaction whereby Hanna sold to Sullens adjoining ranch lands. On September 10, 1949, Hanna made application for renewal of the lease in his own name. The board issued a renewal lease to Hanna for a term of 12 years and forwarded it to the county treasurer of Cherry County for delivery. Acceptance of the renewal lease was refused by Hanna. On November 26, 1949, Hanna, having executed an assignment of lease No. 63226 to Sullens, made application to the board for appoval of the assignment and for a renewal thereof in favor of Sullens. The assignment was accepted by Sullens on November 30, 1949. Sullens went into possession of the land on January 10, 1949. In the petition it does not appear

whether or not Sullens ever made application for a renewal of the lease in his name.

The board conducted a hearing and on that hearing refused to approve the assignment of lease No. 63226 and refused either to issue a renewal thereof in the name of Sullens or to approve an assignment of the renewal lease issued to Hanna which he had refused or failed to accept. This renewal lease to Hanna bore No. 69015.

Hanna and Sullens declared in their petition in error that the board was in error in refusing to approve the assignment of lease No. 63226 and in refusing to issue a renewal lease to Sullens.

The reasons for the refusal on the part of the board are fully set forth in the petition in error but in the light of the question or questions subject to review as limited by the decree and the manner in which the case comes here for review it is not deemed necessary to set them forth herein.

As already indicated a demurrer was filed to the petition. This was a general demurrer. The demurrer was overruled and the defendants elected to stand thereon. Whereupon, the court proceeded to examine the allegations of the petition and on the basis thereof rendered its decree. The decree directed the approval of the assignment of lease No. 63226 by the board and also directed the approval of the assignment to Sullens of the renewal lease which had been issued to Hanna but which had not been delivered to him. This is the substantial limit of the relief granted by the decree.

The propriety of that portion of the decree holding that Sullens was entitled to have approved assignment of lease No. 63226 has been fully discussed and decided in Todd v. Board of Educational Lands and Funds, *ante* p. 606, 48 N. W. 2d 706, which decision was approved and followed in Watson Hay Co. v. Board of Educational Lands and Funds, *ante* p. 613, 48 N. W. 2d 711.

The holdings in those cases are approved and adopted for the purposes of this case.

Accordingly it is held herein as it was held by the district court that Sullens is entitled to have approved assignment of lease No. 63226.

The question raised by that portion of the decree pertaining to the right of Sullens to a renewal lease for the period of 12 years beginning with December 31, 1949, has been in essence determined by the opinion and decision of this court in State ex rel. Ebke v. Board of Educational Lands and Funds, *ante* p. 244, 47 N. W. 2d 520.

In the opinion in that case this court condemned as invalid the same sections of the statute as are relied upon by Sullens as authority for his right to receive and have approved this assigned lease. The holding in that case was followed in Todd v. Board of Educational Lands and Funds, *supra.*

The purport and effect of the opinion in the case of State ex rel. Ebke v. Board of Educational Lands and Funds, *supra,* was to say that any legislative plan for the leasing of educational lands which operates to the special benefit of existing lessees desiring to continue as such which is arbitrarily and unreasonably detrimental to the trust is invalid.

That to allow this new lease to stand would have the effect which is condemned in that opinion cannot well be doubted. The petition in error contains a finding of the board fixing a valuation of the lease above that on which renewal was sought and nowhere in the petition is there to be found a contention that the valuation thus fixed is excessive.

It is concluded therefore that the trial court erred wherein it decreed that Sullens was entitled to an assignment of the lease for a period of 12 years beginning December 31, 1949.

The decree of the district court to the extent that it directs that the assignment of lease No. 63226 be ap-

proved is affirmed. To the extent that it directs that the assignment of the lease for the period of 12 years beginning December 31, 1949, be approved it is reversed with directions to the district court to enter decree accordingly.

AFFIRMED IN PART, AND IN PART REVERSED WITH DIRECTIONS.

CHARLES C. HANNA ET AL., APPELLEES, V. BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.
48 N. W. 2d 717

Filed July 10, 1951. No. 32992.

Public Lands. Pursuant to the opinion in Todd v. Board of Educational Lands and Funds, *ante* p. 606, 48 N. W. 2d 706, the appellee Sullens is found to be entitled to assignment of the school land lease involved in this action.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Affirmed.*

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

William B. Quigley, Lynn E. Heth, and *Peterson, Devoe & Ackerman,* for appellees.

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

YEAGER, J.

This is a companion case to the one appearing under the same title, *ante* p. 619, 48 N. W. 2d 715. The parties are the same and their relationships to the cause of action here are the same as they are to that cause of action. Hence, the stated relationships therein will be adopted for the purposes of this case without repetition herein. Reference to them herein will be the same as in the opinion in that case.

It is pointed out further that the conduct and disposition pursued the same procedural plan as was followed in that case.

The subject matter of this case is the assignment of a lease by Hanna to Sullens of the northwest quarter of the southeast quarter of Section 16, Township 31, Range 25, Cherry County, Nebraska. Hanna had a lease of this land for a term of 25 years beginning December 31, 1929, and ending December 31, 1954. As a part of the transaction, the important details of which have been set forth in the opinion, *ante* p. 619, 48 N. W. 2d 715, Hanna contracted to and did assign this lease to Sullens and the two of them asked approval thereof by the board. Approval was denied.

From this action by the board Hanna and Sullens took the matter of this failure of approval to the district court by petition in error. The district court entered its decree reversing the action of the board, and directed the approval of the assignment.

Pursuant to the holding of this court in Todd v. Board of Educational Lands and Funds, *ante* p. 606, 48 N. W. 2d 706, and Hanna v. Board of Educational Lands and Funds, *supra,* the decree of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF DEAN RESLER, DOING BUSINESS AS PLATTE VALLEY TRUCK COMPANY. DEAN RESLER ET AL., APPELLANTS, V. NIELSEN & PETERSEN, INC., ET AL., APPELLEES.

48 N. W. 2d 718

Filed July 10, 1951. No. 32994.

1. **Public Service Commissions: Motor Carriers.** The Nebraska State Railway Commission has jurisdiction and authority to suspend, change, or revoke a certificate of convenience and necessity in whole or in part, provided that in so doing it proceeds in conformity with section 75-238, R. R. S. 1943.

2. ———: ———. The term "willful failure," as used in section 75-238, R. R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of.
3. **Public Service Commissions.** Where there is competent evidence which, if believed, is sufficient to sustain the finding of the railway commission that a willful failure to comply with any lawful order of the commission or with any lawful term, condition, or limitation of a permit or certificate of convenience and necessity issued by it had occurred, an order based on such finding is not unreasonable or arbitrary.
4. **Public Service Commissions: Appeal and Error.** Unless an order of the railway commission is shown to be unreasonable or arbitrary, this court is not authorized to interfere with the power of the commission to regulate common carriers.

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

Loyal G. Kaplan, Marion F. Jones, and *Samuel V. Cooper,* for appellants.

Harry F. Russell and *R. E. Powell,* for appellees.

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

CHAPPELL, J.

On June 3, 1949, the Nebraska State Railway Commission, hereinafter called the commission, entered an order requiring respondent, Dean Resler, doing business as Platte Valley Truck Co., to show cause in application No. M-7036, supplements Nos. 4, 5, and 6, why an order should not be entered suspending, revoking, or changing his regular route certificate of public convenience and necessity, which required him to serve all intermediate points between described termini, for willful cessation of service and abandonment of all or a part of his operations and for willful failure to obtain commission approval to discontinue or abandon said operations in violation of General Order 81, and for willful failure to comply with the provisions of sections

75-222 to 75-250, R. R. S. 1943, and lawful orders, rules, and regulations promulgated thereunder by the commission. After notice duly given, hearing was had thereon, consolidated with transfer application No. M-9324 before an examiner, whereat evidence was adduced and a consolidated report was made to the commission containing certain recommendations in respect to both matters. Exceptions were filed by respondent, and an order of the commission was subsequently rendered, modifying the examiner's report in some particulars.

The commission's order sustained in part its order to show cause issued in M-7036, supplements Nos. 4, 5, and 6, and revoked and canceled respondent's certificates in part for willful violation of the Motor Carrier Act, and rules and regulations of the commission promulgated thereunder. It particularly ordered that respondent's rights and authority to serve all intermediate points between Omaha and North Platte over U. S. Highway No. 30 and all intermediate points between Omaha and McCook over U. S. Highway No. 6 should be revoked and canceled for willful cessation or abandonment of regular scheduled services thereover without first obtaining commission approval, in violation of the Motor Carrier Act, and General Order 81 promulgated thereunder.

It then approved Application No. M-9324 as modified, and consolidated all of respondent's remaining authority in the Platte Valley Truck Co., a corporation, with one certificate of convenience and necessity. The consolidated certificate was further ordered to contain specific alternate routes for operating convenience only.

Motion for rehearing was overruled, and respondent appealed, assigning that the order finding that there was willful cessation or abandonment of service by respondent and ordering revocation of authority to serve all intermediate points aforesaid, was unreasonable, arbitrary, contrary to law, and in excess of the

commission's jurisdiction. We conclude that the assignment has no merit.

No complaint was made that the proceedings were consolidated for hearing and report. Application No. M-9324, only incidentally involved, simply concerned application for acquisition by the Platte Valley Truck Co., a corporation, of all the Nebraska intrastate operating rights and authority previously held by respondent as an individual doing business as Platte Valley Truck Co. In that connection, any restriction imposed upon the authority granted to respondent individually would, as a matter of course, be continued in any authority that might be granted to the Platte Valley Truck Co., a corporation, as a result of the acquisition of respondent's authority. It is so conceded by appellees, and appellant complains here only of the revocation of authority to serve all intermediate points between Omaha and North Platte over U. S. Highway No. 30, and between Omaha and McCook over U. S. Highway No. 6.

Section 75-238, R. R. S. 1943, provides: "Permits and certificates shall be effective from the dates specified therein, and shall remain in effect until teminated as herein provided. Any such permit or certificate may, upon application of the holder thereof, in the discretion of the State Railway Commission, be revoked or may, upon complaint or on the commission's own initiative, after notice and hearing, be suspended, changed or revoked in whole or in part, for willful failure to comply with any of the provisions of sections 75-222 to 75-250, or with any lawful order, rule or regulation of the commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate."

In that regard, General Order 81, insofar as important here, provides that the commission may, after notice and hearing, suspend, change, or revoke any motor carrier's certificate for willful violation of the following:

"(8) Failure of carriers to actually operate their own equipment, or equipment leased with Commission ap-

proval, over the entire certificated route.

"(9) Failure of carriers to obtain Commission approval to:

"(a) Discontinue either in whole, or in part, service authorized under a certificate or permit.

"(d) Serve all or a portion of their certificated route by interline agreements with other carriers."

This court has heretofore concluded that the Nebraska State Railway Commission has jurisdiction and authority to suspend, change, or revoke a certificate of convenience and necessity in whole or in part, provided that in so doing it proceeds in conformity with section 75-238, R. R. S. 1943. In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418; Union Transfer Co. v. Bee Line Motor Freight, 150 Neb. 280, 34 N. W. 2d 363. Insofar as important here, it appears that the commission proceeded in conformity with such statute.

It was said in In re Application of Hergott, *supra*: "We hold that the commission, in order to revoke, change or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions of section 75-231, Comp. St. Supp. 1941 (now section 75-238, R. R. S. 1943), and, should the commission, after hearing, revoke, change or suspend the certificate, it must do so for willful failure to comply with the provisions of the act or with any lawful rule or regulation of the commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate."

In Union Transfer Co. v. Bee Line Motor Freight, *supra*, as in the case at bar, it was contended that the evidence did not establish a "willful failure" to comply with any of the provisions of the statute or any reasonable order, rule, or regulation of the commission promulgated thereunder, or with any term, condition, or limitation of such permit or certificate. Consequently, respondent argued that the order revoking or changing the certificate was arbitrary and unreasonable. In that

opinion it was said: "The word 'willful' like many other words in our language has varied meanings which are dependent upon the nature of the subject under discussion. The word often denotes an act which is voluntarily, knowingly, or permissively done as distinguished from one which is accidental or otherwise beyond the control of the person to be charged. The general notion that a willful act implies a bad purpose is derived from criminal statutes. It has no such meaning when used in a statute to denounce an act not in itself wrong. 'Willful failure,' as used in section 75-238, R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of. A failure to perform an act for a long period of time, which is required by law to be performed, generally constitutes a willful failure to perform. * * * The willful failure or refusal of a carrier to obtain permission from the railway commission to discontinue in whole or in part the service authorized under a certificate of convenience and necessity constitutes sufficient grounds to suspend, change, or revoke the certificate under general rules adopted by the railway commission. No claim is advanced that any such permission was sought or obtained. The evidence being sufficient to sustain the finding of willful failure to comply, the holding that the operating rights had been abandoned, and the order revoking the certificate, cannot be said to be unreasonable or arbitrary. The railway commission clearly acted within the scope of its authority. The evidence is sufficient to sustain the action of the commission. Under such circumstances this court will not interfere with findings of fact made by the commission."

In that case it was specifically held: "The term 'willful failure,' as used in section 75-238, R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of.

"Where there is evidence which, if believed, is sufficient to sustain the finding of the railway commission that a willful failure to comply with an order of the commission had occurred, an order based on such finding is not unreasonable or arbitrary.

"Unless an order of the railway commission is shown to be unreasonable or arbitrary, this court is not authorized to interfere with the power of the commission to regulate common carriers."

Those statements and holdings have application to the case at bar and control decision.

Christianson and Green Revocation of Certificate, No. MC-679, 42 M. C. C. 238, and Hickman, Revocation of Certificate, No. MC C-1121, 52 M. C. C. 201, relied upon by respondent, are both clearly distinguishable upon the issues involved and facts presented.

In the light of the rules of law heretofore stated, we have examined the record, and conclude that sufficient competent evidence was adduced to sustain the order of the commission. It will be summarized because too voluminous to recite in detail. There was competent evidence that respondent had operated between Omaha and North Platte via U. S. Highway No. 30 as terminal points, with consistent regularity three days a week, with six days a week west of North Platte, since September 1946. He had not refused any shipments because none had been tendered, but he did not particularly solicit or desire business for any point on U. S. Highway No. 30 intermediate between the termini of Omaha and North Platte, because his delivery facilities are slower than his competitors who were handling such shipments, and he could not promise or render as efficient service. Thus he had been performing but little service, only 12 or 15 shipments in the last 6 months, to not more than 5 intermediate points between such termini, and none of them upon any regular basis. As a matter of fact, admittedly 95 percent of the business handled by respondent between Omaha and North Platte consisted

of shipments destined to North Platte or points west thereof. In other words, although required by his certificate to serve all of the many such intermediate points regularly, respondent at all times had voluntarily and intentionally failed to do so.

Admittedly, for 2 to 2½ months prior to June 15, 1949, respondent had voluntarily been conducting no operations whatever directly over U. S. Highway No. 6 between the termini of Omaha and McCook, but as instructed and directed by respondent, all shipments originating in Omaha destined for McCook, were routed through North Platte over U. S. Highway No. 30, thence to Sterling, Colorado, and thence back to McCook or points east thereof, sometimes on his own equipment, but generally by interline with another company, as required by it in order to obtain the use of docking facilities at McCook. In that regard, nothing was wrong with U. S. Highway No. 6 itself, and respondent's competitors used it, but respondent had not conducted regular operations over it as aforesaid because freight tonnage dropped off or down too low to warrant the service to be performed by him. Since about a week or more before the hearing, and after notice of the order to show cause, respondent had conducted operations between the terminal points of Omaha and McCook via U. S. Highway No. 6 three days a week. In any event, however, during the last six months respondent had performed none or but little service to only a few of the many intermediate points between such termini, and none to them upon any regular basis. Further, as heretofore observed, he had not even been available to continuously and adequately perform such regular service.

The record discloses that defendant had terminals at Omaha and North Platte, and at Sidney, Kimball, Ogallala, and Scottsbluff, all west of North Platte. The record discloses no other terminals owned or leased by respondent upon either route. The record also discloses

only two docks available to respondent, one at McCook, owned by a competitor, and one at Sidney, rented by respondent.

Concededly, respondent had not at any time made any application to the Nebraska State Railway Commission requesting authority to discontinue or abandon his regular route operating rights in whole or in part, and he had not in any manner advised the Nebraska State Railway Commission of the fact that he was not continuing all operations over all of the highways over which he held authority and had not provided all of the services required by his certificate, although he knew that such approval was required. All of such failure was a direct violation of valid General Order 81 and the laws of this state, of which respondent admittedly had full knowledge.

We conclude, in the light of such evidence and the authorities heretofore cited, that the order of the commission was sustained by ample competent evidence and in conformity with law. Therefore, it was not arbitrary, unreasonable, or contrary to law.

For the reasons heretofore stated, we conclude that the order of the commission should be and hereby is affirmed.

AFFIRMED.

ARCHER-DANIELS-MIDLAND COMPANY, APPELLANT, V. BOARD OF EQUALIZATION OF DOUGLAS COUNTY, APPELLEE.

48 N. W. 2d 756

Filed July 16, 1951. No. 32847.

1. **Taxation: Appeal and Error.** The review by the district court of assessments made by the county assessor is limited to questions presented to the county board of equalization.
2. **Trial.** Where defendant does not adduce any proof, all facts which the evidence on behalf of plaintiff tends to prove will be treated as established for the purposes of a prima facie case in plaintiff's favor.

3. **Statutes: Taxation.** An investment in grain which grain never entered the State of Nebraska is not taxable under sections 77-1222, 77-1223, and 77-1224, R. R. S. 1943.
4. ———: ———. Neither tangible personal property nor the investment of a grain broker in grain which has not acquired a situs in this state is subject to an ad valorem tax under sections 77-1222, 77-1223, and 77-1224, R. R. S. 1943.
5. **Commerce: Taxation.** Property in transit in interstate commerce through this state only as an incident to its transfer to some other state acquires no situs for taxation and is not taxable in this state.
6. ———: ———. Property purchased in transit within this state which does not thereafter lose its character as property in transit in interstate commerce until it reaches its destination outside the state is not taxable under sections 77-1222, 77-1223, and 77-1224, R. R. S. 1943.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Reversed and remanded with directions.*

Abrahams, Kaslow & Carnazzo, for appellant.

James J. Fitzgerald, Henry C. Winters, and *Eugene F. Fitzgerald,* for appellee.

Van Pelt, Marti & O'Gara, Warren K. Dalton, and *Robert D. McNutt,* amici curiae.

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

SIMMONS, C. J.

This action was before us and decision rendered in 153 Neb. 776, 46 N. W. 2d 171. Motion for rehearing was filed challenging our opinion on two grounds: First, that we assumed the evidence established that the grain was in interstate commerce and urging that the clear and convincing proof required was not in the record and our conclusion was erroneous. Novak v. Board of Equalization, 145 Neb. 664, 17 N. W. 2d 882. The second contention was that the questions presented and determined were not in issue before the defendant and hence could

not be considered in the district court or here. We granted reargument.

Amicus curiae filed a brief contending that the constitutionality of our statutes involved here was not an issue and hence that question should not be decided unless necessary. Defendant, by brief, agrees with this contention.

The questions presented on reargument can better be answered by setting aside our former opinion and restating the facts and issues and our determination thereon. Accordingly our former opinion is set aside. We, however, reach the same result in so doing.

The Archer-Daniels-Midland Company for convenience will be hereinafter referred to as the plaintiff and the Board of Equalization of Douglas County as the defendant.

Plaintiff is a corporation organized under the laws of Delaware. Its principal place of business is at Minneapolis. It has a branch office at Omaha. So far as this litigation is concerned, its business is buying, selling, storing, and cleaning grain. It buys in carload lots for cash. It has neither terminal, storage, nor country elevators in Nebraska. It has no storage facilities of any kind in Nebraska. It has had no grain stored in Nebraska. It has a terminal elevator in Council Bluffs, Iowa, where grain is received that has been shipped there from country elevators. It purchases grain either on the floor of the Omaha Grain Exchange or direct from elevators. The physical location of the grain when purchased could be in Omaha or in or out of Nebraska, "* * * most anyplace, depending upon whether we purchase it to arrive or after it arrived here." Plaintiff paid for the grain out of moneys on deposit in an Omaha bank.

Plaintiff made out and filed a schedule of its property for the year 1949 with the county assessor of Douglas County. It there reported office fixtures, "Actual Value," $550. The county assessor raised the tangible

value total to $28,330. The basis of this increase is not shown. Plaintiff filed complaint with the defendant reciting that it had filed a schedule of tangible personal property having a total valuation of $550; that it was raised by the county assessor "without any basis therefor" to a total valuation of $28,330 for the year 1949; and that it was assessed too high. It asked that the assessment be reviewed, corrected, and reduced to $550.

The defendant referred the complaint "for inspection." The inspector requested information and plaintiff supplied the information that its purchases of grain for the twelve months ending February 28, 1949, amounted to $7,263,417.35. The inspector reported to the defendant that on the basis of information received from plaintiff "* * * the amount invested in grain is $19,899.77, seventy per cent of which is $13,930.00 and accordingly the personal property schedule should be increased $13,930.00 making the total tangible property $14,480.00." The defendant, after that report was received, adopted a motion fixing the tangible value at $14,480. From that action the plaintiff appealed to the district court.

It was stipulated at the trial in the district court that 75 percent of the $7,263,417.35 represented grain purchased out of the Omaha office, and that $14,480 was a fair and just assessment in the event it was found that the grain belonging to plaintiff and located at its elevator in Council Bluffs was subject to tax in Nebraska.

In its petition on appeal plaintiff recited these procedural steps and alleged that the office fixtures were its only tangible property subject to taxation in Douglas County; that the increase was based solely on and represented grain stored in Council Bluffs, Iowa; that the defendant proceeded on the theory that the grain constituted part of plaintiff's invested capital and was taxable under sections 77-1222 to 77-1224, R. R. S. 1943; that it was not so taxable; and that the assessment in excess of the sum of $550 constituted an arbitrary classification and discrimination against the plaintiff and was

unconstitutional and void under provisions of both the federal and state constitutions. Plaintiff prayed that the assessment be reduced to $550 and that there be entered the required orders to make the reduced assessment effective.

Defendant filed a general denial.

Plaintiff produced the testimony of its office manager and certain exhibits. Defendant offered no witnesses or evidence. The trial court found generally for the defendant and against the plaintiff, confirmed the action of defendant, and dismissed plaintiff's petition. The trial court proceeded, as its decree indicates, on the theory that it was immaterial where the grain covered by plaintiff's average investment chanced to be, and that defendant was not assessing the grain but rather the average invested capital used by the plaintiff in its Nebraska business.

Plaintiff appeals and presents here three contentions: (1) The tax involved here is an ad valorem property tax; (2) the plaintiff's grain at no time had a taxable situs in Nebraska; and (3) an ad valorem property tax upon a grain broker's investment in grain is in substance and effect a tax upon the grain itself and that the state is without constitutional power to tax the grain and hence a property tax upon capital invested in the grain is beyond the state's constitutional powers.

Defendant here conceded as to (1) that the tax is an ad valorem property tax; as to (2) defendant denies that plaintiff's grain at no time had a taxable situs in Nebraska, or "at least" plaintiff had not proved that fact; and as to (3) defendant denies that a property tax on the investment in grain is necessarily a tax on the grain itself. So our inquiry here is limited to the second and third contentions of plaintiff.

Defendant presents here the contention that the plaintiff did not raise these questions before the county board of equalization and that, therefore, the district court was without jurisdiction to hear and determine them

and accordingly they may not be determined here. Defendant relies on Reichenbach Land & Loan Co. v. Butler County, 105 Neb. 209, 179 N. W. 1015.

The statute there involved was section 77-1511, R. R. S. 1943, which provides: "The district court shall hear appeals taken under section 77-1510 as in equity and without a jury, and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof, and any decision rendered therein shall be certified by the clerk of the court to the county clerk, who shall correct the assessment books in his office accordingly."

In the Reichenbach case the complaint before the board was that the assessment was "too high." It was asserted that the shares of stock involved were assessable. In the district court it was not shown that the assessment was too high but it was pleaded and contended that the shares were not assessable. It was held that the question for review by the board should have been pointed out in some form and that on appeal the district court was limited to the questions presented to the county board of equalization.

Here the plaintiff complained to the defendant that its property was assessed "too high," not because of a miscalculation of values, but because the amount shown on the schedule was raised by the assessor "without any basis therefor." It appears clearly that the validity of the assessment involved in the amount in excess of $550 was the issue before the defendant, the district court, and here. We see no merit in this contention.

The next question is, did the grain of plaintiff have a taxable situs in this state? In our former opinion we expressed some doubt on that matter. On reconsideration that doubt is removed. We have hereinbefore summarized the evidence. The evidence here does not have the pointed precision of proof that eliminates all other possibilities.

The rule is: "Where defendant does not adduce any proof, all facts which the evidence on behalf of plaintiff tends to prove will be treated as established for the purposes of a prima facie case in plaintiff's favor." Thamann v. Merritt, 107 Neb. 602, 186 N. W. 1003.

However, the evidence is held sufficient to establish that all the grain purchased by plaintiff through its Omaha office was either never in Nebraska or, if in Nebraska, was at all times in transit in interstate commerce so far as plaintiff's ownership is concerned.

This brings us to the question of the validity of the assessment.

Section 77-1223, R. R. S. 1943, requires that the plaintiff "* * * list and return the average amount of capital invested in such business in excess of real estate and other tangible property separately assessed, for the preceding year."

Section 77-1224, R. R. S. 1943, requires that the assessor determine the average amount of the total investment in the business, and the amount, if any, by which the average total investment exceeds the value of the real estate and tangible property separately assessed. In determining the excess of the total investment, he shall take into consideration the purchases and sales during the year. The excess, if any, of the average total investment shall be separately listed and shall be taxed.

We determined the remaining questions in this appeal in our former opinion by holding that "The grain in which investment was made outside the state and which thereafter never came into the state of course never had a taxable situs within the state. It appears reasonable therefore to say that the investment which was the representative and substitute for the grain could not be said to have a taxable situs in the state. The investment was no more in the state than was the grain in which it was invested. The investment insofar as the State of Nebraska is concerned was nothing more nor

less than a bookkeeping entry on the books of the appellant.

"The reasoning of the following cases supports this conclusion: Bank of Commerce v. New York City, 2 Black 620, 17 L. Ed. 451; Bank Tax Case, 2 Wall. 200, 17 L. Ed. 793; Farmers & Mechanics Sav. Bank v. Minnesota, 232 U. S. 516, 34 S. Ct. 354, 58 L. Ed. 706; New Jersey R. T. Ins. Co. v. Division of Tax Appeals, 338 U. S. 665, 70 S. Ct. 413, 94 L. Ed. 439; Delaware, L., & W. R. R. Co. v. Pennsylvania, 198 U. S. 341, 25 S. Ct. 669, 49 L. Ed. 1077.

"The authorities hold that tangible personal property is not subject to an ad valorem tax in a taxing jurisdiction unless such property has acquired a situs in such jurisdiction. Hays v. The Pacific Mail Steamship Co., 17 How. 596, 15 L. Ed. 254; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; Wheeling Steel Corp. v. Fox, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143; 51 Am. Jur., Taxation, § 453, p. 468, and § 860, p. 767; Annotation, 110 A. L. R. 707. * * *

"It is well settled that property in interstate commerce through a state and which comes into a state only as an incident to its transfer to some other state acquires no situs for taxation and is not taxable in such state. This rule applies as well to property purchased in transit within the state which does not thereafter lose its character as property in transit in interstate commerce until it reaches a destination outside the state. Kelley v. Rhoads, 188 U. S. 1, 23 S. Ct. 259, 47 L. Ed. 359. Champlain Realty Co. v. Brattleboro, 260 U. S. 366, 43 S. Ct. 146, 67 L. Ed. 309, 25 A. L. R. 1195; Annotation, 25 A. L. R. 1201; 51 Am. Jur., Taxation, § 455, p. 469; 2 Cooley, Taxation (4th ed.), § 452, p. 982." Archer-Daniels-Midland Co. v. Board of Equalization, *supra.*

Based upon these conclusions we held that the assessment here involved was void.

We stated the rules as applied to the statutes here involved as follows:

"An investment in grain which grain never entered the State of Nebraska is not taxable under sections 77-1222, 77-1223, and 77-1224, R. R. S. 1943.

"Neither tangible personal property nor the investment of a grain broker in grain which has not acquired a situs in this state is subject to an ad valorem tax under sections 77-1222, 77-1223, and 77-1224, R. R. S. 1943.

"Property in transit in interstate commerce through this state only as an incident to its transfer to some other state acquires no situs for taxation and is not taxable in this state.

"Property purchased in transit within this state which does not thereafter lose its character as property in transit in interstate commerce until it reaches its destination outside the state is not taxable under sections 77-1222, 77-1223, and 77-1224, R. R. S. 1943." Archer-Daniels-Midland Co. v. Board of Equalization, *supra.*

These holdings are not questioned in the motion for rehearing. We adhere thereto.

The decree of the district court is reversed and the cause remanded with directions to enter a decree in favor of the plaintiff in accord with the conclusions arrived at herein.

REVERSED AND REMANDED WITH DIRECTIONS.

YEAGER, J., concurs in the result.

GILSON JAMES, APPELLANT, V. EVERETT HOGAN, APPELLEE.
48 N. W. 2d 756

Filed July 16, 1951. No. 32918.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. On motion to retax costs. See *ante* p. 306, 47 N. W. 2d 847, for original opinion. *Motion to retax costs sustained.*

F. J. Reed, for appellant.

Herman & Van Steenberg, and *Neighbors & Danielson,* for appellee.

SUPPLEMENTAL OPINION

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

BOSLAUGH, J.

A motion to retax the costs accrued in this case has been submitted. The case has been re-examined and it is concluded that the opinion herein be and is modified by eliminating from it the words "all costs of the action in both courts should be and they are taxed to the defendant" and by requiring in lieu thereof that the taxable costs made and accrued subsequent to the filing of the last pleading before the commencement of the first trial of this case in the district court until the dismissal of the appeal to this court by the defendant from the first judgment should be and they are taxed to Gilson James, the plaintiff, and that all other costs of the action in both courts should be and they are taxed to Everett Hogan, the defendant.

MOTION TO RETAX COSTS SUSTAINED.

CLARENCE TVRZ, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
48 N. W. 2d 761

Filed July 16, 1951. No. 32970.

1. **Witnesses.** A medical expert may properly give his opinion on the question of whether or not a defendant in a criminal action knew the difference between right and wrong with reference to the act committed, with his examination and the results thereof as the foundation therefor.
2. ———. The opinion of a medical expert may rest upon any one or more of three bases, namely (1) acquaintance with the party under investigation, (2) medical examination made by the expert, or (3) a hypothetical case stated to the expert in court.

3. ———. Where a medical expert is called upon to render an opinion based upon a hypothetical case stated in court the question must require the expert to assume the truth of the case stated.
4. ———. Where a medical expert is called upon to render an opinion based solely on the observation of a witness while testifying in open court such witness is not required to assume the truth of the statements made by the witness while testifying.
5. **Evidence.** The admission of incompetent evidence is not prejudicial where the same facts are established by the complaining party himself, and this is true whether he established them before or subsequent to the admission of the incompetent evidence.
6. **Trial: Criminal Law.** Where voluntary intoxication is interposed as a defense in a criminal case involving deliberation, premeditation, and the formation of intent, the following contained in an instruction given by the court is proper: " * * * but excessive intoxication by which a person is wholly deprived of reason, if such intoxication was not indulged in to commit crime, may prevent deliberation, premeditation or the formation of a criminal intent, * * *."
7. ———: ———. Where the trial court having on its own motion instructed the jury as to the defense in a criminal case, it is not required to repeat in another form any such instruction or instructions at the request of the defendant.
8. ———: ———. Where purported statements of a defendant in a criminal case are testified to by witnesses and they are clear and unequivocal and not subject to misunderstanding and where such statements are not material proof of the crime charged, it is not error to refuse to give an instruction that such evidence should be received with caution because of unintentional alteration of words or expressions by the witness.
9. ———: ———. In a criminal case no presumption flows from the use of a deadly weapon where proof of guilt including the element of malice is dependent upon the evidence given by eyewitnesses who testify fully to the facts and circumstances attendant upon the act committed.

APPEAL from the district court for Saline County: STANLEY BARTOS, JUDGE. *Affirmed.*

John E. Mekota, for plaintiff in error.

Clarence S. Beck, Attorney General, and *William T. Gleeson,* for defendant in error.

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

YEAGER, J.

This is a criminal action which was instituted by the filing of an information in the district court for Saline County, Nebraska, charging Clarence Tvrz with murder in the first degree. The action was prosecuted in the name of the State of Nebraska, plaintiff, against Clarence Tvrz, defendant. In the information it was charged that the defendant killed Helen McElroy.

The defendant was tried to a jury. The jury found him guilty as charged and fixed the penalty at life in the State Penitentiary. A motion for new trial was duly filed which was overruled, whereupon sentence was imposed in conformity with the verdict of the jury. The defendant has brought the action of the district court in overruling the motion for new trial and in imposing sentence to this court for review by petition in error. For the purposes of this opinion the defendant in error, the State of Nebraska, will be referred to as the State and the plaintiff in error, Clarence Tvrz, will be referred to as the defendant.

The brief of defendant contains numerous assignments of error which he contends are grounds for a reversal of the action of the district court. Before adverting to them it appears well to set forth certain facts conclusively appearing as background for the consideration of the assignments.

On April 19, 1950, at about 10:30 p. m., in a tavern at Wilber, Nebraska, the defendant shot and killed one Helen McElroy and one Ivan McElroy. The prosecution here is for the killing of Helen McElroy. There is no evidence of cause, excuse, or provocation for the act except an inference from the testimony of witnesses that the defendant became angered when he saw Helen McElroy talking to men other than her husband and himself. The defendant gave evidence that this an-

noyed him but he gave other evidence that he did not regard this as ground for the act proved against him. It is to be noted here that over a period of several years a continuing illicit relationship had existed between the defendant and Helen McElroy. This relationship appears in great detail by admissions in the testimony of the defendant.

On arraignment the defendant pleaded not guilty. On the trial however no effort was made to dispute the fact that Helen McElroy came to her death at the hands of the defendant. The substantial defense interposed under the plea was that of insanity, so-called, or more properly under law that the defendant did not know the difference between right and wrong with reference to the act committed.

The evidentiary effort in this connection was to show that he was incapable of knowledge of the act and that he had no knowledge whatever thereof and was without any intent or capability of an intent to commit it. In pursuance of the effort the defendant gave evidence of consumption of large quantities of intoxicating liquor from about 2 p. m. to about 8:30 p. m. and particularly between 6 p. m. and 8:30 p. m. and a complete absence of knowledge of anything that occurred from about 8:30 p. m. until more than an hour after Helen McElroy was killed. In addition to this, evidence was adduced indicating mental instability in the immediate family of the defendant. There was none of mental instability of the defendant except that claimed to have been induced by intoxicating liquor on the night of the killing and other indefinite occasions which were not described.

To support the theory that the defendant did not know the difference between right and wrong with reference to the act committed and that he was incapable of maintaining the intent necessary to the commission of the crime of murder a psychiatrist was called as a witness.

In response to a hypothetical question containing the

family history of the defendant, his educational and environmental background, his general habits and conduct, his conduct with Helen McElroy and Ivan McElroy, his conduct and actions on the evening of April 19, 1950, before and after the shooting, and experiences in training and in action in the second World War, all as disclosed by the evidence, this psychiatrist gave it as his opinion that at the time of the killing the defendant did not know the difference between right and wrong with reference to the act and that he was incapable of maintaining an intent to commit the act.

In rebuttal the State called as witnesses two psychiatrists, namely Dr. F. L. Spradling and Dr. Juul C. Nielsen. Dr. Spradling was allowed, over objection, to give it as his opinion that the defendant did know the difference between right and wrong with reference to the act of killing Helen McElroy. The defendant urges that this was error. The ground of the alleged error is that no sufficient foundation was laid for the opinion. This assignment appears as No. 1 in the brief of defendant.

As shown by the evidence, Dr. Spradling was duly qualified by education and experience as a specialist in the field of nervous and mental diseases. In September or October 1950, he examined the defendant for almost three hours. It was on the basis of that examination that he was allowed to give his opinion. This foundation, the defendant urges, was insufficient upon which to allow him to give an opinion.

He gave as his reasons for the opinion the following: "In examining the patient I found no evidence of psychosis, insanity, psycho-neurosis. There were no symptoms of mental disturbance. In inquiring into his past, I found no evidence of such abnormality indicated in his history. There were no symptoms of delusions or hallucinations which are a necessary finding in order to find a person legally insane or psychotic."

The contention of the defendant, under previous holding of this court, is without merit. In Torske v. State,

123 Neb. 161, 242 N. W. 408, a case wherein the question here involved was exhaustively considered, it was held that a medical expert may properly give his opinion on the question of whether or not a defendant knew the difference between right and wrong with reference to a particular act based upon an examination and the results thereof. The only stated limitation upon the propriety is that such witness shall be required either before or after giving his opinion to give the reasons therefor.

In the case at bar the witness described the examination made, gave his opinion, and thereafter gave his reasons therefor strictly in conformity with the pronouncement in Torske v. State, *supra*.

Dr. Nielsen, like Dr. Spradling, was shown to be an expert in nervous and mental diseases. He did not examine directly the defendant. He sat in the courtroom and heard all of the testimony given by the defendant throughout and observed his demeanor on the witness stand. The examination of the defendant in chief, the cross-examination, and the re-examination were lengthy and exhaustive. Based on this the witness was allowed to give it as his opinion that the defendant knew the difference between right and wrong with reference to the act committed.

The defendant by assignment of error No. 3 complains that the question which elicited the opinion was insufficient in that it did not require the witness to assume the truth of the testimony given by the defendant. In support of his contention he cites Jones v. Chicago, St. P., M. & O. Ry. Co., 43 Minn. 279, 45 N. W. 444, and Omaha & R. V. Ry. Co. v. Brady, 39 Neb. 27, 57 N. W. 767.

The cited Nebraska case fails to sustain the contention. In the opinion it is pointed out that the opinion of a medical expert may rest upon any one or more of three bases, namely (1) acquaintance with the party under investigation, (2) a medical examination made

by the expert, or (3) a hypothetical case stated to the expert in court.

The matter of assumption to be contained in a question propounded to an expert witness was not involved. The substantial objection was that the question propounded called for an opinion based in part upon an examination made by the expert and in part upon testimony heard in court by him, as follows: " 'Objected to by the defendant, as improper, as it is founded partially upon the memory of the witness as to what testimony was given by the plaintiff to the jury.' " The objection was overruled. The court's interpretation of the objection is the following: "It will be observed that the objection is 'that the witnesses remembered only part of Brady's evidence.' " The following observation was made in regard thereto: "The objection itself was not on its face a valid one."

The Minnesota case cited is authority for the proposition that a hypothetical question propounded to an expert witness must contain an assumption of the truth of the testimony referred to in the question and that the answer must be responsive to that assumption. It is also authority for the proposition that instead of stating the evidence the attention of the witness may properly instead be directed to testimony which he has heard and thus include it in the hypothetical question.

Neither the rule in this case nor the one in the cited Nebraska case however has any application here. The question which elicited the opinion of this witness did not embrace the testimony of the defendant as such as a basis for the opinion. It embraced the observations made of the defendant during the trial. This is clearly apparent from the question itself, as follows: "Q. Doctor, did you, from your observation of the defendant while he was on the witness stand, and taking into consideration his attitude and general behaviour, his stream of thought, his emotional observations, his thinking, his memory and orientation, did you form an opinion as

to whether or not the defendant, Clarence Tvrz, on the night of April 19, 1950, about 10:30 o'clock p. m., knew or had the mental capacity to know the difference between right and wrong with respect to the killing or the shooting of Helen McElroy? Just answer yes or no, please."

This witness as an expert testified from personal observation of the defendant and he testified fully to the facts on which he based his opinion. The assignment of error is without merit. Braunie v. State, 105 Neb. 355, 180 N. W. 567, 12 A. L. R. 658; Torske v. State, *supra.*

The next assignment to be considered is the one numbered 2 in the brief. The gist of this one is that Dr. Nielsen was permitted over objection to testify to conclusions concerning the defendant's mental condition at the time of trial and to conclusions concerning matters of common knowledge amounting to an invasion of the province of the jury. The record has been examined and the assignment found to be without merit. The evidence in this respect constituted interpretative facts which were the necessary basis for the ultimate opinion of the witness. Torske v. State, *supra.*

Early on the morning of April 20, 1950, the defendant was taken from Wilber to the State Penitentiary at Lincoln, Nebraska, for safekeeping where he was kept until a short time before the trial. He was held incommunicado for about 30 hours. In the meantime a statement was taken from him which appears as Exhibit 19. No objection is made in the assignment to the statement. The objection of assignment No. 4 is that the court excluded as hearsay evidence of statements of the warden made during this period to defendant's sister, his brother, and his attorney, and in excluding the details of all that occurred during the confinement.

No theory or rule of law has been advanced to counteract the theory that the evidence of statements of the warden was hearsay and nothing has been offered which

indicates that any right of the defendant was prejudiced by anything that occurred during the first 30 hours or thereafter. Exhibit 19 was obtained and this was received in evidence on behalf of the State. It contained no statement of material fact which was not testified to fully and more elaborately on the trial by the defendant when called as a witness in his own behalf. Also another and much more elaborate statement was taken from the defendant which was offered and received in evidence on behalf of the defendant himself which departed not in any substantial particular from Exhibit 19 and the testimony of the defendant given at the trial except one. The departure was a denial of illicit relations with Helen McElroy whereas in Exhibit 19 and on the trial they were admitted.

The appropriate rule is that the admission of incompetent evidence is not prejudicial where the same facts are established by the testimony of the complaining party himself, and this is true whether he establishes it before or subsequent to the admission of the incompetent evidence. McNutt v. State, 68 Neb. 207, 94 N. W. 143; O'Hearn v. State, 79 Neb. 513, 113 N. W. 130, 25 L. R. A. N. S. 542; Wever v. State, 121 Neb. 816, 238 N. W. 736.

Assignment of error No. 4 is without merit. This conclusion also disposes of the fifth assignment. The fifth assignment is that the court erred in not instructing the jury that Exhibit 19 was involuntary. Whether or not it was involuntary failed of importance, under the authority of the cases already cited, after the defendant gave his testimony and after introduction of the other and later statement previously referred to herein which is Exhibit 22.

Assignment of error No. 6 is a complaint that instruction No. 5 given by the court was erroneous. Particularly, the objection is that the time element involved and the deliberation and premeditation necessary to the crime of first degree murder received improper emphasis

and that in that connection the instruction was confusing.

All of the elements of the crime of first degree murder were set forth and defined in the instructions as a whole with precision and accuracy, and this instruction has been in form and substance approved by this court. Carleton v. State, 43 Neb. 373, 61 N. W. 699; Savary v. State, 62 Neb. 166, 87 N. W. 34; Reed v. State, 75 Neb. 509, 106 N. W. 649; Hamblin v. State, 81 Neb. 148, 115 N. W. 850. There was no error involved in the giving of the instruction.

It becomes necessary to consider assignments Nos. 7 and 8 together.

Assignment No. 7 relates to the seventh instruction. Instruction No. 7 informs the jury of the elements necessary to be proved by the State before the defendant may be convicted of first degree murder. One of the elements is the following: "That at the time of the killing the defendant, Clarence Tvrz, was not insane, as hereinafter explained, * * *."

The complaint is that the instruction ignores the defense of intoxication. In this connection the defendant contends that the defense of intoxication is not elsewhere submitted except in instruction No. 11 which instruction is erroneous. The claimed error in instruction No. 11 is the basis of the eighth assignment of error. Assignment No. 7 must therefore prevail or fall with assignment No. 8.

As a defense to the crime charged the defendant adduced evidence that because of voluntary intoxication he was incapable of the deliberation and premeditation essential to the formation of criminal intent. The burden was on the State, of course, to overcome this and to prove the contrary beyond a reasonable doubt.

In this connection the court instructed as follows which is the part of instruction No. 11 which it is contended is erroneous: "You are instructed that ordinarily voluntary intoxication is no justification or excuse for crime; but excessive intoxication by which a person is wholly

deprived of reason, if such intoxication was not indulged in to commit crime, may prevent deliberation, premeditation or the formation of a criminal intent, and if you find such intoxication existed, it should be considered by you, together with all the facts and circumstances in evidence, for the purpose of determining whether or not the defendant, Clarence Tvrz, was at the time in question capable of deliberation, premeditation or of entertaining the intent charged."

This expression of the attitude required of a jury in considering voluntary intoxication of a defendant charged with a criminal offense has been approved by this court. In O'Grady v. State, 36 Neb. 320, 54 N. W. 556, it was said: "Intoxication is no justification or excuse for crime; but evidence of excessive intoxication by which the party is wholly deprived of reason, if the intoxication was not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime had been committed, or to determine the degree where the offense consists of several degrees." This principle of law was approved in Brownrigg v. State, 136 Neb. 729, 287 N. W. 193. See, also, Hill v. State, 42 Neb. 503, 60 N. W. 916; Latimer v. State, 55 Neb. 609, 76 N. W. 207, 70 Am. S. R. 403; Brinegar v. State, 82 Neb. 558, 118 N. W. 475. The seventh and eighth assignments of error are without merit.

By his ninth assignment of error the defendant urges that the court erred in refusing to give the following instruction requested by him: "If from all of the evidence produced in this case, * * * you should find the defendant, at the time of the shooting, or just prior thereto, was laboring under such a defect of the mind and reason, whether the result of drinking alcoholic liquor, heredity, military service, or any other cause, as not to know the nature and quality of the acts he was doing, and was incapable of forming a criminal intent, he cannot be convicted of the offense charged and your verdict should be, 'Not Guilty', on the ground of insanity."

There is no evidence in the record that the defendant was laboring under a defect of mind or reason flowing from heredity or military service. It is true that there is evidence of mental infirmity in his family and that the defendant had been subjected to harrowing experiences in the military service but none that these or either of them had any controlling influence upon him on the night of April 19, 1950.

There was evidence relating to the excessive use of alcoholic liquor. The attitude required of the jury toward this subject was properly and fully presented by instructions already discussed and the other instructions presenting and defining the issues. The rule appropriately determining this assignment is that where the trial court having on its own motion instructed the jury as to the defense in a criminal case, it is not required to repeat in another form any such instruction or instructions at the request of the defendant. Johnson v. State, 88 Neb. 565, 130 N. W. 282, Ann. Cas. 1912B 965.

The tenth assignment of error is a contention that the court at the request of defendant should have given instruction No. 12 requested by the defendant. This was a cautionary instruction regarding the attitude required of a jury in considering oral statements purported to have been made by the defendant and testified to by witnesses. The purport of the requested instruction was to say such statements should be received with great caution because of unintentional alteration of words or expressions by the witness.

In Bourne v. State, 116 Neb. 141, 216 N. W. 173, this court held that it was error for the court to refuse to give such an offered instruction. It appears however that in that case the court was addressing itself to a situation where the oral statements were material in proof of the crime charged, particularly where from them deduction might flow as to a design or purpose to kill. Such is not the case here.

One witness testified that on the way from Wilber to

Lincoln, Nebraska, on the night of the killing the defendant said, not in response to any questions, "I can kill a man as easy as I can kill a dog or a chicken," and another testified that he said, "I can kill a man as easy as a dog or a chicken." A third witness testified to a statement not at all different in substance. The argument upon the cautionary instruction relates to this or these statements and no other.

In view of the fact that all of the illuminating facts sursounding the killing were before the jury through testimony of eyewitnesses to the tragedy including the testimony as to statements made by the defendant at the time and not adverted to in the briefs we fail to see how it may be said that this statement called for the giving of this instruction. There is no contention that the statement as testified to was not clear, distinct, and unequivocal, or that it was capable of misunderstanding or that it had been misunderstood.

We think it proper to say that in cases where testimony has been given as to material oral statements of a defendant in a criminal case and such statements lack clarity or are equivocal or are capable of misunderstanding it is required that the jury be instructed that testimony as to such statements shall be received with caution, but where the statements are clear and unequivocal and not subject to misunderstanding no such instruction is necessary. In the latter situation the weight to be given the testimony in this respect is, along with all the other evidence, for the jury. See Bode v. State, 80 Neb. 74, 113 N. W. 996.

The next and last assignment of error argued in the brief is that the court erred in refusing to give the following instruction requested by the defendant: "You are instructed that you must not presume malice merely because the defendant used a deadly weapon. The State must prove malice beyond a reasonable doubt."

The instructions given fully describe the charge, define the elements of the charge including that of malice,

and inform the jury as to its duty with reference to proof. There is nothing in this record calling for instruction on presumption flowing from the use of a deadly weapon. This court pointed out in Quijas v. State, 133 Neb. 410, 275 N. W. 588, and Lucas v. State, 78 Neb. 454, 111 N. W. 145, that in cases where proof of guilt including the element of malice is dependent upon the evidence of eyewitnesses who saw the transaction no question of presumption is involved.

The defendant relies on Quijas v. State, *supra,* to support his assignment but it fails to do so. No such question was involved. It was pointed out only that no presumption of malice was available to the State from evidence of the use of a deadly weapon where the circumstances attendant upon a homicide were fully testified to by eyewitnesses.

Finding no prejudicial error the judgment of the district court is affirmed.

AFFIRMED.

JAMES A. MICHELSON, APPELLANT, V. CITY OF GRAND ISLAND, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

48 N. W. 2d 769

Filed July 16, 1951. No. 32971.

1. **Municipal Corporations.** Under the provisions of Article XI, section 2, of the Constitution, a home rule charter must be consistent with and subject to the Constitution and laws of this state.
2. ———. Whether or not an act of the Legislature pertains to a matter of state-wide or strictly local concern becomes a question for the courts when a conflict of authority arises.
3. ———. The health of the inhabitants of a city and the sanitary condition existing in any one city of the state are of vast importance to all the people of the state because of the danger through social and business relations with other parts of the state of spreading contagious and infectious diseases. The state

has not delegated to the municipal authorities complete control over the health and sanitation of the municipalities' inhabitants.

4. **Statutes.** The protection and preservation of public health and sanitation are of state-wide concern with respect to which the Legislature has jurisdiction.
5. **Municipal Corporations.** When the Legislature has enacted a law affecting municipal affairs, which are also of state-wide concern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield.
6. ———. Sections 18-501 to 18-508, R. S. 1943, constitute an independent act providing legislation authorizing issuance of mortgage and revenue bonds which do not impose a general liability upon the municipality but are secured only by the property and revenues of the sewerage system which the act further authorizes may be constructed or extended, and provides that owners or occupants of premises shall be charged for the service, and to raise the money to retire the interest and principal of the revenue bonds.
7. **Municipal Corporations: Taxation.** The imposition of a rental charge for the use of a sewage disposal system is not an exercise of the taxing power, nor is it the levy of a special assessment.
8. **Constitutional Law: Municipal Corporations.** The provision of a city ordinance for shutting off water furnished by the city to the premises of the consumer failing to pay sewer service charges is not unconstitutional as depriving persons of property without due process of law, as where water and sewer services are so interlocked neither can be effective without the other.
9. ———: ———. A regulation promulgated by municipal ordinance which provides that the water supply be shut off to residents delinquent in the payment of sewer charges is valid and not an unreasonable or arbitrary regulation, or in conflict with section 18-503, R. S. 1943.

APPEAL from the district court for Hall County: HARRY D. LANDIS, JUDGE. *Affirmed as modified.*

Grimminger & Abbott, for appellant.

Harold A. Prince and *Paul C. Holmberg,* for appellees.

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

MESSMORE, J.

The plaintiff, James A. Michelson a taxpayer of the city of Grand Island, brought this action in equity in

the district court for Hall County (1) to enjoin the city and its officials from discontinuing the plaintiff's water service to his properties for his refusal to pay certain sewage service charges established by an ordinance of the city and its officials, (2) to have declared illegal and unconstitutional the provisions of ordinance No. 2289, as amended by ordinance No. 2317, and ordinance No. 2290, part of the laws of the city of Grand Island embodied in its home rule charter, and (3) to construe certain statutory provisions with reference to which the ordinances were enacted. Hearing was had to the court. The trial court entered judgment finding generally in favor of the defendants, the city of Grand Island, Clarence W. Burdick its light, water, ice, and sewer commissioner, and Kirkpatrick-Pettis Company the purchaser of the bonds issued by the city pursuant to the ordinances, and against the plaintiff, that the petition of the plaintiff be dismissed, and assessed the costs of the action against the defendant city. Upon the overruling of the plaintiff's motion for new trial, the plaintiff perfected appeal to this court.

For convenience we will refer to appellant James A. Michelson as plaintiff and appellee as defendant, or city.

The city of Grand Island adopted a home rule charter in 1928, as provided for in Article XI, section 2, of the Constitution of this state. In Nagle v. City of Grand Island, 144 Neb. 67, 12 N. W. 2d 540, the court said that such cities, in so acting under Article XI, section 2, of the Constitution, may provide for the exercise of every power, not contravening constitutional inhibitions, connected with a proper and efficient government of the municipality, but are subject to the general laws of the state, except as to municipal matters of strictly local concern.

In 1933, the Legislature passed Chapter 146, Laws 1933, page 561. This act is now found as sections 18-501 to and including section 18-508, R. S. 1943. We briefly summarize the following sections of the act.

Section 18-501, R. S. 1943, authorizes any city or village in this state to own, construct, equip, and operate either within or without the corporate limits of such municipality a sewerage system and plant or plants for the treatment, purification, and disposal in a sanitary manner, of the liquid and solid wastes, sewage, and night soil of such municipality or to extend or improve any existing sewerage system.

Section 18-502, R. S. 1943, provides, for the purpose heretofore set out, that a municipality may issue mortgage bonds therefor. Such mortgage bonds shall not impose any general liability upon the municipality but shall be secured only on the property and revenues as hereinafter provided of such utility including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a period of longer than 20 years from the date of the sale thereof on foreclosure. Such mortgage bonds shall be sold for not less than par and bear interest at a rate not to exceed 6 percent per annum. The amount of such mortgage bonds, either issued or outstanding, shall not be included in computing the maximum amount of bonds which the said municipality may be authorized to issue under its charter or any statute of this state.

Section 18-503, R. S. 1943, provides that the governing body of such municipality may make all necessary rules and regulations governing the use, operation, and control of the sewerage system or disposal plant. The governing body may establish just and equitable rates or charges to be paid to it for the use of such disposal plant and sewerage system by each person, firm, or corporation whose premises are served thereby. If the service charge so established is not paid when due, such sum may be recovered by the municipality in an action of assumpsit, or it may be certified to the tax assessor and assessed against the premises served, and collected or returned in the same manner as other municipal taxes

are certified, assessed, collected, and returned.

Section 18-504, R. S. 1943, provides that bonds which are issued and secured by a mortgage on the utility, as provided in section 18-502, shall not be a general obligation of the municipality, but shall be paid only out of the revenues received from the service charges as provided in section 18-503, or from a sale of the property and franchises under a foreclosure of the mortgage. If a service rate is charged, to be paid as herein provided, such portion thereof as may be deemed sufficient shall be set aside as a sinking fund for the payment of the interest on said bonds, and the principal thereof at maturity.

Section 18-506, R. S. 1943, authorizes a municipality to issue and sell the general obligation bonds of such municipality upon compliance with statutory and charter requirements with reference to the issuance of bonds.

Section 18-507, R. S. 1943, provides, in part, whenever the governing body of any city extends or improves an existing sewerage system, upon approving plans and specifications thereof, it shall advertise for sealed bids a specified time in a legal newspaper published in the municipality, and the contract shall be awarded the lowest responsible bidder.

We deem it unnecessary to summarize the provisions of either sections 18-505 or 18-508, R. S. 1943.

In the case of State ex rel. City of Columbus v. Price, 127 Neb. 132, 254 N. W. 889, the act in question was before the court in a mandamus action to compel the Auditor of Public Accounts to register certain sewer bonds of the city of Columbus in the amount of $60,000. The act was at that time included in sections 18-1401 to 18-1408, C. S. Supp., 1933. This court held, after reviewing the title of the act, as follows: "The title of an independent act authorizing the construction of sewers and providing that owners or occupants of the premises shall be charged for the services, and to raise

money, is broad enough to include legislation authorizing issuance of mortgage and revenue bonds which do not impose a general liability upon the municipality but are secured only by the property and revenues of the sewerage system." The court further said: "The language in the title of chapter 146, Laws 1933, gave notice of a legislative purpose to provide authority for cities to build a different kind of sewerage system by the issuance of bonds to which the property and the revenues of the system were to be pledged, instead of general obligation bonds of the city." The judgment in that case was reversed because of an omission in the bonds which failed to comply with section 16-721, Comp. St. 1929, which has no bearing in the instant case. The case is cited to disclose the purpose of the act.

Apparently the original sewage disposal plant of the city was built in 1918, and an addition made thereto in 1928. The present plant was put in operation in 1930 or 1931. Due to the growth in population and the extensive use to which the sewerage system and disposal plant had been put, the city officials in 1947 surveyed the possibility of an addition to the plant. Engineers were employed to investigate, report, and submit plans for consideration of the governing body of the city, which was done. It also appears that the city was involved in litigation concerning its sewage plant in Stuhr v. City of Grand Island, 120 Neb. 491, 233 N. W. 886. Stuhr was granted an injunction against the city from running its sanitary sewage through an open ditch across his lands and others into Wood River which is outside of the boundaries of the city, and then into the Platte River. The injunction was to stand unless the city made certain additions to its then existing sewerage system and disposal plant to correct the nuisance, which it did in 1931, and the injunction was dissolved.

On June 1, 1949, the city, through its mayor and council, passed ordinances Nos. 2289 and 2290, which are too voluminous to detail but substantially conform

to the sections of the statutes heretofore summarized.

Ordinance No. 2289 may be summarized as follows: Section 1 set forth that it was necessary to establish rates for the use of the disposal plant and sewerage system to pay the principal and interest on revenue bonds. Section 3 established certain rates and minimum charges for the quantity of water used upon the premises as shown by the water meter. Section 7, for the most part, conforms to section 18-503, R. S. 1943, and in addition provides: "Bills for the rental charges made by this ordinance shall be rendered at the same time that bills are rendered for water service of the City and all rental charges levied by this ordinance which are not paid at or before water service charges of the City are required to be paid shall be deemed to be delinquent and the water service of such consumer may be discontinued." Section 8 provides that charges shall be placed in a separate fund designated as a "Sewerage Rental Fund," and to be used solely for the purpose of paying principal and interest on the revenue bonds. Section 9 provides that the council may establish special rates applying to consumers where the service rates or rentals would be inequitable and unfair to either the city or the consumer.

Ordinance No. 2290 refers to the bonds. There are 325 serial bonds of $1,000 each, redeemable at the option of the city at any time after five years. The first 84 bonds draw interest at the rate of 1½ percent and the remainder at 2⅜ percent per annum. The bonds are revenue obligations secured by a lien on the entire main sanitary sewerage system and disposal plant theretofore constructed, and all improvements to be made upon the same. Section 5 provides the city can collect just and equitable rates sufficient to pay the bonds and interest. Section 6 provides that the funds are to be deposited in a special fund known as the "Sewerage Revenue Bond Fund." Section 12 provides that the principal and interest should be secured by a first mort-

gage lien upon the sewerage system theretofore existing, and thereafter provides that upon failure to pay, the owners of 60 percent of the bonds shall have the option to declare the bonds due and proceed to foreclose their lien in equity, and that the court might appoint a receiver to operate the property until the default is made good. Section 15 provides that if the property should be sold in foreclosure proceedings the purchaser should be vested with a franchise for 20 years to operate under the laws of this state to pay off the bonds and interest.

The revenue bonds were sold and the $325,000 paid to the city. The city executed a mortgage to the First National Bank of Grand Island and Donald L. Pettis as trustees for the benefit of the bondholders.

It appears from the record that the plaintiff owns and pays taxes on real estate in the city. Part of his holdings consists of the Masonic Temple Building located at 211, referred to in the record as 215, Locust Street. This building comprises seven stories. The first story was vacant at the time of trial. The second and third stories were occupied by professional persons. The fourth floor was equipped for a dance hall, and the fifth, sixth, and seventh floors were lodge quarters. There are two toilets on each floor which are kept locked and are for the use of the tenants of the building. They are equipped with two bowls, a urinal, and a lavatory. The toilets are the tankless type, flush toilets. The water service running to the toilets is through a one and one-half inch pipe which operates them satisfactorily. The water from the toilets goes into the sanitary system and through the disposal plant. The building is also equipped with fire protection on each floor.

On October 4, 1949, the city submitted a bill to the plaintiff which included the charge for water and the sewerage charge as provided by ordinance. This bill is with reference to the above-described building. The bill proved to be erroneous, and the city conceded this

fact at the trial and attempted to rectify the mistake. The mistake was incident to a misconception of the ordinance as it applied to a commercial enterprise as distinguished from an apartment house or residence. The plaintiff tendered the amount of the water charge to the city, which the city refused to accept unless the sewerage charge was also paid. The city gave notice that if the accounts of the plaintiff were not paid on or before January 4, 1950, service would be discontinued. This matter was extended for a short period of time and the plaintiff instituted this injunction action to restrain the city from discontinuing the water service to his property.

At the time this suit was instituted the additions to the sewerage system and disposal plant had been made, the bonds had been sold, and the city was operating under the ordinances as heretofore, in part, set out.

It also appears from the evidence that the size of the meter in the basement of the plaintiff's building that services the same is not a proper size for such service as he requires but meets the requirements of an apartment house. It is admitted by the city that a smaller meter would tend to reduce the cost of his service. The city would not buy the meter, exchange it, or remove it.

We deem it unnecessary to set forth the pleadings. The issues joined therein appear in the assignments of error.

This brings us to the assignments of error which we consider pertinent to a determination of this appeal.

The plaintiff contends the district court erred in failing to find that the sewerage service charges amount to a special assessment for a general improvement. Are the sewerage service charges provided for in section 18-503, R. S. 1943, a special assessment for a general improvement within the meaning of the Constitution and therefore prohibited?

Article VIII, section 6, of the Constitution provides: "The Legislature may vest the corporate authorities of

cities, * * * with power to make * * * special assessments, or by special taxation of property, benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

Section 18-503, R. S. 1943, provides in part: "The governing body may establish just and equitable rates or charges to be paid to it for the use of such disposal plant and sewerage system by each person, firm or corporation whose premises are served thereby."

This court has not had occasion to pass directly upon this issue.

In Laverents v. City of Cheyenne, — Wyo. —, 217 P. 2d 877, counsel contended that the service charge directed to be levied under the statute was in fact a tax. The court said: "True, the payment of a fee for the use of the sewer is, practically speaking, substantially like the enforced obligation of a tax. But so are the bills for the use of electric lights, whether the electric-light system is publicly or privately owned; and so are the water bills sent out monthly by the City of Cheyenne. Water bills and bills for the use of the sewer are very much alike. A public sewer system is a public utility the same as a water system. City of Edwardsville v. Jenkins, 376 Ill. 327, 33 N. E. 2d 598, 134 A. L. R. 891, Payne v. City of Racine, 217 Wis. 550, 259 N. W. 437 and cases cited. In the case of City of Harrison v. Braswell, 209 Ark. 1094, 194 S. W. 2d 12, 16, 165 A. L. R. 845, 849, speaking of service charges for the use of a sewer and for water, the court said: 'Payments by the users for the service rendered is not a tax within the meaning of the constitutional provision of Art. 16, Section 11.' The section mentioned refers to a tax (as does Article VIII, section 6, of the Constitution of this state). In the case of State v. City of Miami, 157 Fla. 726, 27 So. 2d 118, 124, the court stated:

'the imposition of fees for the use of the sewage disposal system is not an exercise of the taxing power, nor is it the levy of a special assessment.' "

In Sharp v. Hall, 198 Okl. 678, 181 P. 2d 972, the city of Muskogee passed an ordinance establishing fees for the use of public sewers by its inhabitants, and providing that the net profits should be placed in the general fund. The sewer charge was added to each water bill and a failure to pay the total of water fee and sewer fee was made a cause for discontinuance of water service. The court held that sewers were public utilities, and a municipality may fix, as a basis for computing a charge for use of the sewer, a service fee based upon the volume of water delivered to the user through the water meter. An ordinance imposing a service fee for use of public sewer and basing the amount thereof on amount of water used, and making the person purchasing the water liable therefor does not deprive such user of property without due process of law. See, also, Payne v. City of Racine, 217 Wis. 550, 259 N. W. 437, and cases cited therein.

In Grim v. Village of Louisville, 54 Ohio App. 270, 6 N. E. 2d 998, it was held that a charge for the maintenance of a sewer system was not a tax assessment, or a special assessment, but a rental authorized by statute, partaking of the nature of a tax or assessment.

The case of Hurd v. Sanitary Sewer District, 109 Neb. 384, 191 N. W. 438, cited by the plaintiff which adopted language in Futscher v. City of Rulo, 107 Neb. 521, 186 N. W. 536, is not in point but dissimilar from the issue here presented.

We conclude that the plaintiff's assignment of error cannot be sustained.

The plaintiff contends the question of sewage disposal by municipalities is one of local concern until the Legislature appropriates the field.

When the Legislature has enacted a law affecting municipal affairs, but which are also of state-wide con-

cern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield. But where the legislative act deals with a strictly local municipal concern, it can have no application to a city which has adopted a home rule charter. Whether or not an act of the Legislature pertains to a matter of local or state-wide concern becomes a question for the courts when conflict of authority occurs. See, Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894; Nagle v. City of Grand Island, *supra.*

In Axberg v. City of Lincoln, *supra,* this court said: " '* * * If fire, police and health departments be deemed purely matters of local self-government, they could be abolished and the state would be unable to step in. * * * Indeed, police and fire protection and health preservation are essential to the administration of state government in such a way as to accomplish vital purposes expressed in its organic law. * * * That duty does not end at the city limits. Control of deadly, contagious diseases may often require uniform state action; * * *. The state must remain sovereign in all such affairs else its authorities cannot protect rights assured to its citizens by its Constitution. These are fundamental reasons why police, fire and health undertakings are essentially attributes of state sovereignty and matters of state-wide concern.' "

In Laverents v. City of Cheyenne, *supra,* it was said: " '* * * The science of sanitation has developed and taught much in recent years. It has demonstrated that nothing contributes more to secure the preservation of public health than a sanitary system of sewerage disposal, whether it be the modern sewers or septic closets. * * *' " See, also, Nourse v. City of Russellville, 257 Ky. 525, 78 S. W. 2d 761.

Axberg v. City of Lincoln, *supra,* cited the case of City of Cincinnati v. Gamble, 138 Ohio St. 220, 34 N. E. 2d 226, which held that the matter of health was of state-

wide concern. See, also, Adler v. Deegan, 251 N. Y. 467, 167 N. E. 705.

In the case of State ex rel. Mowrer v. Underwood, 137 Ohio 1, 27 N. E. 2d 773, it was said: "The protection and preservation of public health is of a state-wide concern, with respect to which the Legislature has jurisdiction. 'The health of the inhabitants of a city and the sanitary condition existing in any one city of the state are of vast importance to all the people of the state because of the danger through social and business relations with other parts of the state of spreading contagious and infectious diseases. For this reason, the state has not delegated to the municipal authorities complete and absolute control over the health of municipalities' inhabitants.'" See, also, Stuhr v. City of Grand Island, *supra.*

We conclude that in the matter of health and sanitation the state has entered the field; these matters are of state-wide concern; and the state is supreme over its municipalities and may, in the exercise of its sovereignty, impose duties and responsibilities upon them as arms or agencies of the state.

The city contends that the legislative history of sections 18-501 to 18-508, R. S. 1943, indicates that the Legislature did not intend to supersede the laws of cities operating under a home rule charter. Having determined that matters of sanitation and health are of state-wide concern and the state has entered the field in such respect, an analysis of Chapter 18, article 5, R. S. 1943, shows that it applies to cities having a home rule charter. In the title of the act appearing in Chapter 146, Laws 1933, this language is found: "An Act authorizing cities and villages * * *," and throughout the entire act cities and municipalities are referred to, and the language in "any city or village." We believe the act is plain, and applies to a charter city.

The plaintiff contends the district court erred in failing to find that the mortgage trust deed executed by the

city to secure the bonds issued is a general obligation of the city. We repeat the following sections of the statutes.

Section 18-502, R. S. 1943, provides a municipality may issue mortgage bonds for the purpose of improving or extending an existing system. Such bonds shall not impose any general liability upon the municipality but shall be secured only on the property and revenues.

Section 18-503, R. S. 1943, provides a governing body of such municipality may make all necessary rules and regulations governing the use, operation, and control of the sewerage system and may establish just and equitable rates or charges to be paid to it for the use of such disposal plant and sewerage system.

Section 18-504, R. S. 1943, provides that bonds which are issued and secured by a mortgage on a utility, as provided in section 18-502, shall not be a general obligation of the municipality, but shall be paid out of revenues received from the service charges as provided in section 18-503, or from a sale of the property and franchises under a foreclosure of the mortgage. If a service rate is charged, to be paid as herein provided, such portion thereof as may be deemed sufficient shall be set aside as a sinking fund for the payment of the interest and principal of such bonds at maturity.

It is clear that the Legislature has specifically authorized the issuance and sale of bonds and a mortgage to be given thereon as provided for in the act. From an analysis of the foregoing sections of the statutes, the mortgage trust deed executed by the city to secure the bonds issued does not create a general obligation of the city.

This brings us to the questions of (1) whether or not the city, by ordinance, is privileged to discontinue water service in the event that the water and sewerage bills are not paid, (2) whether or not the city can make such rules and regulations by ordinance, and (3) whether or not the same are reasonable.

In American Water-Works v. State, 46 Neb. 194, 64 N. W. 711, 38 L. R. A. 447, 50 Am. S. R. 610, this court

held that a water company, though a private corporation, by virtue of the franchise granted it by the city of Omaha and its user of such franchise, became affected with a public use. The water company had the right to prescribe all such rules and regulations for its convenience and security as were reasonable and just, and to refuse to furnish water to any inhabitant who refused to comply with such reasonable rules and regulations. The court held that the rule with reference to discontinuing the water service was a proper regulation. See, also, Keystone Investment Co. v. Metropolitan Utilities District, 113 Neb. 132, 202 N. W. 416, 37 A. L. R. 1507.

We have heretofore set out section 18-503, R. S. 1943, and by the language of the section it will be noted that it affords two methods, one as provided for by ordinance enacted by the city, a rule and regulation that in the event the consumer fails to pay the water and sewerage bill the city may then discontinue the water service. The purpose of the last sentence of the above section of the statutes is to make plain that in addition to adoption by ordinance of rules and regulations for the collection of the sewerage charges the city may sue the plaintiff for the bill or certify it to become a lien against the property.

In Gericke v. City of Philadelphia, 353 Pa. 60, 44 A. 2d 233, in construing an ordinance which provided that the user shall pay an annual charge based upon the water consumption of the property served as measured by the charges for water supplied for the then current calendar year, the Supreme Court of Pennsylvania upheld the validity of the ordinance which based the charges for use of the sewerage system on the amount of water metered to the premises.

In Gatton v. City of Mansfield, 67 Ohio App. 210, 36 N. E. 2d 306, the general code provided that sewer rental charges should constitute a lien upon the property served by the connection, and if not paid when due should be collected in the same manner as other city and village

taxes. The court said: "It is well settled that a municipality may shut off water for the non-payment of a delinquent water bill."

In State v. City of Miami, 157 Fla. 726, 27 So. 2d 118, the court held: "The provision of Miami city ordinance for shutting off water furnished by city to premises of consumer failing to pay sewer service charges is not unconstitutional as depriving persons of property without due process of law, as water and sewer services are so interlocked that neither can be effective without the other."

In Dodd v. City of Atlanta, 154 Ga. 33, 113 S. E. 166, 28 A. L. R. 465, the contention was made that if the city could, under certain circumstances, assess the cost of water connections against the property served and enforce the collection thereof by execution, levy, and sale, this remedy was exclusive and superseded the right of the city by a duly promulgated regulation to cut off the water supply until the charges for making the connection were paid. The court said that if the city could proceed by assessment method, it could proceed by the method of shutting off the water supply, under a rule or regulation for that purpose. The right to coerce and enforce the payment of arrearages by cutting off the water is cumulative, and is not affected by the fact that the city may assess the cost of the connection against the property of the consumer, and collect the same by execution, levy, and sale, as in cases of assessments for street improvements.

We are of the opinion that the sewer rental is based upon the amount of water used. The operation of the sewerage system is dependent upon the amount of water supplied, and the water and sewerage service may be rightfully considered as one transaction. The regulations adopted by the city ordinance that the water supply be shut off to residents delinquent in the payment of the water and sewerage charges to said city is not an unreasonable regulation and is permitted under section 18-

503, R. S. 1943. In the instant case, for noncompliance with the ordinance to pay the water and sewerage bill the city would be warranted in discontinuing the water service to the plaintiff.

While there is contention made on the part of the plaintiff that in enacting ordinances Nos. 2289 and 2290, the mayor and members of the council misrepresented the true situation, as also did the city attorney and as shown by newspaper clippings in evidence the purpose of which was to influence the taxpayer of the manner of thinking of the mayor and council and others connected with the project, we have examined this evidence and conclude that it is similar to that analyzed in the case of Inslee v. City of Bridgeport, 153 Neb. 559, 45 N. W. 2d 590, and we find no coercion, fraud, or misrepresentation sufficient to invalidate the issuance of the revenue bonds in question.

The defendant city, by cross-appeal, predicates error on the part of the trial court in entering judgment against it for costs. We have heretofore set out the factual situation in this respect. It is apparent the plaintiff in this action desired to test the validity of the ordinances regardless of the charges made by the city with respect to his property for water and sewerage services.

In Lamaster v. Elliott, 53 Neb. 424, 73 N. W. 925, this court held: "If the question of the liability of the respective parties to an action to pay costs therein is one which was directly considered and determined by the trial court, no motion in that court to retax costs is necessary to entitle a party to have a judgment against him for the costs or any part thereof reviewed in this court." See, also, Burton v. State, 34 Neb. 125, 51 N. W. 601; Hartford Fire Ins. Co. v. Corey, 53 Neb. 209, 73 N. W. 674.

In this trial de novo, as provided for in section 25-1925, R. R. S. 1943, from a review of the record we conclude the trial court erred in assessing the costs against the defendant city.

For the reasons stated in this opinion, we find the action of the city officials to have been within their authority, and the judgment of the trial court is therefore affirmed. With reference to the costs being taxed to the defendant city, we reverse the judgment of the trial court and direct that judgment be entered for the costs against the plaintiff in conformity with this opinion.

AFFIRMED AS MODIFIED.

VIOLET KREPCIK, ADMINISTRATRIX OF THE ESTATE OF CALVIN L. KREPCIK, DECEASED, APPELLEE, V. INTERSTATE TRANSIT LINES, A CORPORATION, APPELLANT.

48 N. W. 2d 839

Filed July 16, 1951. No. 32974.

1. **Negligence.** If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect.
2. **Trial.** It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence.
3. ———. A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleading and evidence, and a failure to do so is prejudicial error.
4. **Negligence: Trial.** It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. This rule applies to the affirmative defense of contributory negligence.
5. ———: ———. Where specific charges of contributory negligence are pleaded and supported by proof the instructions should submit those specific charges to the jury for its determination. To fail to do so, whether or not requested to do so, is error.
6. **Automobiles.** The provision in section 39-7,108, R. S. Supp., 1949, that "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions

then existing" is the basic speed rule. Other provisions following in the section are specific speed restrictions based on the existence of the fact situation or situations mentioned in the act.

7. **Statutes.** Words defined in a prior statute will be understood in the same sense in subsequent statutes unless the contrary appears.
8. **Automobiles: Municipal Corporations.** The definition of "business district" in section 39-741, R. S. 1943, applies to the provisions of section 39-7,108, R. S. Supp., 1949.
9. ———: ———. In determining whether or not an accident happened within a business district as defined in section 39-741, R. S. 1943, and as used in section 39-7,108, R. S. Supp., 1949, the occupied frontage on both sides of the highway for three hundred feet or more traveled immediately before the accident by the vehicle involved is to be considered and land which is not occupied by buildings in use for business is not to be considered.
10. ———: ———. The restrictions set out in subsection (4) of section 39-7,108, R. S. Supp., 1949, are speed limitations upon the "prima facie lawful" speeds fixed for a "business district," a "residence district," and "any highway outside of a city or village." They place a "duty to decrease speed" below those prima facie lawful speeds when the conditions described exist. They prescribe conditions under which the "prima facie lawful" speeds are "unsafe" and "shall not be lawful."
11. **Automobiles: Highways.** Sections 39-746 and 39-748, R. S. 1943, are to be construed together. The "right half of the highway" as that term is used in section 39-746, R. S. 1943, means the right half of the main traveled portion of the highway available for traffic.

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

C. B. Matthai, G. C. Holdrege, R. B. Hamer, and *James G. McIntosh,* for appellant.

Beatty, Clarke, Murphy & Morgan, and *William S. Padley,* for appellee.

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

SIMMONS, C. J.

This action was before this court in Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533; 152

Neb. 39, 40 N. W. 2d 252; and 153 Neb. 98, 43 N. W. 2d 609. As a result of the trial here involved plaintiff secured a favorable jury's verdict upon her first and second causes of action. Defendant filed a motion for judgment notwithstanding the verdict and, in the alternative, for a new trial. These motions were overruled and judgment was rendered on the verdict. Defendant appeals. We reverse the judgment of the trial court and remand the cause.

Defendant presents here errors in the giving and refusing to give instructions relating to its defense of contributory negligence, and assigns as error the refusal of the trial court to grant the alternative motion for a new trial.

The factual situation generally is set out in the opinion in 152 Neb. 39, 40 N. W. 2d 252, and will not be repeated here, although it will be necessary to refer to the evidence as to particular matters in order to dispose of the questions here presented. We will refer to the above case as our former opinion.

The defendant pleaded eight specifications of negligence of decedent. Seven of these are summarized in our former opinion.

In instruction No. 3 the court advised the jury as to the specifications of negligence which the plaintiff was required to prove, and stated that if the jurors were satisfied by a preponderance of the evidence that the propositions stated were true, they should find for the plaintiff, unless prevented by rules next following. They were also instructed as to the conditions under which they should find for the defendant on those propositions.

In instruction No. 4 the court advised the jury that if it found the defendant negligent in some manner proximately causing injury to the person and property of decedent, it should next consider the affirmative defense of contributory negligence, and that "The burden of proving contributory negligence is upon the defendant." The court then set out its construction of material

allegations of defendant as to contributory negligence and advised the jury that if it found by a preponderance of the evidence that the propositions were true, the jury would find that the decedent was guilty of contributory negligence. The jury also was instructed as to the conditions under which it would find against the defendant upon its affirmative defense.

In instruction No. 5 the court advised the jury that if it found that both decedent and defendant had been negligent in some manner proximately causing the injuries complained of, it should then compare the negligence and determine from the evidence the degree of negligence of each of the parties. The court instructed as to the rights of the parties.

The defendant assigns the giving of instruction No. 4 as error in several particulars. The first one is that the instruction did not advise the jury that the defendant was entitled to the benefit of evidence adduced for the plaintiff.

We have recently stated the applicable rule as follows: "If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect." Mundy v. Davis, *ante* p. 423, 48 N. W. 2d 394.

The better practice, of course, is that the instruction to that effect be included in the instruction on contributory negligence. That it was not so included here is patent. We recognized, however, in the above decision that if other instructions could reasonably be construed to properly advise the jury in that regard, it would be sufficient.

We have referred to the language in instructions Nos. 3 and 4 as to "preponderance of the evidence." There was also in instruction No. 5 the statement that the

jury "will determine from the evidence." In the instruction with reference to the duty of the driver to obey stop signals there was a reference to considering "all of the evidence." There are other references to "the evidence" in the instructions.

Our attention is also called to the instruction on credibility of witnesses wherein the jury was told "It is your duty to carefully scrutinize and to dispassionately weigh the testimony of all the witnesses, giving to the several parts of the evidence such weight as in your judgment they should receive." In connection with this instruction our attention is called to City of Beatrice v. Forbes, 74 Neb. 125, 103 N. W. 1069, and to the statement therein that "It might perhaps have been better had the court said to the jury in plain terms that, in determining whether the plaintiff below was guilty of contributory negligence, they should take into consideration all the evidence before them upon that question, and that any evidence coming from the plaintiff or his witnesses in that respect should be considered together with that produced by the defendant. It can hardly be, however, that the jury were misled, as in its fourth instruction the court told them that, in determining the issues in the case, they should take into consideration the whole of the evidence and all the facts and circumstances proved on the trial, giving the several parts of the evidence such weight as they thought it entitled to."

The instruction above quoted relates to witnesses. The quoted language from the City of Beatrice case relates to issues in the case. The case is not controlling here.

We think it patent that if these instructions are to be construed as meeting the requirements of the rule stated in the Mundy case, then it would in effect nullify the rule. It necessarily follows that the instructions given do not comply with the requirement of the rule as stated in the Mundy case.

This requires a consideration of the evidence of plain-

tiff to determine whether or not it contains anything that tends to prove the issue of contributory negligence.

In the former opinion in this case we held that the evidence of the speed of decedent's truck was subject to a reasonable inference that speed contributed to the happening of the accident but pointed out that no witness testified as to speed at the point of the collision and that no witness for plaintiff testified as to the speed at which decedent was traveling. In the instant case plaintiff's witnesses testified to a speed of 30 to 35 miles an hour up to the time the collision happened. In addition to this there was plaintiff's evidence that the truck was loaded with cattle and over capacity, and under those circumstances a truck was more difficult to control and required a more moderate rate of speed than a truck loaded with dead weight that would not shift from side to side. To this is also to be added the evidence of skid marks.

Consistent with our former opinion and without going into the evidence as to other specifications of contributory negligence we hold that the plaintiff's evidence tended to prove the contributory negligence charge based on excessive speed. It follows that the failure of the trial court to properly instruct on that matter was prejudicial error.

Defendant pleaded negligence on the part of decedent in driving "at a rate of speed greatly in excess of a speed which was reasonable and prudent under the conditions then existing and at a rate of speed greatly in excess of 20 miles per hour while within said business district, to-wit, at a rate of speed of 40 miles per hour or more."

The trial court in instruction No. 4 submitted the issue as "In driving said truck at a rate of speed unreasonable under the circumstances then existing." Defendant contends that the trial court in so doing removed from the consideration of the jury the issue of

speed in excess of 20 miles an hour in a business district.

The rules are:

"It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence.

"A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleading and evidence, and a failure to do so is prejudicial error." McKain v. Platte Valley Public Power and Irrigation District, 151 Neb. 497, 37 N. W. 2d 923.

" 'It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence.' Dunlap v. Welch, 152 Neb. 459, 41 N. W. 2d 384. This rule applies to the affirmative defense of contributory negligence. Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549.

"It is the uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to the specific acts so alleged and supported. It necessarily follows that where specific charges of contributory negligence are pleaded and supported by proof the instructions should submit those specific charges to the jury for its determination. Reece v. Jefferson Transp. Co. (Mo. App.), 160 S. W. 2d 789. To fail to do so, whether or not requested to do so, is error." Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N. W. 2d 609.

We have hereinbefore set out the evidence of plaintiff that decedent's truck was being operated at a speed of 30 to 35 miles an hour. Defendant offered a witness who fixed the speed of the truck at 40 to 45 miles an hour.

The evidence is that on the north side of the highway looking west from the intersection there is a bank building which runs west to an alley and houses a bank, a

liquor store, and a barber shop. Beyond that is a garage and other places of business, and then a residence with a lot of 25 or 30 feet fronting the highway, so that on the north side of the highway and in the block west of the intersection business places occupied 260 or 270 feet. On the south side of the highway and west of the intersection is a park. East of the intersection and on the north side of the highway there are business places for one and one-half blocks. On the south side and east of the intersection is a small business building at the corner, then vacant lots, and farther on an oil tank.

Section 39-741, R. S. 1943, is in part as follows: "(10) 'Business district' is the territory contiguous to a highway when fifty percent or more of the frontage thereon for a distance of three hundred feet or more is occupied by buildings and used for business. (11) 'Residence district' is the territory contiguous to a highway not comprising a business district when the frontage on such highway for a distance of three hundred feet or more is mainly occupied by dwellings and buildings in use for business."

Section 39-7,108, R. S. Supp., 1949, provides in part: "(1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. (2) No person shall drive a vehicle in any residence district within any city or village at a speed greater than twenty-five miles per hour unless, by the ordinance of such city or village, a greater rate of speed is specifically permitted. (3) The following speeds shall be prima facie lawful, but in any case when such speed would be unsafe, they shall not be lawful: (a) Twenty miles per hour in any business district; (b) twenty-five miles per hour in any residence district; * * *."

It is defendant's contention that this accident occurred in a business district as defined by the statute; that the speed of decedent's truck was in excess of the limits of the statute; and that the trial court erred to defendant's

prejudice in failing to submit that issue to the jury.

The provision in section 39-7,108, R. S. Supp., 1949, that "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing" is the basic speed rule. Other provisions following in the section are specific speed restrictions based on the existence of the fact situation or situations mentioned in the act. Folken v. Petersen, 140 Neb. 800, 1 N. W. 2d 916; Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499; Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178.

Section 39-741, R. S. 1943, begins: "The following words and phrases when used in sections 39-741 to 39-799 shall for the purpose of said sections have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning * * *." Plaintiff contends that the statutory definition of business district, therefore, does not apply to section 39-7,108, R. S. Supp., 1949.

Section 39-741, R. S. 1943, was originally section 1 of Chapter 110, Laws 1931, page 304. That act in section 4 (b) contained provisions for lawful speeds and became section 39-1135, C. S. Supp., 1933. This section was repealed. In 1935, section 4 as to lawful speeds was enacted in lieu of section 39-1135, C. S. Supp., 1933. Laws 1935, c. 134, § 4, p. 486, § 12, p. 490. This became section 39-11,101, C. S. Supp., 1937. This was amended in 1939. Laws 1939, c. 47, § 2, p. 209. It became section 39-11,101, C. S. Supp., 1941, and section 39-7,108, R. S. 1943. This in turn was amended in 1945. Laws 1945, c. 93, p. 315. It became section 39-7,108, R. S. Supp., 1949.

The provision in section 39-741, R. S. 1943, referring to sections 39-741 to 39-799 was put in the Revised Statutes of 1943 to identify the remaining sections of the original act of 1931 in lieu of the words "this act." This does not alter the fact that section 39-7,108, R. S.

Supp., 1949, is in effect an amendment of the 1931 act. Words defined in a prior statute will be understood in the same sense in subsequent statutes unless the contrary appears. Purtell v. Philadelphia and Reading Coal and Iron Co., 256 Ill. 110, 99 N. E. 899, Ann. Cas. 1913E 335. It necessarily follows that the definitions in the original act apply to the amendatory sections. There appears no legislative intent to the contrary. The definition, then, of "business district" in section 39-741, R. S. 1943, applies to the provisions of section 39-7,108, R. S. Supp., 1949.

This brings us down to this question. Was the deceased driving in a business district, as defined by the statute, when this accident occurred?

The definition in our statute is substantially that of the Uniform Code. 11 U. L. A., Motor Vehicle Acts, § 1, p. 10.

It does not appear that we have determined the requisite fact situation that makes the provision operative. Other courts have considered the matter. We are to so construe the act as to make uniform the law of those states which have enacted similar legislation. Bainter v. Appel, 124 Neb. 40, 245 N. W. 16; Behrens v. State, 140 Neb. 671, 1 N. W. 2d 289. From the decisions of other states we arrive at the applicable rule. In determining whether or not an accident happened within a business district as defined in section 39-741, R. S. 1943, and as used in section 39-7,108, R. S. Supp., 1949, the occupied frontage on both sides of the highway for three hundred feet or more traveled immediately before the accident by the vehicle involved is to be considered and land which is not occupied by buildings in use for business is not to be considered. McGill v. Baumgart, 233 Wis. 86, 288 N. W. 799; Mitchell v. Melts, 220 N. C. 793, 18 S. E. 2d 406; Utility Trailer Works v. Phillips, 249 Ala. 61, 29 So. 2d 289.

We do not determine the sufficiency of the evidence to show that the buildings were "in use for business,"

but rather determine that the frontage occupied is not shown to meet the requirements of the statute. The evidence here does not bring the place of the accident within a business district under the statute. The required density of buildings is not shown. It follows that the trial court did not err in refusing to submit the business district speed issue to the jury.

This holding disposes of other assignments of error based on the premise that the accident occurred while decedent was driving in a business district.

The defendant further pleaded negligence of the decedent in failing to keep a proper lookout for vehicles entering said intersection from the north, and for the purpose of keeping his truck confined to its proper lane of traffic; in failing to turn or direct his truck to the south when by so doing the collision could have been avoided; and in failing to stop the truck when by so doing the collision could have been avoided. In our former opinion we held that these charges presented questions for determination by a jury. It is not contended otherwise here. The question here presented is as to the adequacy of the instructions given in submitting those issues to the jury.

As to the defense of negligence, other than speed, above discussed, the court submitted the contentions of negligence as follows:

"(b) In driving said truck negligently upon the north half of said highway.

"(c) In driving said truck into the intersection without using due care to observe the approach of defendant's bus.

"(d) In failing to exercise reasonable control in the operation of said truck so as to avoid colliding with defendant's bus."

We have hereinbefore pointed out the rule that where specific charges of contributory negligence are pleaded and supported by proof, the instructions should sub-

mit those specific charges to the jury for its determination and that to fail to do so is error.

Here there were specific charges of negligence pleaded. Here the trial court did not directly or in effect submit the specific charges to the jury. The failure to do so was error.

The trial court in instruction No. 6 quoted the provisions of section 39-7,108, R. S. Supp., 1949, hereinbefore set out. Subsection (3) of this section sets out what shall be a "prima facie lawful" speed in a business district and a residence district as defined in the act. Subsection (4) of the section is: "The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, * * * or when special hazards exist with respect to pedestrians or other traffic * * * and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care * * *."

The defendant contends that the failure to submit these additional restrictions to the jury was prejudicial error. Defendant relies upon our holding in Hamblen v. Steckley, *supra,* that "An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications to enable the jury to observe and understand the duty of drivers at the time and place in question."

The plaintiff contends there is no evidence that decedent was going less than 20 miles an hour and hence the provision is not applicable. The restrictions set out in subsection (4) of section 39-7,108, R. S. Supp., 1949, are speed limitations upon the "prima facie lawful" speeds fixed for a "business district," a "residence district," and "any highway outside of a city or village."

They place a "duty to decrease speed" below those prima facie lawful speeds when the conditions described exist. They prescribe conditions under which the "prima facie lawful" speeds are "unsafe" and "shall not be lawful."

The facts here do not make operative the specific prima facie lawful speed provisions. The basic speed provision applies. The trial court was not required to instruct on the specific provisions here considered. The assigned error is not sustained.

Defendant pleaded negligence of the decedent in failing to confine the course of the truck to the south half of the traveled portion of the highway, in failing to yield the north half of the traveled portion of the highway to defendant's bus, and in failing to keep the truck on the south half of the traveled portion of the highway while proceeding into the intersection.

The statutes provide:

"Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway and shall drive a slow moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway and except when overtaking and passing another vehicle, subject to the limitations applicable in overtaking and passing set forth in section 39-748." § 39-746, R. S. 1943.

"In crossing an intersection of highways or the intersection of a highway by a railroad right-of-way, the driver of a vehicle shall at all times cause such vehicle to travel on the right half of the highway unless such right half is obstructed or impassable." § 39-747, R. S. 1943.

"Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one half of the main traveled portion of the roadway as nearly as possible." § 39-748, R. S. 1943.

In submitting the matter to the jury the trial court

copied into the instructions that part of section 39-746, R. S. 1943, omitting "subject to the limitations applicable in overtaking and passing set forth in section 39-748." No direct reference was made to sections 39-747 and 39-748, R. S. 1943. It is to be noted that sections 39-746 and 39-747, R. S. 1943, refer to "the right half of the highway" and section 39-748, R. S. 1943, refers to the "main traveled portion" of the highway.

The Supreme Court of Arizona in construing statutes comparable to sections 39-746 and 39-748, R. S. 1943, held that the sections should be construed together and that the "right half of the highway" means the right half of the main traveled portion of the highway as it exists at the time, i. e., the right half of that portion of the highway available for traffic, and that such constituted a simple, easily understandable, and at all times workable rule for motorists to follow. Dixon v. Alabam Freight Co., 57 Ariz. 173, 112 P. 2d 584, followed in Patton v. Kirkman, 109 Utah 487, 167 P. 2d 282. We adopt that construction as applicable to our statute.

Defendant's contention is that by quoting section 39-746, R. S. 1943, and not quoting section 39-748, R. S. 1943, the court put undue emphasis upon the "right half of the highway" provision and did not advise the jury of the statute requiring the yielding of one-half of the "main traveled portion." Strictly speaking section 39-748, R. S. 1943, does not apply to the fact situation here, for it relates to vehicles "proceeding in opposite directions." However, we do not rest the answer to this contention on that basis. Defendant contends that the trial court instructed that it was the duty of a driver to drive upon the right half of the highway and that this did not cover a duty to remain to the right of the center of the traveled portion of the highway. We see no merit to that contention.

The trial court in its instruction did not limit it to the use of the words "right half of the highway." The court further said: "Such half is determined after as-

certaining the total width of such highway which is then open and available for the use of vehicles and dividing such width by two." We think the instruction is in substantial accord with the two sections of the statute when construed together. The assignment is not sustained.

For the reasons given herein the judgment of the district court is reversed and the cause is remanded.

REVERSED AND REMANDED.

MESSMORE, J., participating on briefs.

CHAPPELL, J., dissents.

DON P. HARRINGTON ET AL., APPELLANTS, V. HAZEL M. GRIESER ET AL., APPELLEES.

48 N. W. 2d 753

Filed July 16, 1951. No. 32976.

1. **Divorce.** Jurisdiction of the court in matters relating to divorce and alimony is given by the statute and every power exercised by the court with reference thereto must look for its source in the statute or it does not exist.
2. **Courts.** Courts of general jurisdiction have the inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction.
3. **Statutes.** It is a general principle of interpretation that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Under this principle the enumeration of certain powers implies the exclusion of all others not fairly incident to those enumerated and an affirmative description of cases in which certain powers may be exercised implies a negative on the exercise of such powers in other cases.

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

Chambers, Holland & Groth, Hymen Rosenberg, and *Roy F. Gilkeson,* for appellants.

Paul W. White, Frederick Wagener, Herbert Ronin, and *William Schaumberg,* for appellees.

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

WENKE, J.

Don P. Harrington, Jane F. Harrington, and Union Loan and Savings Association, a corporation, brought this action in the district court for Lancaster County against Hazel M. Grieser and Myles Holloway, sheriff of Lancaster County. The purpose of the action is to permanently enjoin the defendants from selling or causing to be sold Lot 5, Block 3, Capital View Addition to Lincoln pursuant to an execution which the sheriff has levied thereon. The defendants separately demurred to plaintiff's petition on the ground that it failed to state a cause of action. These demurrers were sustained as to the Harringtons and their action dismissed but overruled as to the Union Loan and Savings Association. The Harringtons filed a motion for new trial and from the overruling thereof have perfected this appeal.

The defendants have not cross-appealed from the overruling of their demurrer to the Union Loan and Savings Association's cause of action. Consequently no question is here presented as to its rights under and by virtue of its mortgage dated October 1, 1946, or as to any rights it may have by subrogation for such of the moneys advanced under its mortgage that were paid to the Lutheran Mutual Life Insurance Company to satisfy its prior mortgage on these premises dated April 7, 1945.

Merle Karnopp, now sheriff of Lancaster County, has been substituted as defendant and appellee in place of Myles Holloway.

The pleadings present the following factual situation: Hazel M. Grieser filed her petition in the district court for Lancaster County on September 25, 1945, seeking a divorce from her husband, Leonard F. Grieser. Decree was rendered therein on November 1, 1945, granting her a divorce and awarding her the custody of the parties' two minor children. The decree also ordered him to pay

her alimony and child support in accordance with an agreement which the parties had entered into on September 20, 1945, which agreement the court had approved. This agreement provided that commencing on September 15, 1945, the defendant should pay plaintiff each month, until such time as she remarries the sum of $90 as alimony, and $60 a month for the support and education of the two children. The decree entered judgment against defendant for these payments.

The Griesers, at the time this decree was rendered, owned property located at 1035 South Thirty-first Street in Lincoln. This is the same property now levied on and sought to be sold. By the agreement of the Griesers this was to be the property of Leonard F. Grieser and Hazel M. Grieser was to give him a quitclaim deed thereto. This she did by a quitclaim deed dated November 1, 1945.

On August 1, 1946, at a subsequent term of the court, Leonard F. Grieser made an application in the divorce action to have the decree entered therein so modified that the property which he had received under the terms of the settlement agreement of September 20, 1945, would be released from the lien of these monthly payments of alimony and child support. Therein he alleged, as the basis therefor, that it was understood between the parties that he was to get the property free of liens.

By stipulation dated August 7, 1946, Hazel M. Grieser agreed to the court's modifying its decree of November 1, 1945, so the payments due thereunder for alimony and child support would not be a lien upon the property received by Leonard F. Grieser pursuant to their settlement agreement but that the amount of the payments should not be changed. Based on this stipulation the court, on August 8, 1946, entered an order modifying its decree of November 1, 1945. The modification made provided that the alimony and child support payments should not be a lien on this property.

On September 20, 1946, for a valuable consideration,

Leonard F. Grieser and his then wife, Florence E., conveyed this property to the Harringtons as joint tenants. The Harringtons, in buying the property, relied on the August 8, 1946, order of the court modifying its decree of November 1, 1945, releasing this property from the liens of the alimony and child support payments.

On December 1, 1949, Hazel M. Grieser caused an execution to be issued for the unpaid installments of alimony and child support under the decree of November 1, 1945. This execution directed the sheriff of Lancaster County to levy on this property to satisfy the unpaid installments in the sum of $5,272 which had become delinquent since December 1946. This the sheriff did and, pursuant to the levy, advertised the property for sale on January 17, 1950, at 2 p. m. It is this execution and sale which the appellants seek to enjoin.

The question raised is, did the district court have the power to enter the order of August 8, 1946, releasing this property from the liens of these future alimony and child support payments?

That these future payments of alimony and child support were liens on this property by reason of the decree of November 1, 1945, is firmly established by the holdings of this court. See, Wharton v. Jackson, 107 Neb. 288, 185 N. W. 428; Lynch v. Rohan, 116 Neb. 820, 219 N. W. 239; McCord v. McCord, 128 Neb. 230, 258 N. W. 474.

Divorce and its incidents are matters of public concern over which the Legislature has authority. What policies to adopt concerning its regulation are for it to decide and are not for the courts.

In this respect we have said of our power in that regard as follows: "Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist." Cizek v. Cizek, on rehearing,

69 Neb. 800, 99 N. W. 28. See, also, Wharton v. Jackson, *supra.*

As stated in Cizek v. Cizek, *supra:* "We proceed, therefore, in the examination of the question presented upon the assumption that the court's power to do what it did under the pleadings in this case must find justification in the statute or it can not be sustained."

To the extent of the power granted the following principle is applicable: "Courts of general jurisdiction have the inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction. See, Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340; Lippincott v. Lippincott, supra." Miller v. Miller, 153 Neb. 890, 46 N. W. 2d 618.

For many years after the Legislature established that alimony and child support payments, including future payments, should be liens it made no provision respecting the court's authority to release or in any way change the priority thereof. Then, in 1935, the Legislature provided if certain conditions were found to exist, none of which were here found to exist as the basis for the court's order of August 8, 1946, that then the court would have authority to enter an order respecting the priority thereof or to subordinate it to the lien of a mortgage, the proceeds of which are to be used solely for the specific purposes as therein set forth. Laws 1935, c. 94, p. 316, now section 42-324, R. S. 1943. The Legislature during its 1951 session broadened the court's authority in this respect with reference to child support. See L. B. 299, appearing as Laws 1951, c. 125.

Applicable here, under this situation, is the following principle: "It is a general principle of interpretation that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Under this principle, it has been held that the enumeration of certain powers implies the exclusion of all others not fairly incidental to those enumerated, and that an affirmative description of cases in which certain powers

may be exercised implies a negative on the exercise of such powers in other cases." 50 Am. Jur., Statutes, § 429, p. 450. See, Michigan Wolverine Student Co-Operative, Inc. v. Wm. Goodyear & Co., 314 Mich. 590, 22 N. W. 2d 884; Van Eaton v. Town of Sidney, 211 Iowa 986, 231 N. W. 475, 71 A. L. R. 820.

So tested we find that the court was without authority and did not have the power to enter the decree of August 8, 1946, insofar as it therein attempted to release this property from the lien for future payments of alimony and child support as ordered by the decree of November 1, 1945, and that its order doing so was void. See Cizek v. Cizek, *supra*.

In view thereof we find the order of the trial court sustaining the separate demurrers of the appellees to be correct and we affirm its order dismissing the appellants' action.

AFFIRMED.

IN RE ESTATE OF SARAH ELIZABETH COONS, DECEASED. LULU C. MOORE, APPELLEE, V. WILLIAM BRYAN MOORE ET AL., APPELLANTS.

48 N. W. 2d 778

Filed July 16, 1951. No. 32984.

1. **Wills.** It is the duty of a proponent in a will contest, in the first instance, to prove the execution of the will and the mental capacity of the testator by evidence sufficient to make a prima facie case.
2. ———. The evidence of the attesting witnesses to a will, who are available, is indispensable to the proving of a will where such will is contested.
3. **Wills: Witnesses.** Communications made to an attorney by his client, in the absence of a proper waiver, are inadmissible in a contested probate proceeding to establish the mental capacity of the client to make the will.
4. ———: ———. An attorney who drafted a will, and was present at the time of its execution, is competent to testify to factual

matters concerning its execution, such matters not being privileged communications within the meaning of sections 25-1201 and 25-1206, R. R. S. 1943.

5. **Wills.** The personal representative of a testator has no authority to waive for such testator the privilege provided by section 25-1201, R. R. S. 1943.
6. **Trial.** A motion for a directed verdict, although joined in by all parties to an action, made pursuant to section 25-1315.01, R. R. S. 1943, raises only questions of law and does not constitute a waiver of a jury trial.
7. ———. Whether a judgment will be directed or a new trial granted under the provisions of section 25-1315.02, R. R. S. 1943, involves a judicial discretion based upon the record. The purpose of the act is to serve the ends of justice and not to defeat them.

APPEAL from the district court for Nemaha County: VIRGIL FALLOON, JUDGE. *Reversed and remanded.*

Ferneau & Kiechel, and *Dwight Griffiths,* for appellants.

John P. McKnight and *John C. Mullen,* for appellee.

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

CARTER, J.

This is an appeal in a will contest in which the trial court directed a verdict for the proponent. The contestants appeal.

On October 8, 1942, Sarah Elizabeth Coons executed her last will and testament. The attesting witnesses were Bess M. Kay and Mrs. Lee Pyles. The only other person present at the time of the execution of the will was Ernest F. Armstrong, the attorney who drafted the will at the request of Mrs. Coons. The testatrix died on January 19, 1950. Thereafter Edward E. Moore, a brother of Sarah Elizabeth Coons and the chief beneficiary under the will, offered the will for probate. The will was admitted to probate in the county court of Nemaha County and Edward E. Moore was appointed executor of the estate of Sarah Elizabeth Coons. On

May 2, 1950, Edward E. Moore died and Lulu C. Moore, his widow, became the administratrix with will annexed of the estate of Sarah Elizabeth Coons as successor to Edward E. Moore, deceased, and now stands as the proponent of the will of Sarah Elizabeth Coons.

The petition for the probate of the will of Sarah Elizabeth Coons was in the usual form and alleged, among other things, that the heirs at law of the testatrix were Clara Peabody, a sister; Frank Moore, a brother; Edward E. Moore, a brother; Vern McIninch, a nephew, the son and only surviving heir at law of a deceased sister, Miranda McIninch; and Ben Moore, Claude Moore, Bryan Moore, Howard Moore, Helen Handley, May Argabright, and Raymond Moore, nephews and nieces, and the heirs at law of William Moore, a deceased brother of Sarah Elizabeth Coons. Objections to the probate of the will were filed alleging that the will of Sarah Elizabeth Coons was not executed in the manner and form required by law; that Sarah Elizabeth Coons did not have the mental capacity to make a will at the time she purported to execute it; and that the purported will was the result of undue influence on the part of Edward E. Moore and others not known to the objectors.

The proponent of the will in making a prima facie case produced the evidence of Bess M. Kay, one of the attesting witnesses, and Ernest F. Armstrong, the attorney who drafted the will. It is the contention of the objectors that the proponent of a will must, when objections have been filed to the probate of the will, produce all of the attesting witnesses to the will or show their unavailability in the manner prescribed by sections 30-219 and 30-219.01, R. R. S. 1943. It is further contended that the testimony of the witness Armstrong, the attorney who drafted the will, is privileged, and, upon objection, incompetent for that reason. At the close of proponent's evidence in chief the objectors moved for a directed verdict for the foregoing reasons. We shall first determine the correctness of the ruling of the

trial court in denying the motion for a directed verdict.

The general rule in this state is that the burden is upon the proponent of a will to prove not only the execution of the will but the capacity of the testator to make it as well. In Seebrock v. Fedawa, 30 Neb. 424, 46 N. W. 650, the rule was announced as follows: "It is the duty of the proponent in the first instance to offer sufficient testimony of the capacity of the testator to make out a prima facie case. The contestant will then introduce his proof to show the invalidity of the will; after which the proponent may introduce further testimony to sustain the will, as well as rebutting testimony. During the entire trial the burden of proof remains with the proponent. Unless the sanity of the testator be established by a preponderance of the testimony, the will cannot be admitted to probate and record." See, also, In re Estate of Renter, 148 Neb. 776, 29 N. W. 2d 466; In re Estate of Hunter, 151 Neb. 704, 39 N. W. 2d 418. The question here presented is whether or not proponent made a prima facie case in the first instance.

The record shows that only one of the two attesting witnesses was called to testify to the compliance with the statutory requirements for a valid testamentary disposition of property by will. Proponent produced no evidence of the unavailability of the second attesting witness, Mrs. Lee Pyles. After the motion of contestants for a directed verdict was overruled, Mrs. Lee Pyles was called as a witness for the contestants. She was therefore available to the proponent so far as the record shows. Was she an indispensable witness for the proponent in making a prima facie case?

In this respect we point out the provisions of section 30-218, R. R. S. 1943: "If no person shall appear to contest the probate of a will at the time appointed for that purpose, the court may, in its discretion, grant probate thereof on the testimony of one of the subscribing witnesses only, if such a witness shall testify that such will was executed in all the particulars as re-

quired in section 30-204, and that the testator was of sound mind at the time of the execution thereof." We point out that this section authorizes the court to grant probate of a will on the testimony of one attesting witness only where no person appears to contest the will. The inference is strong that in case of a contest the testimony of all of the attesting witnesses is indispensable to the granting of probate of a will when they are available. Where none of the attesting witnesses resides in the state at the time appointed for proving a will, the court is authorized to admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will. § 30-219, R. R. S. 1943. Where witnesses to the will are unavailable because they are serving in or are present with the armed forces of the United States, are in service as merchant seamen, are dead, or are mentally or physically incapable of testifying, the court is authorized to admit a will to probate upon the testimony of two or more credible disinterested witnesses to the effect that the signature to the will is in the handwriting of the person whose will it purports to be, or upon other sufficient proof of such handwriting. § 30-219.01, R. R. S. 1943. The foregoing statutory exceptions are not shown to have any application to the case at bar.

The manner of disposing of property by will is prescribed by statute. The formalities provided by statute for executing and proving a will must be followed to give validity to the purported will. We think the applicable statutes require, in making a prima facie case, that the evidence of the attesting witnesses is indispensable to the proving of a will except where such witnesses are unavailable.

In Gillis v. Gillis, 96 Ga. 1, 23 S. E. 107, 51 Am. S. R. 121, 30 L. R. A. 143, the court said: "It is well settled that the subscribing witnesses to a will must, if practicable, be called and examined; but the fate of a will does not depend entirely upon their testimony.

Upon the trial of an application to prove a will in solemn form, they are, all of them, unless accounted for, indispensably necessary witnesses; but the testimony, even as to the factum of execution, is not confined to them. The fact to be established is the proper execution of the will. If that is proved by competent testimony, it is sufficient, no matter from what quarter the testimony comes, provided the attesting witnesses are among those who bear testimony, or their absence is explained. The inquiry, as in other cases, is whether, taking all the testimony together, the fact is duly established. It is not required that any one or more of the essential facts should be proved by all, or any number, of the attesting witnesses. The right is simply to have the attesting witnesses examined, no matter what their testimony may be. The law does not allow proof of the valid execution and attestation of a will to be defeated at the time of probate by the failure of the memory on the part of any of the subscribing witnesses." See Annotation II b, 63 A. L. R. 1200; 57 Am. Jur., Wills, § 903, p. 595; German Evangelical Bethel Church v. Reith, 327 Mo. 1098, 39 S. W. 2d 1057, 76 A. L. R. 604. The rule is that a proponent is required to present all attesting witnesses if their testimony is available, otherwise a prima facie case is not made. Consequently it was error on the part of the trial court to overrule contestants' motion for a directed verdict when proponent failed to present an attesting witness to the will, not shown to be unavailable as provided in sections 30-219 and 30-219.01, R. R. S. 1943.

The contestants assert that it was error for the trial court to permit the attorney who drafted the will, and who was present at the time of its execution, to testify to the mental capacity of the testatrix. The claim that such evidence is privileged is based on section 25-1206, R. R. S. 1943, which provides: "No practicing attorney, counselor, physician, surgeon, minister of the gospel or priest of any denomination, shall be allowed in giving

testimony to disclose any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline."

This court has determined the question. It was held in the case of In re Estate of Bayer, 116 Neb. 670, 218 N. W. 746, that section 8835, Comp. St. 1922, now section 25-1201, R. R. S. 1943, is applicable and controlling and renders communications made to an attorney by his client, in the absence of a proper waiver, inadmissible in a contested probate proceeding to establish the competency of such client in a contest between legatees and devisees on the one hand and the legal heirs on the other, even though the will was not drafted by him. In other words, an attorney may not testify to any communication arising from his relationship with the testator as attorney and client. The authorities are fully discussed in the Bayer case and we think it arrives at a correct conclusion, to which we adhere. Our conclusion necessarily is that an attorney who drafted the will of a testator is an incompetent witness, upon objection, to testify to any communication pertaining to the mental competency of the testator which arises out of his relationship with the testator as attorney and client. The proponent relies upon Brown v. Brown, 77 Neb. 125, 108 N. W. 180; Lennox v. Anderson, 140 Neb. 748, 1 N. W. 2d 912; and Elliott v. Elliott, 3 Neb. (Unoff.) 832, 92 N. W. 1006. These are cases where the testator waived the privilege by requesting the attorney to attest the will as a subscribing witness. They do not sustain the right of an attorney who drafted the will of the testator, in the absence of a waiver, to testify to the mental competency of the testator at the time of the execution of the will.

Proponent contends that the personal representative waived the privilege by calling, as a witness, the attorney who drafted the will. This contention was also

determined in the case of In re Estate of Bayer, *supra,* wherein it was held the personal representative of a testatrix could not waive the privilege for her. Briefly stated, the holding of the Bayer case is that after the amendment of section 8835, Comp. St. 1922, now section 25-1201, R. R. S. 1943, the right to waive the privilege was limited by the following language: "The following persons shall be incompetent to testify: * * * an attorney concerning any communication made to him by his client in that relation or his advice thereon, without the client's consent in open court or in writing produced in court." Consequently, a waiver of the privilege is not available without the client's consent in open court or by a writing produced in court. Cases adopted since this statutory change was made which do not take cognizance thereof are not controlling precedents in determining the matter presented. Among the cases in this class are Parker v. Parker, 78 Neb. 535, 111 N. W. 119, and In re Estate of Gray, 88 Neb. 835, 130 N. W. 746, 33 L. R. A. N. S. 319, Ann. Cas. 1912B 1037. We think the trial court erred in overruling the objections of contestants to the testimony of the attorney who drafted the will for testatrix, bearing upon her mental competency, for the reason that such testimony was privileged, in that it grew out of the relationship of attorney and client, and had not been waived in the manner authorized by the statute.

It is urged also that the attorney was an incompetent witness to establish the legal requirements for the execution of the will. We do not think that the testimony of the attorney who drafted the will, concerning the formal requirements of its execution, is a confidential communication within the meaning of section 25-1206, R. R. S. 1943, or within the prohibition of section 25-1201, R. R. S. 1943. The word "communication" is used to denote the fact that one person has brought an idea to the perception of another. Testimony of the mechanics followed in executing the will are not within

such definition. Factual matters concerning the execution of the will, not gleaned from communications by the testator, are not privileged and constitute competent evidence concerning which an attorney present at the execution of the will may properly testify.

We deem it necessary to discuss the effect of section 25-1315.01, R. R. S. 1943, to avoid the possibility of error upon a retrial of this case. This section provides: "A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor." Prior to the adoption of this section of the statute, if all parties moved for directed verdicts without reservation, the effect was to waive a jury trial. But since the adoption of section 25-1315.01, R. R. S. 1943, such is not the case. A motion for a directed verdict by all parties to the litigation is not a waiver of a jury trial. Such motions raise only questions of law and, after their determination, if any question of fact remains it is for the jury, unless a jury is expressly waived by the parties. The statute in question is similar to Rule 50 (a), Federal Rules of Civil Procedure. Federal cases dealing with this rule sustain the interpretation we have given to section 25-1315.01, R. R. S. 1943. See, Starfred Properties, Inc. v. Ettinger, 131 F. 2d 575; Vilter Mfg. Co. v. Rolaff, 110 F. 2d 491; Marsh v. Illinois Central R. R. Co., 175 F. 2d 498.

The record shows that at the close of proponent's case contestants moved for a directed verdict. The motion was overruled. At the close of the evidence offered on behalf of contestants the contestants renewed their motion made at the close of proponent's evidence

in chief for a directed verdict. The motion was again overruled. The motion was again renewed at the close of all the evidence. The trial court overruled the motion of contestants and sustained the motion of proponent for a directed verdict. Contestants thereupon filed a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial. This motion was overruled by the trial court. In so doing we think the trial court was in error.

The motion for judgment notwithstanding the verdict, or in the alternative for a new trial, was filed pursuant to section 25-1315.02, R. R. S. 1943. The pertinent part of this section provides: "Within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." It will be noted that the trial court was empowered, when error appeared in the record, to grant a new trial or to direct the entry of judgment as if the requested verdict had been directed. Which of the two orders is proper to be entered is to be determined from the record. It is a judicial discretion and not an absolute one that is lodged in the court. Our holding that the testimony of all available attesting witnesses to a will is indispensable to the making of a prima facie case appears to be one of first impression in this state. The competency of the attorney who drafted the will to testify to the proper execution

of the will and to the mental competency of the testator does not appear to have been clearly stated in the previous holdings of this court. The possibility exists that other evidence may be obtained in lieu of that held to be incompetent. In view of these considerations we feel that the ends of justice would be better served by granting a new trial. The purpose of the act is to serve the ends of justice and not to defeat them. Because of the errors pointed out the motion of the contestants for a new trial should have been sustained. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

SIMMONS, C. J., dissenting.

I dissent.

The majority hold that the attorney who drafted the will offered for probate is an incompetent witness, upon objection, to testify to any communication pertaining to the mental competency of the testator which arises out of his relationship with the testator as attorney and client. This conclusion is based upon section 25-1206, R. R. S. 1943, and In re Estate of Bayer, 116 Neb. 670, 218 N. W. 746.

The conclusion is not supported by our decision in the case of In re Estate of Bayer, *supra,* and it is contra to our opinion in Lennox v. Anderson, 140 Neb. 748, 1 N. W. 2d 912.

A decision to be a precedent should be one where there is a similarity in controlling facts and issues and then to the extent that the decision relates itself to those facts and issues.

In the Bayer case an attorney was asked as to conversations and instructions received by him from a client as to the proposed disposition of property by will. *The attorney did not draft the will offered for probate.* The opinion specifically limits the question presented to that fact situation. Here the attorney *who drafted the will* was called to testify as to the men-

tal competency of his client. The distinction is material. It lies in the reason for the rule of privileged communications as applied to an attorney. It is stated by Wigmore as follows: "It has already been noticed (ante, § 2309) that the fact of execution of a deed has commonly been declared to be without the privilege, partly because it was not a subject of communication at all, and partly because, if a communication, it was not impliedly a confidential one. On the other hand, the contents of the deed are generally within the privilege (ante, § 2308). No further examination of the principle as applied to deeds is here necessary.

"But for wills a special consideration comes into play. Here it can hardly be doubted that the execution and especially the contents are impliedly desired by the client to be kept secret during his lifetime, and are accordingly a part of his confidential communication. It must be assumed that during that period the attorney ought not to be called upon to disclose even the fact of a will's execution, much less its tenor. But, on the other hand, this confidence is intended to be temporary only. That there may be such a qualification to the privilege is plain. That it appropriately explains the client's relation with an attorney drafting a will seems almost equally clear.

"It follows, therefore, that after the testator's death the attorney is at liberty to disclose all that affects the execution and tenor of the will.

"The only question could be as to communications tending to show the invalidity of the will, i. e. from which a circumstantial inference could be drawn that the testator was insane or was unduly influenced. It may be conceded that the testator would not wish the attorney to assist in any way the overthrow of the will. But the answer is that such utterances were obviously not confidentially made with reference to the secrecy of the fact of insanity or undue influence, for the testator of course did not believe those facts to exist and

therefore could not possibly be said to have communicated them.

"As to the tenor and execution of the will, it seems hardly open to dispute that they are the very facts which the testator expected and intended to be disclosed after his death; and, with this general intention covering the whole transaction, it is impossible to select a circumstance here or there (such as the absence of one witness in another room) and argue that the testator would have wanted it kept secret if he had known that it would tend to defeat his intended act. The confidence is not apportionable by a reference to what the testator might have intended had he known or reflected on certain facts which now bear against the will." 8 Wigmore, Evidence (3d ed.), § 2314, p. 610. See, 58 Am. Jur., Witnesses, § 505, p. 283; 70 C. J., Witnesses, § 567 (15), p. 424; Annotation, 64 A. L. R. 185.

In Lennox v. Anderson, *supra,* we followed the reasoning and almost literally the language of these authorities and said: "When a person employs an attorney to have a will drawn and confides in the attorney as to the disposition of his property, it is the client's desire that during his lifetime the will be kept a secret, and a confidential relation exists. The attorney is not privileged to give the will publicity in any form. This confidential communication is temporary. After the testator's death, the attorney is at liberty to disclose all that affects the execution and contents of the will. The privilege has been waived by the testator, especially so when the scrivener of the will is a witness to it." I call attention to the fact that in the Lennox opinion we quoted the exact statute that the Bayer case considered and upon which the majority rely here. In the Lennox case the will had been revoked and for that reason we held the proffered testimony was not admissible. This holding is clearly in accord with the Bayer case and illustrates the distinction here made.

Basically it is not a question of waiver but a ques-

tion of the point beyond which the privileged communication rule has no application. The reason for the rule terminating with the death of the client the rule itself should terminate.

An examination of the briefs in the Bayer case discloses that it was presented on the fact distinction that the attorney witness there had not drafted the will involved; that we decided the exact question submitted; and that the question here presented was not in anywise involved there.

I also call attention to the fact that section 25-1206, R. R. S. 1943, relied upon here, and in the Bayer case, was not involved in the amendment there discussed. The section properly construed is not a bar to the admissibility of the evidence here involved. The decision here made places us in a minority view class as to this question, as is shown by the authorities above cited.

The majority hold that there has been no waiver here. In view of the above authorities and our opinion in the Lennox case I do not consider that question is necessarily involved; nevertheless it should be explored.

The majority rely upon section 25-1201, R. R. S. 1943, and again the Bayer case as determining the question. To repeat—the claimed waiver there involved was that of the testimony of the lawyer who did not draft the will so it related to a confidential communication generally. The decision of course is related to this fact situation, so I submit the Bayer case is not controlling here.

Here, as in the Bayer case, section 25-1201, R. R. S. 1943, is relied upon. Much is said in the Bayer opinion about an amendment to this section. The majority refer to that amendment. A reading of the Bayer case leaves the impression that the amendment there relied upon was of recent origin, although a close examination of the opinion does not sustain that impression. The fact is that the amendment there relied upon was passed by the Territorial Legislature in 1866. R. S.

1866, § 328, p. 449. So the section as it now exists has been the law since territorial days. The Bayer opinion also leaves the impression that the amendment was one specifically directed at this provision. The facts are that this amendment was in a complete revision of our code of substantive and adjective law.

The Code of Civil Procedure so adopted had in it some 1,100 sections. R. S. 1866, p. 394. To impart to the Legislature a particular intent as to this one section is carrying a good rule too far. This is particularly true in view of the provisions of section 1 of the Code (p. 394) that it "* * * shall be liberally construed, with a view to promote its object, and assist the parties in obtaining justice." I am inclined to ask, does it assist the obtaining of justice to close the lips of the one witness who knows as much if not more than any other witness about the question at issue, to-wit, the mental competency of the testator at the time the will was executed?

The majority leave the impression that the amendment is of recent origin for they state: "Cases adopted since this statutory change was made which do not take cognizance thereof are not controlling precedents in determining the matter presented." Of course that means any such case in all our 153 volumes of reported decisions. On that basis the majority put aside Parker v. Parker, 78 Neb. 535, 111 N. W. 119, and In re Estate of Gray, 88 Neb. 835, 130 N. W. 746, 33 L. R. A. N. S. 319, Ann. Cas. 1912B 1037.

We held in Parker v. Parker, *supra,* that "The provisions of the code against the disclosure of confidential communications may be waived by the party in whose favor they were enacted, and the privilege of waiver extends to the personal representative of a deceased person." That case involved the testimony of an attorney who prepared the will, as does the instant case. This holding was not a mere statement in discussing the issues, but rather it was the only point in the case

deemed sufficiently important to mention in the syllabus.

In re Estate of Gray, *supra,* was a will contest where "The real controversy is between the heirs at law and the principal legatee." In that case proponent offered the testimony of a doctor to show the mental condition of testatrix where the information which enabled him to do so was acquired solely in his professional capacity. We there directly considered "eminent authority" that the privilege cannot be waived by "any one else." We there considered and quoted from what is now section 25-1206, R. R. S. 1943. We there recognized that the courts were divided on the question. We followed Parker v. Parker, *supra,* and said: "Having held in the case last cited that the right to waive the statutory privilege extends to the personal representative of a deceased person, consistency and justice require a construction which permits an executor or a legatee to compel a physician to testify to the mental condition of his patient, when that question is involved in a contest with the heirs over the probate of the patient's will. Though the courts of the country are divided on this question, the construction here announced has frequently been adopted under similar statutes." We there kept in accord with the territorial legislative purpose to construe the act so as to "assist the parties in obtaining justice." The majority now undertake to serve the "ends of justice" by granting a new trial and at the same time deny what we have heretofore held that "consistency and justice require."

These two decisions have for 40 years remained unchallenged and unquestioned in our decisions.

Admittedly the Gray case did not involve subsection 3 of section 25-1201, R. R. S. 1943. I refer to it for three reasons. The majority have seen fit to consider it an authority and cast discredit upon it. It is important in that this court there puts its approval upon the holding in the Parker case and further that we there

held that the privilege can be waived by someone other than the privileged person. The waiver provision cited and so construed in the Gray case is applicable also to the waiver provision here relied upon by the majority.

It cannot be assumed that the careful author of the Bayer opinion overlooked the Parker and Gray opinions for they are cited in the annotations of the statute from which he quoted. It seems reasonable to assume that he did not deem them as in anywise in conflict with the opinion he was writing. Adopting a phrase often used by the author of the Bayer opinion "indeed" they were not mentioned therein because that question decided by those cases was not presented in the Bayer case.

It is quite apparent that the Bayer case was not intended to decide nor did it decide the issue presently presented and is not a precedent or authority for the position taken by the majority.

It is recognized that section 25-1201, R. R. S. 1943, provides that "The following persons shall be incompetent to testify * * *" and that the issue relates to the third subsection— "* * * an attorney concerning any communication made to him by his client in that relation or his advice thereon, without the client's consent in open court or in writing produced in court." However, both of these provisions were in the 1866 act under a chapter entitled "Competency of Witnesses." § 328, p. 449, R. S. 1866. That act in a later section provided: "The *prohibitions* in the preceding sections *do not apply* to cases where the party in whose favor the respective provisions are enacted, waives the rights thereby conferred." § 334, p. 450, R. S. 1866. (Emphasis supplied.)

I submit the Legislature did not have a particular distinction in mind in expressing what is in effect the same "prohibition." But as to waiver the authorities state: "That an executor or administrator may exercise authority over all the interests of the estate left by the client, and yet may not incidentally have the

right, in the interest of that estate, to waive the privilege of concealing confidential communications affecting it, would seem too inconsistent to be maintained under any system of law. It has, indeed, seldom been maintained for the present privilege; but the denial of this waiver for another privilege, by some Courts (post, § 2391), demands here the more emphatic repudiation of such a fallacy * * *. This view is accepted with practical unanimity. It is further generally agreed that in testamentary contests the privilege is divisible, and may be waived by the executor, the administrator, the heir, the next of kin, or the legatee." 8 Wigmore, Evidence (3d ed.), § 2329, p. 634.

"The personal representative of the deceased may waive the privilege. One who is entrusted with the management of the deceased's property may surely be trusted to protect the memory and reputation of the deceased, in so far as it is liable to injury by the disclosure of his physical condition when alive. It is incongruous to hold that the person who manages the litigation of the deceased's property-interests has no power to waive rules of Evidence for the purpose of advancing those interests. The power of an heir may also be conceded, if we remember that the heir, first, is at least equally interested in preserving the ancestor's reputation, and, secondly, has an equal moral claim to protect the deceased's property-rights from unwarranted diminution. The futility, under the circumstances, of predicating any privilege is the more apparent when (as in the usual case) the issue turns upon the fact of a testator's sanity, which is so bruited publicly in the litigation that the pretense of preserving secrecy is a vain one * * *. Except in two or three jurisdictions, it is usually agreed that the deceased's or a minor's or an insane person's representative (and probably also the heir) may waive the privilege." 8 Wigmore, Evidence (3d ed.), § 2391, p. 840. See, also, 70 C. J., Witnesses,

§ 628 (2), p. 462. In both texts our opinion in the Parker case is cited.

Section 334, R. S. 1866, above quoted, became section 25-1207, R. R. S. 1943, with this amendment added in 1925 (Laws 1925, c. 74, p. 235): "* * * and if a party to any action now pending, or hereafter brought, shall offer evidence with reference to his physical or mental condition, or the alleged cause thereof, or if the personal representative of a deceased person in any such action shall offer such evidence as to such deceased person, the right conferred by section 25-1206 shall be deemed to have been waived as to any physician or surgeon who shall have attended said party or said deceased person." The language on its face leaves an inference that the Legislature intended to indicate a restriction on the waiver provisions except as to physicians or surgeons. The reference to "any action now pending" is the key to the meaning of this amendment. Culver v. Union P. R. R. Co., 112 Neb. 441, 199 N. W. 794, was filed July 18, 1924. A reading of this opinion clearly discloses that the 1925 amendment was the result of a legislative purpose to further remove the prohibitions of the statute in part in order to "assist the parties in obtaining justice."

I would hold that the trial court did not err in overruling objections to the testimony of the attorney.

MESSMORE, J., joins in the dissent.

DEAN KRISTUFEK, APPELLEE, V. WILLIAM W. RAPP, APPELLANT.

47 N. W. 2d 927

Filed July 16, 1951. No. 32985.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. On oral argument on motion

for rehearing. See *ante* p. 343, 47 N. W. 2d 923, for original opinion. *Motion for rehearing denied.*

Fraser, Connolly, Crofoot & Wenstrand, for appellant.

Pilcher & Haney, for appellee.

SUPPLEMENTAL OPINION

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

CARTER, J.

As a result of appellee's motion for rehearing it has come to our attention that one statement contained in the opinion (*ante* p. 343, 47 N. W. 2d 923) does not exactly reflect the record. In the opinion we said of the witness Mrs. Karl Stone that: "She testified that just as plaintiff started to get into his car she saw defendant's automobile strike him and go on east about 100 feet and stop, that she had driven a car for 15 years, and that in her opinion it was going 40 to 45 miles an hour." While, from certain exhibits found in the record, this distance can be calculated, however, it is true that the witness herself never testified as to how far she thought it was from the place where defendant's car struck plaintiff to the point where she saw it stop. We therefore delete from this sentence the words "about 100 feet" so the sentence will read: "She testified that just as plaintiff started to get into his car she saw defendant's automobile strike him and go on east and stop, that she had driven a car for 15 years, and that in her opinion it was going 40 to 45 miles an hour." In all other respects the opinion is adhered to and the motion for rehearing denied.

MOTION FOR REHEARING DENIED.

THEODORE L. GADE, APPELLANT, V. CHARLES CARLSON ET AL., APPELLEES.

48 N. W. 2d 727

Filed July 16, 1951. No. 32989.

1. **Negligence.** A person who knowingly and of his own volition exposes himself to an obvious danger cannot recover damages for any injury which he might have avoided by the use of reasonable care.
2. ———. Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence.
3. **Negligence: Automobiles.** When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery.

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

Gaines, Shoemaker & Crawford, Tyler B. Gaines and *Lawrence Fredericksen,* for appellant.

Gross, Welch, Vinardi & Kauffman, for appellees.

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

SIMMONS, C. J.

The plaintiff filed a petition asking damages for personal injuries against the driver of a car, Fort Crook Bus Lines, a copartnership operating a bus line, and the members of the copartnership. Service was not had on the driver of the car. The action proceeded against the remaining defendants. At the close of plaintiff's evidence, on motion of defendants, the trial court discharged the jury and dismissed the action. Plaintiff appeals. We affirm the judgment of the trial court.

The accident happened in May 1943. Petition was filed in April 1944. Trial was had in December 1950. From the briefs it appears that trial was delayed pending

unsuccessful efforts to get service on the driver of the car.

We review the evidence in accord with the established rule that a motion for a directed verdict is 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 that such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the facts in evidence.

The accident happened shortly after 8 a. m. The weather was clear and visibility was good. The place of the accident was on the highway that runs generally north and south along the west side of the military reservation of Fort Crook, south of Omaha. The highway is a 4-lane highway, two lanes for south-bound and two lanes for north-bound traffic, with a parkway between.

Plaintiff was and had been for two years prior thereto a stationary engineer at Fort Crook. He lived in Omaha and used defendants' busses to go to and from Fort Crook. On the morning in question he finished work at 8 a. m., and boarded a bus of defendants to go to Omaha as was his custom. He was a compensation-paying passenger.

The bus was about 8 feet wide, 20 feet long, with the engine in the rear, and built so that the front was straight up and down and taller than the plaintiff. It was equipped with rear view mirrors inside and outside for the use of the driver. It had windows in the rear through which the driver and passengers could see.

When the bus left the Fort Crook loading station it turned south and away from the direction to Omaha. Plaintiff told the driver that he wanted to go to Omaha. The driver told him he would put him on another bus to Omaha. A north-bound bus was seen approaching some distance to the south. The driver flagged that bus and stopped the bus in which plaintiff was riding

at a point about 3 blocks south of the starting point and along the west shoulder of the highway. It was not a regular stop or a crossing, but just alongside the highway. At the trial plaintiff testified that the driver told him to get out and cross over and get on the other bus. In his deposition taken earlier, he testified that the driver said nothing to him when he got off. The driver opened the door and plaintiff alighted on the gravel alongside the pavement. The driver made a motion to plaintiff to go around in front of the bus, which remained in position. At the trial plaintiff testified that he did not, at that point, look to the north or to the south. When his deposition was taken he testified that he looked north and south at that time.

In any event, plaintiff testified that he started across the highway in front of the bus and close enough to touch it. He went to the left front corner of the bus and stopped and looked "catty-corner across the road." He then stepped out into the highway two or more feet farther when he was hit by a south-bound automobile. He was seriously injured.

Plaintiff pleaded negligence of the defendants in five particulars: (1) In stopping the bus for the discharge of a passenger at a point other than a designated discharge point; (2) in stopping at a point where it was dangerous for a passenger to descend and cross the highway; (3) in directing the plaintiff to descend and cross the highway to board the north-bound bus at the place and under the circumstances mentioned in (1) and (2); (4) in inviting the plaintiff to descend and cross when the driver knew or should have known of the south-bound automobile and the danger to plaintiff; and (5) in failing to warn plaintiff of the approach and proximity of the south-bound automobile.

Defendants by answer denied that they were guilty of any negligence which contributed to or was the proximate cause of plaintiff's injuries and pleaded contributory negligence of plaintiff which was more than slight.

We do not deem it necessary to discuss the question of defendants' negligence.

"A person who knowingly and of his own volition exposes himself to an obvious danger cannot recover damages for any injury which he might have avoided by the use of reasonable care." Kerwin v. Thompson, Belden & Co., 110 Neb. 251, 192 N. W. 692. See, also, Grantham v. Watson Bros. Transportation Co., 142 Neb. 362, 6 N. W. 2d 372, on rehearing, 142 Neb. 367, 9 N. W. 2d 157. "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, last followed in Tite v. Omaha Coliseum Corporation, 144 Neb. 22, 12 N. W. 2d 90, 149 A. L. R. 1164.

The test of the plea of contributory negligence here then is, was the plaintiff exercising reasonable care to avoid an obvious danger in doing what he did?

Plaintiff was on a highway that he had traveled north of the place of the accident for two years at least. He alighted in a place of safety. He started across the street in front of defendants' bus knowing that it shut off his view to the north. His actions clearly demonstrate that he realized there was danger in going onto the highway under the conditions then existing. He proceeded to a place where a full view to the north and the danger from a south-bound vehicle were concurrent. Ordinary prudence would have dictated that he wait in his place of safety until the bus had moved on or go around to the rear of the bus. He did neither. Jones v. Florios, 248 Mich. 153, 226 N. W. 852.

In Troup v. Porter, 126 Neb. 93, 252 N. W. 611, the fact was that Judge Troup came into the street from between two parked cars into the lane of travel of automobiles and was hit and killed. A majority deemed there was negligence shown on the part of the decedent. Defendant knew of the custom of people to cross there. There speed of 25 miles an hour was shown. Here the speed of the automobile that hit plaintiff is not shown.

We there held that as a matter of law decedent in stepping from between two parked automobiles directly in front of defendant's car without looking was guilty of more than slight negligence in comparison with the negligence of the defendant. In McDonald v. Omaha & C. B. St. Ry. Co., 128 Neb. 17, 257 N. W. 489, we denied recovery where plaintiff moved from a place of safety into a place of danger. In Travinsky v. Omaha & C. B. St. Ry. Co., 137 Neb. 168, 288 N. W. 512, we held: "The negligence does not arise from the single circumstance of whether the pedestrian looks or does not look. The determining element in this type of case is the sudden movement into the path of the vehicle followed by almost instantaneous collision." We followed this case in Cuevas v. Yellow Cab & Baggage Co., 141 Neb. 662, 4 N. W. 2d 790. In the Cuevas case we held: "When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery."

In Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436, we followed the rule that "One who attempts to cross a street between intersections without looking is guilty of such negligence as will bar a recovery as a matter of law. If he testifies that he did look, it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse for not seeing is shown."

It is recognized that plaintiff testified both that he looked and did not look while he was standing on the curb. Thereafter he moved into the front of the bus where he could not see. There in order to see to the north he had to expose himself to danger. This could have been avoided by the exercise of ordinary care.

We are mindful of the contention advanced here that plaintiff was moving under the direction of defendants.

The motion of the bus driver to go in front of the bus was obviously nothing more than an indication that the bus would not move forward until plaintiff had passed across in front. It would not support a finding that plaintiff had lost control of or was not responsible for his own movements. The testimony of the plaintiff shows without dispute that he was in control of his own movements and of his own volition stepped into the place of danger.

Plaintiff's contributory negligence bars recovery as a matter of law.

The judgment of the district court is affirmed.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1951

COUNCIL BLUFFS TRANSIT COMPANY, A CORPORATION, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

49 N. W. 2d 453

Filed October 11, 1951. No. 32878.

1. **Constitutional Law.** While it is competent for a legislative body to make classifications for legislative purposes, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified.
2. **Municipal Corporations.** Municipal corporations are prima facie the judges of the necessity and reasonableness of ordinances. A legal presumption exists in their favor unless the contrary appears on their face or unless unreasonableness is established by clear and unequivocal evidence.
3. ———. 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.
4. ———. In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised.
5. ———. The burden is upon a person attacking an ordinance as invalid to show that a regulation imposed by it is so un-

reasonable and arbitrary as to amount to depriving such person of property without due process of law.

6. **Municipal Corporations: Streets.** A city has the right by ordinance to prescribe reasonable regulations for the control of traffic on its streets as a matter of public safety.
7. **Constitutional Law.** A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid simply because it may affect incidentally the exercise of some right guaranteed by the Constitution. In all matters within the police power some compromise between the exigencies of public health and safety and the free exercise of their rights by individuals must be reached.
8. **Municipal Corporations: Streets.** In dealing with the problem of control of traffic on its streets in a proper exercise of the police power a city may adopt the expedient of prohibiting operations thereon by additional carriers.
9. **Constitutional Law: Carriers.** The guaranty of equal protection does not prevent the state or a city from adopting the simple expedient of prohibiting operations by additional carriers.
10. **Carriers.** Evidence that one interstate carrier is granted the right by a city to use certain streets is not a sufficient fact to establish the right of another interstate carrier, operating under a like interstate authority, to use the same streets.

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

Gaines, Shoemaker & Crawford, for appellant.

Edward F. Fogarty, Edward Sklenicka, Herbert M. Fitle, and *James M. Paxson,* for appellees.

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

SIMMONS, C. J.

It will be necessary in this opinion to refer to the city of Omaha, Nebraska, hereinafter called Omaha, and to the city of Council Bluffs, Iowa, hereinafter called Council Bluffs. The Omaha & Council Bluffs Railway and Bridge Company operates through an agency agreement with the Omaha & Council Bluffs Street Railway Company. These corporations will be referred to re-

spectively herein as Bridge Company and Railway Company. The Council Bluffs Transit Company will be hereinafter called Transit Company.

So far as material here, Transit Company seeks a decree declaring that ordinance No. 16477 of Omaha is unconstitutional and void; that certain provisions of ordinance No. 14924 of Omaha are not applicable to or enforceable against this plaintiff and that they be declared discriminatory, unconstitutional, and void; and that Omaha be enjoined from enforcing said ordinances as to the plaintiff "* * * or from in any manner whatsoever interferring (sic) with the plaintiff or its representatives in the operation of its buses within the City of Omaha, Nebraska, in compliance with the orders of the Interstate Commerce Commission * * *" and for equitable relief.

Transit Company secured first a restraining order and then a temporary injunction protecting its operations pending the determination of the issues presented. Issues were made, and trial was had. The court decreed that the ordinances involved were valid and constitutional and enforceable against Transit Company, dissolved the restraining order and temporary injunction, and dismissed Transit Company's petition. Transit Company appeals. We affirm the judgment of the trial court.

The two ordinances involved are No. 14924, section 29-1.4(a), hereinafter referred to as No. 14924, and No. 16477.

Ordinance No. 14924 was adopted by Omaha in 1941, and so far as material here is: "'* * * It shall be unlawful for the driver of any auto bus to deviate from the route set forth by the permit granted by the City Council, except at either termini of such route, and in the event such driver so deviates, he shall return to said termini before resuming his running on such route, and, except in case any street or thoroughfare is blocked or obstructed, said vehicle shall be permitted to operate

temporarily, until, the obstruction or blockage is removed, over the best alternative route, subject to the direction of the City Council'."

Ordinance No. 16477 so far as material here is: "No common carrier of passengers operating with motor buses between Council Bluffs, Iowa, and Omaha, Nebraska, on or before October 9, 1949, shall operate the said buses over any of the streets of the City of Omaha other than those specified by name or highway number in the certificate of the said carrier from the Inter-state Commerce Commission and those actually used by it on regular schedules on or before October 9, 1949." Ordinance No. 16477 was passed October 25, 1949, and by its terms became effective 15 days thereafter.

Omaha and Council Bluffs are neighbor cities on the Missouri River. For many years Bridge Company provided interstate transportation of passengers by streetcar between the two cities. Bridge Company and Railway Company, operating under the agency agreement, had intracity rights in both cities. The intracity rights in Council Bluffs terminated in 1948 and Transit Company was granted those rights.

Transit Company, Bridge Company, and Railway Company then applied to the Interstate Commerce Commission for temporary authority to operate as common carriers by motor vehicle for hire between Omaha and Council Bluffs. The commission granted temporary authority to Transit Company and Bridge Company to operate interstate motor bus lines as common carriers of "Passengers, between Omaha, Nebraska and Council Bluffs, Iowa, over U. S. Highway 75 and city streets." Railway Company's application was denied. We are here concerned with claimed rights of Bridge Company and Transit Company.

Omaha's numbered streets begin from the east. U. S. Highway No. 75 enters Omaha on Douglas Street, turns south at Thirteenth Street, and follows that route out of the city. The streets, whose use is here in dispute,

are to the west of Thirteenth Street in Omaha.

Bridge Company for many years turned its cars in interstate operation at Twentieth Street. Following the grant of the Interstate Commerce Commission authority, Bridge Company put on buses and turned them at Eighteenth Street, going west on Harney from Fourteenth to Eighteenth Streets, thence north to Farnam Street, thence east on Farnam Street to Tenth Street. Bridge Company did not have specific authority to make this routing, Omaha's position being that it had that right under existing franchise. Transit Company does not challenge that contention here. In any event, it is agreed that they had that express authority following the passage of ordinance No. 16477. Bridge Company then had turned first at Twentieth Street and later at Eighteenth Street in its interstate operation.

Following the grant of authority by the Interstate Commerce Commission, Transit Company commenced operations on September 15, 1948, making its turn on Fourteenth Street between Douglas and Harney Streets, having a day prior thereto applied to Omaha for authority to go west on Harney from Fourteenth to Eighteenth, thence north across Farnam Street to Douglas, and thence east to U. S. Highway No. 75.

On October 19, 1948, Omaha denied this application and by resolution granted temporary authority which required that the turn be on Fourteenth Street.

On August 24, 1949, Transit Company filed its application with Omaha for authority to operate on the identical route west of Fourteenth Street that was being then followed by Bridge Company. This application was denied on October 4, 1949.

On October 10, 1949, Transit Company commenced operations west of Fourteenth Street on the route covered by its application that had been denied six days before.

Omaha then passed ordinance No. 16477, the effect of which was to make Transit Company's operation west of Fourteenth Street a violation of the ordinance and to

permit Bridge Company's operations west to Eighteenth Street. Omaha then undertook on November 10, 1949, to enforce ordinance No. 16477 by proceedings in municipal court against a Transit Company employee. That court held that the ordinance was discriminatory and unconstitutional. Omaha then on November 19, 1949, undertook to enforce ordinance No. 14924 by like proceedings. The action here was brought on November 21, 1949, with the result heretofore stated.

Transit Company charged that ordinance No. 16477 was unconstitutional in that it discriminated between companies within the same class and deprived it of its equal right to engage in a lawful business in Omaha, and therefore deprived it of its property, all in violation of Article XIV, section 1, of the Constitution of the United States, and Article I, section 3, of the Constitution of Nebraska.

Transit Company charged that ordinance No. 14924 was not enforceable against companies holding authority from the Interstate Commerce Commission to operate in Omaha, and that it violated the commerce clause of the Constitution of the United States and was discriminatory and unconstitutional for the reasons assigned as to ordinance No. 16477.

Omaha answered that the ordinances were enacted in the exercise of its police power generally and particularly its power to control traffic on the streets; that there was no conflict between the ordinances and the orders of the Interstate Commerce Commission; and that the order of the commission left it to Omaha to determine the streets to be used by the two carriers in the turn-around in their interstate operations.

Transit Company bases its appeal here on the ground that both it and Bridge Company are operating under the same authority of the Interstate Commerce Commission granted at the same time; that the action of Omaha in limiting its use of the streets to Fourteenth

Street and allowing Bridge Company to operate to Eighteenth Street is not a reasonable exercise of Omaha's police power and is discriminatory, unconstitutional, and void; and that both companies have the same rights to the use of Omaha streets. It states the questions submitted as: Do these ordinances arbitrarily discriminate between the two companies; do they operate uniformly upon each company; and the question of "* * * whether in the exercise of this power it has discriminated against the plaintiff company * * *." It states that "* * * Omaha under its police power has the authority to regulate the operation of buses engaged in interstate commerce and traveling over the streets of the city."

Omaha's position is that there has been no unlawful or unreasonable discrimination.

In adopting the two ordinances here involved, Omaha acted legislatively. State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683. The long established and often followed rule is: "* * * while it is competent for the legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified." State ex rel. Dawson County v. Farmers & Merchants Irrigation Co., 59 Neb. 1, 80 N. W. 52.

Municipal corporations are prima facie the judges of the necessity and reasonableness of ordinances. A legal presumption exists in their favor unless the contrary appears on their face or unless unreasonableness is established by clear and unequivocal evidence. Webber v. City of Scottsbluff, 141 Neb. 363, 3 N. W. 2d 635.

"In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation."

"In the exercise of police power delegated by the

state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised." City of Omaha v. Glissmann, 151 Neb. 895, 39 N. W. 2d 828.

The burden is upon a person attacking an ordinance as invalid to show that a regulation imposed by it is so unreasonable and arbitrary as to amount to depriving such person of property without due process of law. Clough v. North Central Gas Co., 150 Neb. 418, 34 N. W. 2d 862.

The only discrimination that appears here is that Transit Company is required to turn its route at Fourteenth Street, while Bridge Company is permitted to turn its route at Eighteenth Street. From that we are expected to assume that Transit Company is denied access to potential traffic that is accorded to Bridge Company in that four-block-long area. There is nothing in this record upon which such an assumption can be based.

Transit Company argues here that prior to 1948, neither company was engaged in the business of operating motor buses for the transportation of passengers in interstate commerce; both companies are operating under the identical temporary authority of the Interstate Commerce Commission, an authority that does not specify the city streets over which each may operate; both companies are engaged only in interstate commerce in Omaha, and hence they are similarly situated and are engaged in operating a business in the same class.

We refer first to Transit Company's contention that prior to September 1948, neither company had been engaged in the business of operating motor buses for the transportation of passengers in interstate commerce. The applications here referred to have been determined by Division 5 of the Interstate Commerce Commission. See Omaha & Council Bluffs Railway & Bridge Com-

pany Common Carrier Application, 49 M. C. C. 445. In the course of its discussions and conclusions the division considered a comparable contention of Transit Company and held that under the circumstances there shown they were justified in treating the past operations of Bridge Company and Railway Company "* * * as having been conducted by the companies as a single carrier" and that the applications of Bridge Company and Railway Company were "* * * in reality for authority merely to utilize a new facility in the rendition of a service they have been performing for a half century." We follow that reasoning and conclusion here.

Transit Company relies upon our decisions in Ernesti v. City of Grand Island, 125 Neb. 688, 251 N. W. 899; Webber v. City of Scottsbluff, *supra;* State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835; and City of Lincoln v. Lincoln Gas & Electric Light Co., 100 Neb. 182, 158 N. W. 962.

The Ernesti case specifically recognizes the rule as heretofore stated from State ex rel. Dawson County v. Farmers & Merchants Irrigation Co., *supra.* The cases recognize the rule but find no valid basis for the discrimination in the facts of the case. Here we have no facts upon which to base a finding to overcome the presumption of validity of the ordinances under the above rules. There is no evidence here as to the amount of the use of the streets that either of the companies is making or proposes to make of the streets involved, neither is there any evidence of a comparative use. Omaha has knowledge of the width of its streets and the uses to which they are put; it has knowledge of its traffic problems, the density of use, and all other matters. It knows whether or not it is necessary to measure out the use of its streets and the extent of the use. It has only one set of streets. In the absence of evidence, as here, it is presumed that it acted with full knowledge of all conditions in determining when and how its police power should be exercised.

It then becomes a question of law as to whether or not Omaha has the power to grant the use of certain streets to Bridge Company and deny the use of those streets to Transit Company.

Transit Company here asserts the right to select the same route through Omaha that Bridge Company has been granted, or any other route that it chooses, and that without regard to any problem of traffic, public safety, or otherwise, that it is the duty of Omaha to solve. The issue then is, may Omaha designate separate routes within the city to be followed by such carriers in interstate commerce? The problem must be determined here in the light of the presumptions of fact and validity that follow from the state of this record.

In State v. Hind, 143 Neb. 479, 10 N. W. 2d 258, we held: "The city clearly has the right by ordinance to prescribe reasonable regulations for the control of traffic on its streets as a matter of public safety." We also approved this rule: "'A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid simply because it may affect incidentally the exercise of some right guaranteed by the Constitution. In all matters within the police power some compromise between the exigencies of public health and safety and the free exercise of their rights by individuals must be reached.'"

It is apparent that the Interstate Commerce Commission has not undertaken to exercise any authority in this matter.

It also is apparent that the ordinances here involved do not prevent either company from operating in interstate commerce. The Supreme Court of the United States has held: "Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce." Railway Express

Agency, Inc. v. New York, 336 U. S. 106, 69 S. Ct. 463, 93 L. Ed. 533.

In dealing with the problem of restricting the volume of traffic, the Supreme Court of the United States has held that it is not necessary to limit the extent of each certificate holder's use, and that "The guaranty of equal protection does not prevent the State from adopting the simple expedient of prohibiting operations by additional carriers." Bradley v. Public Utilities Commission, 289 U. S. 92, 53 S. Ct. 577, 77 L. Ed. 1053, 85 A. L. R. 1131. The same rule would, of course, apply to cities. That it seems to us is all Omaha has done here.

Evidence that one interstate carrier is granted the right by a city to use certain streets is not a sufficient fact to establish the right of another interstate carrier, operating under a like interstate authority, to use the same streets. A number of reasons are given for such a rule. As said in Railroad Commission v. McDonald (Tex. Civ. App.), 90 S. W. 2d 581, the use made by the first permittee may be all that the public safety and convenience will permit. A like conclusion was reached in Motor Transport & Truck Co. v. Public Utilities Commission, 125 Ohio St. 374, 181 N. E. 665, where the court pointed out that the record did not disclose that the order would result in either a substantial interference with or prohibition of the business of one engaged in interstate commerce, or that the carrier could not operate over another highway as well as over the congested one. See, also, People's Transit Co. v. Henshaw, 20 F. 2d 87; Town of Ascarate v. Villalobos (Tex.), 223 S. W. 2d 945.

An authoritative text states the rule generally as follows: "The right to operate vehicles on the streets of a municipality as a common carrier for hire is not an inherent or vested right, but is in the nature of a special right or privilege which may be exercised only by license or permission of the state, or of the municipality, under its delegated powers, and an individual conducting such a business without such permission

may be deprived of such right without compensation, as long as his right to pass over streets and do anything incident to their use for purposes of travel is not interfered with.

"As a mere privilege, the use of streets by common carriers is subject to reasonable control and regulation, and, since such a right or privilege is special, unusual, and extraordinary, the power to regulate and restrict such use of the streets is broader than in respect of their use by the general public. The state or municipality, within the limits of its delegated powers, may determine to what extent or on what streets such an extraordinary use as encroaches on the paramount rights of the public at large will be permitted, and it may discriminate against those making such use of the streets, and may either grant or withhold the right or privilege of operating vehicles for such a purpose, and may grant it to some and refuse it to others, without violating the constitution, except that a license or permission cannot be granted to some and refused to others who are willing to comply with the terms and conditions of the regulation providing for such license or permission." 64 C. J. S., Municipal Corporations, § 1760, p. 199.

We conclude, as did the trial court, that the ordinances are valid. Its judgment is affirmed.

AFFIRMED.

CARTER, J., dissenting.

On September 3, 1948, the Council Bluffs Transit Company was granted temporary authority by the Interstate Commerce Commission to operate as a common carrier of passengers by motor vehicle in interstate commerce between Omaha, Nebraska, and Council Bluffs, Iowa. The order granting such authority specifies "passengers between Omaha, Nebraska, and Council Bluffs, Iowa, over U. S. Highway 75 and city streets." On September 14, 1948, the Omaha & Council Bluffs Railway and Bridge Company was granted similar authority by the Interstate Commerce Commission between the same points in lan-

guage identical with that granted the Council Bluffs Transit Company. For convenience the two carriers will be referred to as the Transit Company and the Bridge Company. On September 14, 1948, Transit Company applied to the city council of Omaha for a permit to operate as far west as Eighteenth Street in Omaha. The application was denied. A later application made to the city council was also denied. On October 10, 1949, Transit Company commenced operating its buses west to Eighteenth Street. On October 25, 1949, the city council passed ordinance No. 16477 which provides that: "No common carrier of passengers operating with motor buses between Council Bluffs, Iowa, and Omaha, Nebraska, on or before October 9, 1949, shall operate the said buses over any of the streets of the City of Omaha other than those specified by name and or highway number in the certificate of the said carrier from the Inter-State Commerce Commission and those actually used by it on regular schedules on or before October 9, 1949." The Transit Company contends that this ordinance constitutes an invalid exercise of the police power by the city council of the city of Omaha.

The record shows that neither the Transit Company nor the Bridge Company had ever had any express authority granted to it to operate motor buses over the city streets of Omaha prior to the adoption of ordinance No. 16477 on October 25, 1949. Neither had either of the two companies operated in interstate business under Interstate Commerce Commission authority previous to the granting of the temporary orders herein mentioned. It is clear from the record that the authority of each to operate was identical prior to the passage of ordinance No. 16477. Contrary to the statement made in the majority opinion, neither had ever held a franchise granted by the city of Omaha, and certainly it was beyond the powers of the city of Omaha to grant a franchise to carry interstate passengers between Omaha and Council Bluffs.

It will not be questioned in this dissent that the city

of Omaha under its police power may reasonably regulate traffic upon its streets, including common carriers engaged in interstate commerce. But it is submitted that such regulation must be reasonable, it must operate uniformly as to class, the classifications must be reasonable, and the regulations must not be discriminatory or confiscatory. The holdings to this effect are legion. Webber v. City of Scottsbluff, 141 Neb. 363, 3 N. W. 2d 635; Ernesti v. City of Grand Island, 125 Neb. 688, 251 N. W. 899; Jewel Tea Co. v. City of Geneva, 137 Neb. 768, 291 N. W. 664. The majority opinion does not question the principles announced in the foregoing cases. It simply holds in effect that they have no application in a case where the use of city streets by common carriers is involved. It is submitted that although the law permits more stringent regulation of paid carriers in the use of public streets and highways, it in no manner permits or authorizes a departure from the rules as to reasonableness, classification, uniformity of operation, and freedom from discrimination and confiscation that is required in any other general exercise of the police power.

It is submitted that Transit Company and Bridge Company are in identical situations insofar as their regulation by the city of Omaha is concerned and that the ordinance prescribes an unreasonable classification when it fixes the use of streets on regular schedules before and after the arbitrary date of October 9, 1949, as the basis of its action. It is nothing more than the arbitrary division of members of the same class for purposes of legislation, a method which has been uniformly condemned as an improper exercise of the police power. If the fixing of an arbitrary date is sufficient in itself to sustain the classifications created for legislative purposes, reasonableness of classification and uniformity of operation as to class no longer protect against discrimination and confiscation. The protecting mantle of the Constitution is gone and the citizen is at the mercy of

legislative bodies, irrespective of constitutional prohibitions.

It is argued that because one of the two interstate carriers has previously contracted with a third intrastate carrier in the past to transport interstate passengers between Omaha and Council Bluffs, although without authority from the Interstate Commerce Commission, this gives a superior right which the city of Omaha can protect. There are two valid answers to this contention. First, the classification made by ordinance No. 16477 is not made on any such basis, and, second, no such plenary power is lodged with the city council of the city of Omaha. The majority opinion applies to a city ordinance the rules which courts have limited to the plenary powers over common carriers granted to railway and public utility commissions by specific constitutional grant. A perusal of the cases cited in the majority opinion is conclusive on this point. It is submitted that a city council has no such power in this state. Municipalities have no authority in this state to regulate common carriers for the purpose of protecting them from competition for the public welfare, or to foster monopolies and regulate them in the public interest by fixing rates and determining routes. The Constitution places that power exclusively in the railway commission by the following language contained in Article IV, section 20, thereof: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." In the absence of implementing legislation the provision is self-executing. It is exclusive, and the powers of the railway commission cannot be properly invaded by a municipality. The power to grant certificates of convenience and necessity to protect established carriers against harmful competition rests exclusively with the railway commission. State ex rel.

State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502. Municipalities in this state have never been granted plenary powers over common carriers. Any theory that the present ordinance can be upheld as a means of protecting an established common carrier against the inroads of competition by another simply has no basis in law. If such be the reason for the ordinance, the parties are in the wrong forum.

We have repeatedly held that where, in the exercise of the police power, an ordinance is passed which shows on its face that the classifications made are unreasonable and arbitrary, that it does not operate uniformly as to class and is therefore discriminatory, it is void. It is only where such an ordinance appears regular on its face, but is in fact discriminatory or confiscatory, that evidence must be produced to establish injury to the complainant to overcome the presumption of regularity. There is no presumption of validity of an ordinance which is void on its face.

I submit that the classifications contained in the ordinance as a basis for legislation are made on an arbitrary basis and are therefore unreasonable. The purported classification is nothing more than a division of members of the same class for the purposes of the legislation and consequently violates the rule as to uniformity of operation upon those in the same class. The ordinance is discriminatory on its face and is void for that reason. It, if sustained, permits the exercise by a municipality of plenary powers over common carriers where the Constitution exclusively reserves such powers to the railway commission. The ordinance shows, also, that its object was something other than the safety and welfare of the public or the protection of the city's streets. Its purpose was clearly to favor one over another in the same class by attempting in an arbitrary manner to divide the class by the use of an arbitrary date. It freezes the designated class when it makes common carriers of passengers operating with motor buses "over any of

the streets of the City of Omaha other than those specified by name or highway number in the certificate of the said carrier from the Inter-state Commerce Commission and those actually used by it on regular schedules on or before October 9, 1949." The benefits are special and discriminatory in that no person or entity, other than the Bridge Company, can ever be a member of the class limited to those operating prior to the arbitrary date of October 9, 1949.

I submit that ordinance No. 16477 violates almost every limitation which has heretofore been placed upon the exercise of the police power by legislative bodies. In upholding the validity of the ordinance this court has abandoned fundamental principles which have protected the citizen against discriminatory and confiscatory legislation. To the striking down of this protection against discrimination and confiscation I respectfully but emphatically dissent.

I am directed by Wenke and Boslaugh, JJ., to state that they join in this dissent.

CHAPPELL, J., concurring.

I do not question propositions of law discussed and relied upon in the dissenting opinion. However, I do deny that they are controlling under the particular facts, circumstances, and issues presented in this case.

In that connection it was stipulated by the parties that the Railway Company did operate the streetcar line between Council Bluffs, Iowa, and Omaha, Nebraska, under an agency or management contract with the Bridge Company from 1902 or thereabouts to September 15, 1948, and has operated a motorbus line between Council Bluffs and Omaha under another such an agency or management contract since on or about September 15, 1948.

It was further stipulated that since on or after August 10, 1930, the streetcar lines ran as far as Twentieth Street in Omaha until conclusion of the streetcar lines' operations on or about September 15, 1948, and that since

September 25, 1948, when motorbus operation was begun by the Railway Company under its agency or management contract with the Bridge Company, the west terminus of the operation had been at Eighteenth Street.

Subsection 11, page 7, of the franchise granted by the city of Omaha to the Railway Company on August 14, 1928, provided: "The Consent given by this ordinance is limited to intra-city transportation exclusively, except that grantee is hereby authorized to operate suburban, interurban or interstate electric or motor bus passenger transportation lines owned, leased or legally operated by grantee, by connecting same with its city lines or entering the city over the tracks or along the routes of grantee, for interurban transportation exclusively, and to be operated subject to all of the provisions of this ordinance and the legal requirements of Nebraska Statutes." Thereby it appears to me that the aforesaid agency or management contract was authenticated by the people of the city of Omaha.

In that connection also, the temporary permits or authority issued to Transit Company and the Bridge Company by the Interstate Commerce Commission, were not identical. The Bridge Company's permit, by appendix dated September 14, 1948, specifically provided: "Applicant is hereby authorized to enter into an agency or management agreement with the Omaha & Council Bluffs Street Railway Company, MC 57037 Sub 1 TA, during the continuance of this temporary authority, provided, however, that the service authorized by the order of which this is a part and all operations performed in the rendition of such service shall be in the name of applicant and applicant shall assume full responsibility therefor, both to the patrons of such service and to the general public." It thus authenticated the aforesaid agency or management agreement.

As I view it, under such circumstances, the classification made by the ordinances here involved was not unreasonable, arbitrary, or unlawful, because there were

but two companies involved and they were clearly not in identical situations. The Bridge Company had, by permission of the city, continuously operated over the very streets here involved for almost a quarter of a century before Transit Company attempted, without permission of the city, to intrude its lines over the same route.

The jurisdiction of the Nebraska State Railway Commission is not involved in any manner. Transit Company has never attempted to invoke it and seek any relief in that forum. In that connection, it was stated in Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756: "We must not permit a confusion between the jurisdiction of the city and the railway commission. There is a clear distinction between powers of a city to grant or withhold franchises, licenses or permits to use its streets, police power, and the exclusive constitutional power of the railway commission to impose regulation and control over the city's common carriers."

The effect of the ordinances involved was to simply deny Transit Company permission to duplicate bus service upon certain city streets. Under the circumstances, I am convinced that the city had such jurisdiction and authority.

WILLIAM F. DALTON, ADMINISTRATOR OF THE ESTATE OF SCOTT G. CASTETTER, DECEASED, ET AL., APPELLANTS, V. FLORENCE HOME FOR THE AGED, A CORPORATION, APPELLEE.

49 N. W. 2d 595

Filed October 25, 1951. No. 32982.

1. **Annuities.** Public policy does not forbid the purchase of an annuity. By the payment of a sum in gross the annuitant obtains a certain sum of money annually as long as he lives. There is no difference in principle between receiving a sum of money annually for life and that of receiving a home, including board and room, for life.

2. **Gifts.** To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, as well as a delivery by the donor and an acceptance by the donee.

3. ———. It is generally held that the transfer inter vivos should be sustained if all the facts and circumstances show the desire and the act completed, whatever may have been the method adopted.

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

Hotz & Hotz, for appellants.

Wells, Martin & Lane, for appellee.

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

WENKE, J.

William F. Dalton, as administrator of the estate of Scott G. Castetter, deceased, and Margaret Vincent Pullen and Frances Vincent Hall, nieces and sole heirs of the deceased, brought this action in the district court for Douglas County against the Florence Home for the Aged, a non-profit corporation operating a home for aged people. By their action plaintiffs ask for an accounting by the defendant of its financial dealings with Scott G. Castetter, deceased, and seek to have returned to them any balance owing by the defendant of $13,354 paid by the deceased to it for a life membership contract in its home and to recover four shares of American Telephone and Telegraph Company stock. The trial court found generally for the defendant and dismissed plaintiffs' action. Plaintiffs thereupon filed a motion for new trial and have appealed from the overruling thereof.

The appellee is a non-profit, charitable corporation organized under the laws of the State of Nebraska and operates a home in Omaha, Nebraska, for aged people of both sexes. For convenience we will herein refer to it as the Home. Scott G. Castetter, deceased, whose

dealings with the Home during his lifetime are herein involved will be referred to as the deceased.

On January 6, 1948, the deceased made an application to the Home asking that he be received as a life member. Pursuant thereto, and after he had visited the Home in February 1948, he entered the Home on March 3, 1948. The Home had a rule requiring every applicant for life membership to live in the Home for a trial or probation period of two months. It also required that such applicant be examined by its doctor before the application could be finally acted upon. This examination was made on April 1, 1948, by Dr. Charles M. Murphy who was employed by the Home for that purpose. He made a report recommending the deceased as satisfactory. Thereafter, after deceased had been in the Home two months and his application had been approved by the trustees of the Home, a contract for life membership was entered into on May 15, 1948.

The consideration for this life membership was $13,354. It was based on a charge of $900 a year for the life expectancy of the deceased. The deceased was given credit for the $180 he had paid for the two months he had been in the Home on trial. This contract provided that the Home would receive the deceased and provide him "with proper food, lodging, care and the usual nursing and medical attention furnished at the 'HOME' during the period of the 'MEMBER'S' life, in room with running water." Deceased continued to live in the Home until October 4, 1948. He died on that day.

That public policy does not forbid the purchase of an annuity does not need citation of authority. By the payment of a sum in gross the annuitant obtains a certain sum of money annually as long as he lives. There is no difference in principle between receiving a sum of money annually for life and that of receiving a home, including board and room, for life. The adequacy of the consideration is determined at the time the contract is made.

Appellants make no contention that the Home acted fraudulently, that it attempted to take unfair advantage of deceased, or that deceased was unable to understand the terms of the contract. In fact, the record discloses that deceased fully understood the terms of the contract and that he was at all times, up to the very time of his death, pleased with the arrangements he had made and happy in his new home.

However, appellants contend that this court, under its equity powers, should, under the circumstances here disclosed, adjust the payment made by deceased to the Home so as to avoid unconscionable results and prevent an unjust enrichment of the Home. In support of this contention it relies on the following principles:

"Distinction exists as between an ordinary commercial contract and a contract of the kind here considered. Contracts of the latter class are in a different classification and not subject to the ordinary rules applied by courts in other cases. Anderson v. Reed, 20 N. M. 202, 148 Pac. 502, L. R. A. 1916B, 862." Copass v. Wilborn, 139 Neb. 124, 296 N. W. 565. See Whitney v. Combe, 151 Neb. 401, 37 N. W. 2d 613.

"Constructive fraud, a term applied to a great variety of transactions which equity regards as wrongful and to which it attaches the same or similar effects as those that follow actual fraud, has been evolved to designate what is essentially nothing more than the receipt and retention of unmerited benefits. Constructive trusts arise by operation of law to prevent injustice; fraud, active or constructive, is their essential element, and they will arise whenever it becomes necessary to prevent a failure of justice. Equity will construct a trust where a person gains something he should not be permitted to hold in equity and good conscience through actual fraud, abuse of confidence, or questionable means. A constructive trust arises not from agreement but from operation of equities in order to satisfy demands of justice. A court of equity, in decreeing a constructive

trust, is bound by no unyielding formula as the equity of the transaction must shape the measure of relief. A constructive trust is imposed not because of the intention of the parties but because the person holding the title to the property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property. Constructive trusts are such as are raised by equity in respect of property which has been acquired by fraud, or where, though acquired without fraud, it is against equity that it should be retained by him who holds it." Olitkowski v. St. Casimir's Savings & Loan Assn., 302 Mich. 303, 4 N. W. 2d 664. See, Johnson v. Radio Station WOW, 144 Neb. 406, 13 N. W. 2d 556; Restatement, Restitution, § 160, p. 640.

In order to dispose of this contention we shall set out somewhat in detail the facts disclosed by the record as they relate thereto. Deceased was born on November 19, 1886. Either he was born with curvature of the spine or became afflicted with it in his early youth. This affliction caused him to become a pronounced hunchback with a protruding chest and resulted in his remaining small in stature and light in weight. His greatest height is shown as 4 feet 5¼ inches and his heaviest weight as 80 pounds. It also caused him to have difficulty in breathing, particularly when he exerted himself. Little is shown of his early life. He apparently lived with his parents. For some years prior to 1942 they lived in Blair, Nebraska. During his life, but prior to 1942, deceased held various jobs, such as working in a bank, bookkeeper in a store, and selling bus tickets. His condition did not permit him to perform any arduous labors.

The Castetter family consisted of the parents, deceased, and one sister, Hallie Castetter Vincent. The sister died of a stroke in 1942 at the age of 64 years, the mother died in June 1938 at the age of 83 years, and the father died on February 16, 1942, at the age of 94 years.

The sister had two daughters, nieces of deceased and appellants here.

In 1942 deceased became considerably run-down and in poor health. His weight went from about 80 to 70 pounds. Because of his condition he entered the Blair Hospital in September of that year and remained there, being a patient for several months. He gradually recovered. In April 1943 he went to stay with his niece Margaret Vincent Pullen who lives in Des Moines, Iowa. He stayed there 3 or 4 months but because of her employment she was not able to take care of him. He then returned to Blair and again entered the hospital but not as a patient but only to make it his home as he apparently had no other place to live.

He stayed in the Blair Hospital and made it his home until he entered the Home on March 3, 1948. Prior to entering the Home he had, on January 6, 1948, made an application for a life membership. On his application he stated: "I will gladly give all I have to the Home. The Home is doing wonderful good for people that need care and I for one would give any amount I would have to help along the good cause." In this application he listed his property as a store building valued between $12,000 and $18,000, four shares of American Telephone and Telegraph Company stock, and $400 in cash. He sold the store building in March 1948 for $15,000.

The deceased, at this time, was apparently seeking the security of a permanent home for it appears he had made offers to others agreeing to give them everything he had if they would agree to provide him with a home for the rest of his life.

After he entered the Home deceased was on a two month trial or probation period to make sure he wanted to permanently live in the Home and to permit the Home to see if it wanted him. This is a rule of the Home applicable to all seeking to come into it as a life member. The Home also requires that every applicant for

life membership have a complete physical check-up before his application can be acted upon by the board of trustees of the Home who have the final authority to either accept or reject the application. Dr. Charles M. Murphy of Omaha was employed by the Home for this purpose and gave deceased a complete physical examination on April 1, 1948. The examination disclosed that deceased's condition made his breathing more difficult and rapid than an ordinary person. It also disclosed that deceased had a condition affecting his heart but not of such a nature that it would be apt to cause death. Dr. Murphy reported the results of his examination to the Home and recommended that deceased be accepted. He did so because he thought deceased, given good care such as the Home provided, would probably live out a normal span of life for a man in his condition, although he recognized he probably could not withstand any serious pulmonary disease such as pneumonia. On May 12, 1948, the superintendent recommended to the board of trustees that the application of deceased be approved. This was done and on May 15, 1948, the contract was entered into.

That deceased was a pronounced hunchback with protruding chest and short of breath, especially when he exerted himself, and had a poor color was apparent to everyone who saw him. But this condition had existed for many years, if not all his life. He was 61 years of age when he entered the Home. His condition was apparently no different when he entered the Home than it had been while he was living in the hospital at Blair, except for the few months he was being treated by a doctor immediately following his entry therein in September 1942.

After deceased entered the Home he seemed to be satisfied with the arrangement and happy there. Nothing further happened of serious consequence until October 4, 1948, although some six or eight weeks prior thereto Dr. Murphy was called when deceased had a swelling of the ankles and had become very short of

breath. He was treated for those conditions and responded very well to the treatment given him.

On October 4, 1948, deceased had been around in the yard of the Home during the afternoon and had eaten his evening meal in the dining room. Shortly thereafter he became sick and Dr. Murphy was called. Dr. Murphy diagnosed the trouble as pneumonia and ordered that he be sent to a hospital. Deceased was taken to the Nebraska Methodist Hospital in Omaha. He entered there at 8:05 p. m. on October 4, 1948, having been taken there by ambulance. He died at 9:32 p. m of the same day. An autopsy was performed on his body by a pathologist. The pathologist gave as the cause of death a progressive heart condition that had been coming on for many years. It was Dr. Murphy's conclusion that death was due to pneumonia which probably affected his heart.

The uncertainty of the time during which the Home would continue performance of the contract was naturally within the contemplation of the parties and they must be presumed to have contracted with reference thereto. From the very nature of this type of contract some stand to financially gain while others will lose.

As stated in Walker v. Bales, 29 Tenn. App. 471, 197 S. W. 2d 401: "Because of the inherent nature of the agreement, involving, as it did, the uncertainty of life, the ordinary standard for testing the adequacy of the consideration to support a transfer of property cannot be applied in a case of this kind. The matter is not to be viewed with hindsight, but considered from the viewpoint of the parties at the time. Subsequent events, such as the early death of the person to be cared for, cannot be used to determine the fairness of the contract or the adequacy of the consideration. Considerable weight must be given the fact that the immediate parties were satisfied with the terms of the agreement. Dingler v. Ritzius, 42 Idaho 614, 247 P. 10, 49 A. L. R. 598, and note."

Taking into consideration all of the circumstances and

conditions existing at the time the parties negotiated the contract, we do not think it requires the Home to return to the deceased's estate any part of the consideration paid by him for his life membership in the Home.

Appellants further contend the Home terminated the contract when it took deceased to the Nebraska Methodist Hospital. It is true that the party's life membership contract has provisions providing for its termination by the Home under certain conditions but no such conditions here existed nor did the Home attempt to take such action.

The Home has some facilities for taking care of its members when they become sick and in its life membership contract agrees to provide to members the usual nursing and medical care which it has available. However, it has always been the practice of the Home, when its members become seriously ill, to take them to a hospital and then, when they have sufficiently recovered, to bring them back to the Home to convalesce. Facilities are available for this purpose. During this time the Home keeps the members' room available for their return. It was not the intention of the Home to terminate deceased's contract when it took him to the hospital because of his serious illness and merely taking him there for that purpose certainly did not have that effect as a matter of law.

We think what the court said in Wright v. Mary Galloway Home for Aged Women, 186 Miss. 197, 187 So. 752, is here applicable. Therein the court said: "The contention that Mrs. McClain's obligation to pay for her care in the Home did not arise because she did not continue as an inmate therein until her death is without merit. The Home, on account of serious heart trouble from which she was suffering, placed her in the John Gaston Hospital in Memphis to be treated therefor. She died after being there about three weeks. We think while there she was really still an inmate of the Home. If she had recovered, she would doubtless have returned."

Appellants further contend they are entitled to recover four shares of American Telephone and Telegraph Company stock because the Home failed to establish they were given to it by deceased during his lifetime.

"To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, as well as a delivery by the donor and an acceptance by the donee.

"It is generally held that the transfer inter vivos should be sustained if all the facts and circumstances show the desire and the act completed, whatever may have been the method adopted." In re Estate of Vanicek, 145 Neb. 531, 17 N. W. 2d 477.

Before discussing the merits of this contention we refer briefly to the fact that both parties discuss the question of whether or not certain testimony of Rollo V. Dull, superintendent of the Home, relating to this issue is admissible under the provisions of section 25-1202, R. R. S. 1943. The trial court sustained appellants' objections thereto and the Home has taken no cross-appeal from that ruling. In any event we think the evidence received without objection is sufficient to show the stock was a gift and therefore we do not find it necessary to decide the question.

The evidence shows the deceased made an assignment of this stock to the Home and sent it to the headquarters of the American Telephone and Telegraph Company. The company acknowledged receipt thereof and returned to deceased, by letter dated August 5, 1948, a new certificate for the four shares of stock issued in the name of the Home. This certificate of stock was turned over to the Home on August 9, 1948, and they acknowledged receipt thereof and have had possession of the stock certificate ever since. This assignment and transfer of the stock to the Home was in accordance with the terms of an agreement of August 13, 1948, entered into by the Home. This agreement provided that in consideration of deceased having given the Home the four shares of stock

that the Home would do certain things, all of which the record shows the Home has fully performed.

We find that deceased, during his lifetime, voluntarily gave the Home his four shares of stock in the American Telephone and Telegraph Company and that the Home is entitled to keep them.

In view of our findings we have come to the conclusion that the dismissal of the action by the trial court was correct and it is therefore affirmed.

AFFIRMED.

ALLIANCE LOAN AND INVESTMENT COMPANY, A CORPORATION, (FRANK ABEGG AND MARY ANNA ABEGG, DOING BUSINESS AS ALLIANCE LOAN AND INVESTMENT COMPANY, SUBSTITUTED PLAINTIFFS), APPELLEES, V. MAHLON C. MORGAN ET AL., APPELLANTS.

49 N. W. 2d 593

Filed October 25, 1951. No. 33011.

1. **Replevin.** The facts necessary to entitle a plaintiff in replevin to succeed in the case must be shown to have existed at the time the action was commenced.
2. ———. Any fact that transpires after the date of the institution of a replevin case is immaterial in the consideration and determination of the merits of the case.
3. **Chattel Mortgages: Automobiles.** A chattel mortgage on a motor vehicle is void as to creditors of the mortgagor unless a notation thereof is made on the face of the certificate of title to the vehicle as required by the applicable statute of the state.
4. **Replevin.** The law requires that a plaintiff in a replevin case must recover on the strength of his right in or to the property and not upon any weakness of the interest of the defendant therein.
5. **Executions.** The levy of a valid execution by a sheriff on non-exempt property of the judgment debtor creates in him a special interest in the property and the right to the possession of it.
6. **Replevin.** If defendant in an action of replevin has only a

special interest in the property because of a lien thereon, a judgment for him must be for a return of the property, or, in the alternative, for the value of the possession thereof if a return cannot be had and for damages for the withholding of the property and costs of the suit.

7. ———. In such a case if the property cannot be returned, the measure of damage of the defendant is the amount of his lien with interest and costs, within the value of the property.

8. ———. In such a case damages for withholding property taken on a writ of replevin may be recovered only if the property is returned to the defendant.

APPEAL from the district court for Scotts Bluff County: JOHN H. KUNS, JUDGE. *Reversed and remanded with directions.*

Townsend & Youmans, for appellants.

No appearance for appellees.

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

BOSLAUGH, J.

Jack E. Mack recovered a judgment against Maurice D. Moran in the district court for Scotts Bluff County, Nebraska, an execution issued thereon was delivered to Mahlon C. Morgan, sheriff of Scotts Bluff County, and it was by him levied upon a Studebaker truck owned by the judgment debtor. He took possession of the truck at the time of the levy and maintained it until the truck was taken from him on a writ of replevin. A mortgage on the truck had been previously given by the judgment debtor to appellees to secure a debt owing to them by him. Appellees instituted a replevin action in the county court and took the truck from the sheriff. The appraisal of the truck showed a value in excess of the jurisdiction of the county court and the case was certified to the district court. Appellees claimed right of possession of the property because of their chattel mortgage. The sheriff justified his possession under the execution and levy thereof.

The parties at the conclusion of the evidence respectively moved for a directed verdict. The jury was discharged and a judgment rendered for appellants for a return of the truck, or, in the alternative, for their special interest therein in the amount of one cent and for damage for the detention of the truck in the sum of one cent and for costs. This is an appeal from that judgment.

The dates are important in this case. The chattel mortgage on the truck was given on March 18, 1949, the debt secured was due on April 18, 1949, and a notation of the mortgage on the certificate of title of the truck was made on May 24, 1949. The judgment in favor of Jack E. Mack was rendered on May 6, 1949. The execution was issued and delivered to the sheriff on May 21, 1949, and he levied it on and took possession of the truck on May 23, 1949, the day before a notation of the chattel mortgage was made on the certificate of title of the truck. The replevin case was commenced on June 1, 1949, and the property was taken from the sheriff on the writ of replevin the next day.

The gist of a replevin action is the unlawful detention of the property at the inception of the suit and the rights of the parties with respect to possession of the property at that time. What takes place thereafter is immaterial in the consideration and determination of the case. The burden is on the plaintiff in replevin to establish facts necessary for him to recover, and these must be shown to have existed at the time the action was commenced. §§ 25-10,102 and 25-10,103, R. R. S. 1943; Peterson v. Lodwick, 44 Neb. 771, 62 N. W. 1100; Brown v. Hogan, 49 Neb. 746, 69 N. W. 100; Shreck v. Gilbert, 52 Neb. 813, 73 N. W. 276; Rein v. Kendall, 55 Neb. 583, 75 N. W. 1104; Moss v. Marks, 70 Neb. 701, 97 N. W. 1031.

The notation of the mortgage of appellees was not made on the certificate of title of the truck until May 24, 1949, the day after the levy of the execution thereon.

It was, because of this fact, void as to the creditors of the mortgagor. § 60-110, R. S. 1943. Appellees could recover in this case only upon the strength of their interest in the property involved and not on any weakness in the interest of the sheriff in the property. Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913. There was a failure of appellees to produce any evidence of any lien upon or any interest in the property as against the sheriff at the time of the commencement of this case. The levy of the execution by the sheriff upon the property of the judgment debtor gave him a special interest therein and the right to the possession of it. France v. Larkin, 96 Neb. 365, 148 N. W. 86.

The record is conclusive that appellant, the sheriff of Scotts Bluff County, claimed and had at the commencement of this case, by virtue of the execution and levy thereof, a special interest in, lien on, and right of possession of the truck involved in this case. He should have had judgment for the return of the property or for the value of the possession of the property and for damages for the withholding of it and costs of suit. The value of the possession of the sheriff was the amount of the execution with interest and costs, less the payment of $354.23 made on the judgment during the pendency of the case, within the value of the property. Damages for detention of the property should include any depreciation in the value thereof while withheld from the sheriff, but such damages may only be recovered if the property is returned. §§ 25-10,103 and 25-10,104, R. R. S. 1943; Hickman-Williams Agency v. Haney, 152 Neb. 219, 40 N. W. 2d 813; Jackson v. Arndt-Snyder Motor Co., 122 Neb. 276, 240 N. W. 279. The judgment of the district court is not sustained by the evidence and is contrary to law.

The judgment should be and is reversed and the cause remanded with directions to the district court to find and adjudge that the sheriff of Scotts Bluff County had at the commencement of this case the right of possession

of the truck involved; that the truck be returned to him, or, in the alternative, if a return of it cannot be had, that the sheriff have judgment for the value of the possession thereof in the amount due upon the execution levied on the truck with interest and costs less the sum of $354.23, but not in excess of the fair, reasonable market value of the property at the time it was taken on the writ of replevin in this case; that if the truck is returned to the sheriff, that he have judgment for damages for the withholding of it since June 2, 1949; and that the value of the possession of the property and the amount of damages for the withholding of it be tried to and determined by a jury in this case.

REVERSED AND REMANDED WITH DIRECTIONS.

MASTER LABORATORIES, INC., A CORPORATION, ET AL., APPELLEES, V. GERTRUDE CHESNUT ET AL., APPELLANTS.
49 N. W. 2d 693

Filed November 2, 1951. No. 32983.

1. **Vendor and Purchaser.** It is implied in a contract to convey real estate, unless differently agreed, that a seller will convey a good or marketable title.
2. ———. Options are strictly construed and are not extended beyond the express provisions thereof.
3. ———. The acceptance of an offer to buy or sell real estate must be an unconditional acceptance of the offer as made; otherwise no contract is formed. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but is a counter proposition.
4. ———. An offer contained in an option for the sale of real estate, in which nothing is said as to the character of the deed by which the property is to be conveyed, when legally accepted, entitles a purchaser to a conveyance which will vest in him a good or marketable title, but in order to convey such a title it is not necessary that the conveyance be by warranty deed.
5. ———. If an option and its acceptance are relied upon as a

contract to convey real estate, the burden is upon the optionee to establish that his acceptance was unconditional and met the provisions contained in the option, neither falling short of nor going beyond the terms proposed by it. If the acceptance demands a warranty deed when the character of the conveyance to be made is not specified in the option, it is insufficient as an acceptance of the offer contained in the option.

6. **Pleading.** A general denial is available to a defendant to challenge one or more of the elements essential to a recovery by the plaintiff, and the effect of the denial is to put the burden on plaintiff to establish by evidence the matters denied.
7. **Landlord and Tenant: Damages.** The measure of damage for breach by the landlord of a covenant to make repairs to leased premises is generally the difference between the value of the use of the premises in the condition they were contracted to be and the rental value in their actual condition. If the contract is for a particular use by the lessee, the rental for that use is the standard by which damages may be awarded, and special losses properly pleaded and proved to have been directly and proximately caused by the default of the lessor may also be recovered.

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

Ben F. Shrier, Gray & Brumbaugh, and *Fischer, Fischer & Fischer,* for appellants.

Kennedy, Holland, DeLacy & Svoboda, and *L. J. Tierney,* for appellees.

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

BOSLAUGH, J.

Appellees sought specific performance of an option for the purchase of real estate located in the city of Omaha as set forth in a lease of the premises made to Master Laboratories by the executors of the estate of William Pfeiffer, deceased. Appellants are his devisees and the owners of the real estate. There were incidentally involved in the litigation controversies concerning repair of the building on the premises, reduced rental because of damage to the building by fire during the term

of the lease, and rental income from parts of the building collected by appellants after the date appellees claim they accepted or exercised the option.

The district court decreed performance of the option by appellants and conveyance by them to appellees of the premises by warranty deed upon payment by them to the clerk of that court the amount required by the option.

The option as expressed in the lease is as follows: "And it is further agreed that party of the second part (Master Laboratories) has the option to purchase said premises within 5 years from date hereof for $14,000.00 cash." Appellees claimed an unconditional acceptance and offer of performance of the option. They by letter to appellants within the term of the option stated: "Please be advised that we are hereby exercising our option under the April 1942 lease to purchase the building * * * and we stand ready to pay you $14,000.00 in cash for the same, simultaneously with delivery to us by you of warranty deed to the premises."

The conveyance to appellees of the premises by warranty deed made and delivered by appellants was a condition and requirement of each attempted acceptance and performance of the option by appellees. A necessary interpretation of their letters is that appellees exercised the option to purchase the real estate and would pay the consideration only when and if appellants executed and delivered a warranty deed conveying the premises to them. The effort to exercise the option by negotiation and conversation with Herbert W. Fischer, who had acted as attorney for appellants in certain matters, was an offer of appellees to give $14,000.00 for a warranty deed for the premises. They were willing to pay the stated amount when a warranty deed to the premises was furnished them by appellants. In their petition appellees asserted they had exercised the option, performed all of the conditions required of them by it, had been and were willing to pay the con-

sideration in cash, and were "willing to receive a conveyance" of the premises; but they asked the court to require that they be given a "sufficient warranty deed" by appellants. The offer and the proof of appellees at the trial contradicted their pleading. During the trial counsel for appellees inquired of appellants if they "would accept the $14,000.00 for a warranty deed, which they would execute" and followed this with a statement that "We are still ready to pay it for a warranty deed pursuant to the terms of the lease." The testimony of appellees on this subject was strictly and precisely confined to and within the narrow limits of the inquiry and the statement of their counsel.

The express terms of the option are only that the lessee could purchase the premises within five years for a stated consideration. It is silent as to the character of the conveyance in the event the holder of the option decided to buy the property. It was implied that if the option was accepted the sellers would furnish a good title, that is, as frequently defined, a marketable title. Richardson v. Greensboro Warehouse & Storage Co., 223 N. C. 344, 26 S. E. 2d 897, 149 A. L. R. 201; 49 Am. Jur., Specific Performance, § 95, p. 111; 1 Warvelle on Vendors (2d ed.), § 351, p. 412.

The inquiry important to this phase of the case is whether or not it was implied that a part or condition of an acceptance of the offer of the option by the purchaser could be that the sellers convey the premises by deed with covenants of general warranty. The terms of an option should be precisely regarded and enforced without addition or alteration. This court has adopted and applied this view. In Wright v. Barclay, 151 Neb. 94, 36 N. W. 2d 645, it is said: "Options should be strictly construed and not extended beyond the express provisions thereof. If the parties desire to extend an option in a lease beyond the term thereof they can easily use language expressly so providing but the law should not do so for them."

The exercise of an option to buy or sell real estate must be absolute, unambiguous, without condition or reservation, and in accordance with the offer made. It must not vary in any material respect from the offer either by way of omission, addition, or alteration. There must be no lack of identity between the offer and the acceptance. Anderson v. Stewart, 149 Neb. 660, 32 N. W. 2d 140, 3 A. L. R. 2d 250, states the rule in this language: "The acceptance of an offer to buy or sell real estate must be an unconditional acceptance of the offer as made; otherwise no contract is formed. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but is a counterproposition." See, also, Bergman v. Dykhouse, 316 Mich. 315, 25 N. W. 2d 210; Richardson v. Storage Co., *supra;* Restatement, Contracts, § 59, p. 65, § 60, p. 66; 55 Am. Jur., Vendor and Purchaser, § 15, p. 482, § 18, p. 484, § 38, p. 506.

Morris v. Goldthorp, 390 Ill. 186, 60 N. E. 2d 857, involved an option to sell real estate in which nothing was said as to the character of the deed by which the property was to be conveyed when properly accepted. The attempted exercise of the option by optionee required a transfer of title of the property to him by warranty deed of the optionor. The trial court determined that the attempted exercise of the option did not conform to and was not an acceptance of it as made, and denied specific performance. The Supreme Court affirmed the decree. It said: "Appellees further contend that the offer contained in the option was not accepted by appellant in accordance with its terms. As already indicated, the option constituted an offer for the sale of the property upon the terms therein prescribed. Nothing is said in the option as to the character of the deed by which the property is to be conveyed. That being true, the option, if properly accepted, entitled the purchaser to a conveyance which would vest in him

unincumbered fee-simple title, except in so far as a less estate was specified in the option * * *. In order to convey fee-simple title, it is not necessary that the conveyance be by warranty deed. A quitclaim deed is equally as effectual to pass title as a warranty deed with full covenants. * * * Nowhere in this option did the Goldthorps agree to convey by warranty deed or to warrant the title to the purchaser." See, also, Annotation, 149 A. L. R. 205; Hill v. Bell, 111 Vt. 131, 11 A. 2d 211; Trogden v. Williams, 144 N. C. 192, 56 S. E. 865, 10 L. R. A. N. S. 867; Egger v. Nesbitt, 122 Mo. 667, 27 S. W. 385, 43 Am. S. R. 596; Batie v. Allison, 77 Iowa 313, 42 N. W. 306; Bolton v. Huling, 195 Ill. 384, 63 N. E. 140. Appellees have not referred to any authority from any jurisdiction expressing a contrary view, and none has been discovered by independent research.

Appellees say that appellants did not raise the question as to the "kind of deed" until the argument on their motion for new trial, and because of this the effectiveness of their attempt to accept the offer made by the option should not be considered by this court. The record does not support their contention in this regard. The answer of appellants by general denial put in issue each allegation of the petition intended to plead acceptance of the option and offer of performance of the provisions thereof by appellees, and the answer specifically denied that appellees at any time "exercised or offered to exercise the option to purchase said property described, within the terms and provisions of said option to purchase." The pleading of appellants properly raised, and there was always thereafter present, the issue as to whether or not appellees had unconditionally and effectively accepted the offer of the option and tendered performance of the conditions thereof. Marshall v. Rowe, 126 Neb. 817, 254 N. W. 480; Barry v. Barry, 147 Neb. 1067, 26 N. W. 2d 1.

The judgment of specific performance is not justi-

fied by the evidence, is contrary to law, and must be reversed.

The findings and decree of the court, not hereinbefore considered and not involved in the cross-appeal of appellees, concerned and resulted in an accounting between the parties on the basis that appellees had accepted the offer of the option and become the owners of the premises involved herein on the second day of July 1946. It follows from what has been said and determined herein that the basis of the accounting and the part of the judgment relating thereto were and are incorrect and must be set aside.

The cross-appeal challenges the correctness of the finding and adjudication that appellants had sufficiently repaired the building after the fire therein and were not obligated to make any other repairs to it or to the elevator therein. The lease required the lessors to pay for repairs on the building unless they were made necessary by the negligence of the employees of the lessee. The second story of the building and elevator were damaged by fire, and the first floor sustained water damage on May 29, 1945. The district court did not determine whether the fire was or was not caused by the negligence of appellees or their employees. Appellees were not under the circumstances of this case entitled to judgment requiring appellants to make repairs or to the cost or expense of making them. Appellees were lessees of the premises and had no other interest in or right thereto, or to the possession or use thereof. The measure of damages for breach by the landlord of a covenant to make repairs to the leased premises is generally the difference between the value of the use of the premises in the condition that they were contracted to be and the rental value in their actual condition. If the contract is for a particular use by the lessee, the rental for that use is the standard by which damages may be awarded, and special losses properly pleaded and proved to have been directly and proximately

caused by the default of the lessor may also be recovered. Mitchell v. Weiss (Tex. Civ. App.), 26 S. W. 2d 699; Kellogg v. Malick, 125 Wis. 239, 103 N. W. 1116, 4 Ann. Cas. 893; Darnall v. Day, 240 Iowa 665, 37 N. W. 2d 277; Annotation, 28 A. L. R. 1448; Annotation, 116 A. L. R. 1228; 32 Am. Jur., Landlord and Tenant, § 161, p. 156. See, also, Caves v. Bartek, 85 Neb. 511, 123 N. W. 1031; Wattles v. South Omaha Ice & Coal Co., 50 Neb. 251, 69 N. W. 785, 61 Am. S. R. 554, 36 L. R. A. 424.

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

REVERSED AND REMANDED.

YEAGER, J., not participating.

MARIAN V. BYRAM, APPELLANT, V. MILDRED F. THOMPSON, APPELLEE.

49 N. W. 2d 628

Filed November 2, 1951. No. 33001.

1. **Partnership.** The existence of a partnership depends upon the agreement of the parties, and their intention is to be ascertained from all the evidence and circumstances.
2. **Appeal and Error.** An equitable action is tried de novo in this court. § 25-1925, R. R. S. 1943. Therein we will reach an independent conclusion without referring to the findings of the district court. However, when the evidence therein on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
3. **Partnership.** Without having recourse to court proceedings partners may state an account among themselves, either in full or as to some particular branch of the partnership transactions.

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

Wear & Boland, James J. Fitzgerald, and *Gross, Welch, Vinardi & Kauffman,* for appellant.

Eugene D. O'Sullivan, Sr., Harry W. Schackelford, Arthur J. Whalen, and *Eugene D. O'Sullivan, Jr.,* for appellee.

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

WENKE, J.

Marian V. Byram brought this action against Mildred F. Thompson in the district court for Douglas County. The purpose of the action is to obtain an accounting of all their partnership assets and a division and distribution thereof on an equal basis. Defendant answered claiming there had been a settlement and, by cross-petition, asked that plaintiff be required to perform the terms thereof. The trial court found that the parties had voluntarily made settlement of their partnership affairs and dismissed plaintiff's action. Plaintiff filed a motion for new trial and has appealed from the overruling thereof.

The action, being equitable in its nature, comes under the provisions of section 25-1925, R. R. S. 1943, and is here for review de novo. See, Baum v. McBride, 152 Neb. 152, 40 N. W. 2d 649; Kear v. Hausmann, 152 Neb. 512, 41 N. W. 2d 850.

"The existence of a partnership depends upon the agreement of the parties, and their intention is to be ascertained from all the evidence and circumstances." Baum v. McBride, 143 Neb. 629, 10 N. W. 2d 477.

The evidence establishes that appellant and appellee entered into a partnership agreement sometime in 1919 and operated thereunder until sometime in 1947.

The evidence on many material questions of fact is conflicting. This is particularly true with regard to the testimony of appellant and appellee. The record presents a factual situation to which the following is

applicable: "This being an equitable action it will be tried de novo in this court pursuant to section 20-1925, Comp. St. 1929, and we will reach an independent conclusion without referring to the findings of the district court. Subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite." Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393.

The record discloses that at the suggestion of the appellant, and after three or four days of negotiating, the parties, on August 9, 1947, voluntarily entered into a settlement of a part of their assets and made distribution thereof accordingly. This settlement disposed of all of their income holdings. It left undisposed of only their home located at 2332 North Fifty-fifth Street in Omaha, Nebraska, the furniture and furnishings in the home, and their 1941 Buick sedan.

"Without having recourse to court proceedings partners may state an account among themselves, either in full or as to some particular branch of the partnership transactions." 40 Am. Jur., Partnership, § 347, p. 371.

On November 26, 1947, the parties voluntarily entered into an agreement dissolving the partnership arrangement. The basis for the dissolution was an agreed-to distribution of the assets still remaining. This agreed-to settlement, as to appellant, provided that she was to have the home place, which has been deeded to her and of which she has at all times been in possession; that she was to have the furniture and furnishings in the home, of which she has at all times been in possession although appellee has never delivered a bill of sale thereof to her; and that she was to receive $3,500 in cash, of which she has received $2,000. As to appellee it provided that she was to have the 1941 Buick sedan, neith-

er title nor possession of which has ever been delivered to her. The car at all times has remained in possession of appellant. It will be noted that the terms of this final settlement have not been fully carried out by the parties. The reason for their failure to do so resulted from appellant's conduct. This will be discussed somewhat more at length later in the opinion.

Appellant, in her amended answer and reply, has pleaded that the agreements of August 9, 1947, and November 26, 1947, were obtained by appellee through fraud, duress, coercion, and misrepresentation. There is no evidence in the record to sustain these charges and we find them to be without merit.

On Saturday, November 29, 1947, after the parties had agreed to the terms of their final settlement, the appellant prevented it from being fully carried out by physically taking from appellee the keys she then had to the 1941 Buick sedan, thereby making it impossible for appellee to take the car. In view of this conduct appellee did not pay appellant the balance of $1,500 nor deliver to her the bill of sale to the furniture and furnishings. Appellant has at all times retained and used the car. We find the conduct of appellant in this respect to be inexcusable and the sole cause for the settlement not being fully carried out. The trial court denied either party any relief and left them as they were.

By her conduct appellant has converted the car to her own use. Since the parties, at the time of the final settlement, had agreed the car then had a value of $1,500 the appellee is entitled to have that amount deducted from the balance which was owing by her under the terms of the final settlement. Since that is the exact amount still owing the two items offset each other.

The title to the 1941 Buick sedan is in the name of both parties. To correct this situation the appellee should make the necessary transfer to place the title thereto solely in appellant. Likewise the bill of sale to the furniture and furnishings which was, at the time

of settlement, executed by appellee should be delivered to the appellant. In all other respects we find the decree of the trial court to be correct.

The decree of the trial court is therefore modified as herein set forth and as modified it is affirmed.

In view of the appellant's conduct being the cause of this litigation we find that all costs, both in this court and the trial court, should be taxed to her.

MODIFIED AND AFFIRMED.

EINOT, INC., APPELLEE, V. EINOT SALES CO., INC., APPELLANT.
49 N. W. 2d 625

Filed November 2, 1951. No. 33004.

1. **Contracts.** Where parties have clearly indicated by provision in a contract that the contract shall be void if it is not performed within a prescribed time the courts will enforce the provision.
2. ———. Where a party to a contract, with full knowledge of the facts and with knowledge of a breach by the other party, receives money in the performance of the contract the breach will be deemed to have been waived.
3. ———. The assertion of the rescission of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been rescinded.
4. **Forfeitures: Contracts.** The acceptance of the benefits of a contract after breach whether before or after action is commenced to enforce a forfeiture waives the forfeiture.

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

Richards, Yost & Schafersman, for appellant.

Sidner, Lee & Gunderson, and *Spear, Lamme & Flory,* for appellee.

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

YEAGER, J.

This is an action in equity by Einot, Inc., a corporation,

plaintiff and appellee, against Einot Sales Co., Inc., a corporation, John E. Bodell, and Kathryn M. Bodell, defendants, to enjoin the defendants from manufacturing, packaging, selling, distributing, shipping, and in any way dealing in or with the product known as Einot. The case was tried to the court and at the conclusion of the trial a decree was entered against the Einot Sales Co., Inc., as prayed. By stipulation of the parties on the trial the defendants Bodell were removed as parties defendant and the case comes here with Einot Sales Co., Inc., the only defendant and the appellant.

The factual background of this case is that on November 8, 1949, plaintiff and defendant entered into a contract relating to the sale of a cold wave hair preparation known as "Einot." This contract was not made a part of the record in this case. On May 26, 1950, the parties entered into a new contract. By recital in the new contract it was provided, among other provisions, that the defendant should pay to plaintiff on July 26, 1950, $617.70 consisting of royalties due under the contract of November 8, 1949. It provided that if this amount should not be paid on that date the contract should be null and void. A further and separate provision was that the defendant agreed to pay plaintiff $200 a month for the period beginning January 1, 1950, and ending June 1, 1950. The total of this was payable on July 26, 1950. For failure to pay this total at the time specified it was provided that the contract should be null and void. A further separate provision of the contract provided that if the payments provided by the contract were not made or if any other provision was not complied with the contract should be null and void at the option of the party of the first part, the plaintiff herein. The contract provided for payments of $200 a month after June 1, 1950, and the balance of that year, payable the 15th of each month.

It conclusively appears that the $617.70 was not paid by July 26, 1950. In fact it never was paid directly to

plaintiff. By July 26, 1950, according to defendant's evidence, the defendant had paid on the monthly provisions of the contract $1,150. On July 29, 1950, an additional $100 was paid.

On August 9, 1950, the plaintiff had served on the defendant a notice declaring the contract null and void on account of defaults.

On August 11, 1950, this action was filed to enjoin further operation by this defendant under the contract, and as already indicated after trial an injunctive decree was entered.

In defense of the action on the trial, among other defenses, the defendant urged, and as grounds for reversal here it urges, that the plaintiff waived the right to declare the contract according to its terms null and void.

There can be little doubt on the record that up to the time this action was instituted the plaintiff had the right to terminate the contract and declare it at an end. It had done nothing to waive any of its terms. Any contention to the contrary is not supported by the record. The contract in clear and unmistakable terms extended to it that right. As to the force and effect of words such as are employed in the contract here this court said in Jewett v. Black, 60 Neb. 173, 82 N. W. 375: "If they have clearly indicated their purpose that the contract shall be void if not performed within the prescribed time, that is sufficient. It is the business of the courts to enforce agreements actually made and not to make new ones, or relieve parties from obligations which they have deliberately assumed." See, also, Dodge v. Galusha, 151 Neb. 753, 39 N. W. 2d 539.

The defendant urges that after the service of notice of forfeiture and commencement of action the right of forfeiture was waived by the plaintiff. It says that the plaintiff waived the forfeiture by accepting the benefits of the contract after the right of forfeiture accrued

and after notice of forfeiture and the commencement of this action.

Without question the plaintiff did so accept benefits of the contract. The pertinent obligations of the contract have already been pointed out. On the two parts of the obligation of the contract whereon the defendant was required to make payment by July 26, 1950, the total amount was $1,617.70. By July 26, 1950, the defendant had paid a total of $1,150. To what item or items the payments were attributed at the time is not made known by the record, however by subsequent action it becomes clear that the defendant attributed them to be monthly payments. By this time two monthly payments payable after June 1, 1950, had become due. On July 29, 1950, defendant paid an additional $100. This with the monthly payments which came due on June 15, 1950, and July 15, 1950, left due and owing from defendant to plaintiff on the date of notice and date of the commencement of action $150 on monthly payments plus $617.70 or a total of $767.70.

After the commencement of the action and on August 14, 1950, the defendant paid into court for the benefit of the plaintiff $817.70. This was to be in payment of $617.70 and one monthly payment. In addition to this the defendant, in August, September, and October, 1950, sent certified checks to plaintiff each in the amount of $200. These checks have never been returned or declined. On November 15, 1950, the defendant deposited with the court for the benefit of plaintiff $200.

On December 2, 1950, the decree in this case was entered. On December 30, 1950, motion for new trial herein was overruled. On January 22, 1951, the notice of appeal herein was filed. On January 3, 1951, attorneys for plaintiff received for and on behalf of plaintiff the $1,017.70 which had been paid into court for the benefit of plaintiff.

The question of whether or not the acceptance of benefits which had accrued before the right of for-

feiture amounted to a waiver of the right to declare a forfeiture we do not need to and do not decide. It only becomes necessary to determine whether or not the acceptance of benefits accruing under the contract after declaration of forfeiture waived the right to claim a forfeiture under the declaration.

The defendant to support its contention that this does amount to a waiver has cited Abbas v. Demont, 152 Neb. 77, 40 N. W. 2d 265, and Snyder v. Hill, 153 Neb. 721, 45 N. W. 2d 757.

In Abbas v. Demont, *supra,* it was said: "Where there are conditions in a contract for the sale of real estate, making time the essence of the contract and providing for a forfeiture in case of default, the acceptance of part payment on the contract is a waiver of the conditions as to all defaults then existing."

In Snyder v. Hill, *supra,* this court said: "The acceptance of rent after breach waives the forfeiture whether before or after action is commenced to enforce a forfeiture."

This latter case is one involving payments under a lease and the plaintiff insists that the rule has no application to a case such as this one. This insistence is without basis. The rule has application to contracts generally.

In Truemper v. Thane Lumber Co., 154 Ark. 524, 242 S. W. 823, it was said: "The money was accepted with full knowledge of all the facts, and this calls for an application of the well-known rule that where a party to a contract, with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived such breach."

In Brennan v. National Equitable Investment Co., Inc., 247 N. Y. 486, 160 N. E. 924, it was said: "The rule is thoroughly established that an assertion of a rescission is nullified by the subsequent acceptance of benefits growing out of a contract claimed to have been rescinded." See, also, North American Dredging Co. v.

Outer Harbor Dock & Wharf Co., 178 Cal. 406, 173 P. 756; Annotation, 9 A. L. R. 996; Snowball v. Maney Bros. & Co., 39 Wyo. 84, 270 P. 167, 61 A. L. R. 199; Annotation, 173 A. L. R. 308; 12 Am. Jur., Contracts, § 449, p. 1030; 17 C. J. S., Contracts, § 443, p. 926.

It therefore becomes clear that by its conduct the plaintiff waived its right to forfeit the contract herein under consideration and that by reason thereof it was not entitled to the injunction granted by the decree.

The decree is accordingly reversed and the cause remanded with directions to the district court to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

DELBERT JEPPESEN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
49 N. W. 2d 611

Filed November 2, 1951. No. 33021.

1. **Criminal Law.** A distinction obtains between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act, and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, as the constitutional inhibition is directed to the identity of the offense and not to the act.
2. ———. To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence.
3. ———. In such a case, any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused.

ERROR to the district court for Nuckolls County:

STANLEY BARTOS, JUDGE. *Reversed with directions to dismiss.*

Robert H. Downing and *Leon A. Sprague,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Dean G. Kratz,* for defendant in error.

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

MESSMORE, J.

The plaintiff in error Delbert Jeppesen, hereinafter referred to as defendant, was found guilty of manslaughter in the district court for Nuckolls County, Nebraska. He was sentenced to the Nebraska State Penitentiary, and prosecutes error to this court.

This prosecution is the outcome of a tragedy that occurred at midnight or early in the morning of October 7, 1948, and was due to an automobile collision or accident between an automobile driven by the defendant and an automobile driven by Lydia Lipker with her sister Della Tordrup as a passenger. As a result of the collision both Lydia Lipker and Della Tordrup were killed. Thereafter the defendant was charged in two separate informations identical in form with the exception of the name of the person killed, under section 28-403, R. R. S. 1943, referred to as the manslaughter statute, which reads as follows: "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; * * *."

This appeal involves the conviction of the defendant of the crime of manslaughter for the death of Della Tordrup. The defendant, by leave of court, was granted the right to withdraw his plea of not guilty for the purpose of pleading in bar to the information.

It was stipulated between the State and defendant

that the defendant, who was charged with the unlawful killing and slaying of Della Tordrup on or about October 6, 1948, was the same person who was theretofore tried in the district court for Nuckolls County for the unlawful killing and slaying of Lydia Lipker on or about the same date, and who was acquitted of the charge of killing Lydia Lipker on September 28, 1949; that the acts and omissions of the defendant relied upon by the State in the prosecution for the unlawful killing of Lydia Lipker were the same acts and omissions of the defendant which were relied upon by the State in the prosecution for the unlawful killing of Della Tordrup.

The following facts appear from the record: Two informations for manslaughter were filed against the defendant. The charging part of each was the same, with the exception of the names of the persons killed. Both of the deaths resulted from the same automobile collision or accident. The defendant was found not guilty on the information charging him with killing Lydia Lipker. The trial court overruled the plea in bar.

It is contended by the defendant that inasmuch as the one accident produced the death of two persons and the same evidence with the exception of the name of the person killed would of necessity be relied upon in the prosecution of the defendant in both cases, and as no criminal intent is involved, the acquittal in one case is a bar to the prosecution of the other information. This court has not passed upon this precise question.

Introductory to our consideration of the subject, we set forth here for convenient reference later, certain constitutional provisions.

The Fifth Amendment to the Constitution of the United States provides: "* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *."

Article I, section 12, Bill of Rights of the Constitution of the State of Nebraska as amended and in force at the present time provides: "No person shall be compelled,

in any criminal case, to give evidence against himself, or be twice put in jeopardy for the same offense."

The plea of former jeopardy is an established maxim of the common law, and has been included in the Constitution of the United States as well as ours. The protection afforded is not against the peril of second punishment, but against being tried again for the same offense.

In Warren v. State, 79 Neb. 526, 113 N. W. 143, the acquittal of the defendant upon the charge of murder of one Lausten was held not to be a bar to a prosecution for the crime of robbery of Lausten committed at or about the time of the killing. The court said: "When a plea of former jeopardy is made by reason of autrefois acquit, the test to determine the identity of the two offenses is whether the evidence necessary to convict in the second case was admissible under the former charge, * * *. If such a condition is shown to exist, the former acquittal is a bar to the second prosecution, but otherwise it will not operate to prevent prosecution upon another charge, even though based upon acts closely related in point of time." The case is cited solely to disclose the test applying to double jeopardy as it appears in this state, and its application to the case at bar as will subsequently appear.

The defendant contends that the requirements of the test so laid down in the above-cited case were met by him for the reason the charges are identical and the evidence necessary for a conviction in the former case was identical and might be sufficient to warrant a conviction in the instant case.

In the annotation appearing in 172 A. L. R. 1062, applying the rule against double jeopardy to offenses involving the operation of automobiles it is said: "Though the courts recognize that a single act may constitute two or more distinct and separate offenses and a person charged therewith may be punished for all of them, they are not always in accord as to what constitutes dis-

tinct and separate offenses arising from a single act. Thus, there is a conflict on the question of how many offenses are committed where two or more persons are injured or killed by a single criminal act in the operation of a motor vehicle. The majority of courts hold that there are as many separate and distinct offenses as there are persons injured or killed by the unlawful act so that successive prosecutions may be instituted against the person who committed the unlawful act without violating the rule against double jeopardy."

Therefore, a prosecution founded upon the same transaction, act, or omission with regard to which a prosecution has already been had, is not necessarily a bar where two offenses may have been committed.

Our statute in defining manslaughter is the enactment of the common-law manslaughter, and under the common law it is the unlawful killing and not the means which brought about the killing that constitutes the offense. It is the identity of the offense, and not of the act, which is referred to in the constitutional guaranty against putting a person twice in jeopardy. When two or more persons are killed, though it be by a single act, yet, since the consequences affect, separately, each person killed, there is a corresponding number of offenses.

In the instant case the same act caused the death of two different persons. Obviously the proof of death of Lydia Lipker cannot possibly convict or acquit defendant of the killing of Della Tordrup. The only thing determined by the prior adjudication is that as to Lydia Lipker's death, the defendant's misconduct or negligence, if such existed, was insufficient to fasten the guilt upon him.

Neither in the Constitution of the United States nor in the Constitution of Nebraska is there any prohibition against successive prosecutions if the wrongful act is the cause of separate and distinct offenses. See State v. Fredlund, 200 Minn. 44, 273 N. W. 353, 113 A. L. R. 215, a case very similar to the case at bar, the exception

being that indictments were brought under the third degree murder statute, which we deem of no particular significance as a distinction. We cite the case for the principle of law announced therein on the issue of double jeopardy. See, also, People v. Brannon, 70 Cal. App. 225, 233 P. 88; People v. Majors, 65 Cal. 138, 3 P. 597, 52 Am. R. 295, to the same effect.

In People v. Allen, 368 Ill. 368, 14 N. E. 2d 397, it was held that a distinction obtains between an offense and the unlawful act out of which it arises. The act is the cause of the offense which, conversely, is the result of the act. The constitutional inhibition is directed to the identity of the offense and not the act. Where a single felonious act results in the commission of two or more crimes not embraced in different degrees of the same offense, there is but a single physical act, the collision, from which two persons met their deaths. See, also, Fleming v. Commonwealth, 284 Ky. 209, 144 S. W. 2d 220; Commonwealth v. Maguire, 313 Mass. 669, 48 N. E. 2d 665.

In State v. Taylor, 185 Wash. 198, 52 P. 2d 1252, it was held that: "Where defendant, accused of manslaughter in five counts, was found guilty on three counts of causing the death of three persons and not guilty on two counts of causing the death of two others, each killing constitutes a separate crime and on the granting of a new trial, a plea of former jeopardy does not lie, * * *." See, also, Fay v. State, 62 Okl. Cr. 350, 71 P. 2d 768; Lawrence v. Commonwealth, 181 Va. 582, 26 S. E. 2d 54.

The defendant relies on State v. Wheelock, 216 Iowa 1428, 250 N. W. 617, and State v. Cosgrove, 103 N. J. Law 412, 135 A. 871, to which might be added Smith v. State, 159 Tenn. 674, 21 S. W. 2d 400, as supporting his contention as to why his plea in bar should be sustained. It is true that the afore-cited cases sustain the defendant's contention, however, they are contrary to

the recent trend of judicial decisions and the weight of authority respecting this issue.

In the Ohio case of State v. Martin, 90 N. E. 2d 706, a very recent case relied upon by the defendant, it is true the decision in the Court of Common Pleas sustained defendant's position. However, in State v. Martin, 154 Ohio St. 539, 96 N. E. 2d 776, the Supreme Court of Ohio held: "When a single unlawful act results in the killing of more than one person, each homicide constitutes a separate offense for which the defendant may be tried without being twice put in jeopardy." The Supreme Court of Ohio affirmed the Ohio Court of Appeals. It is apparent the cited case supports the opposite view contended for by defendant, and is in line with the majority rule.

From a review and analysis of the cases on the question presented, we conclude that the more logical view is contained in the cases cited by the State, rather than the authorities cited and relied upon by the defendant. We conclude the trial court properly overruled the defendant's plea in bar.

The defendant contends the evidence is insufficient to warrant the judgment of conviction.

To sustain the conviction of the defendant of the crime charged the evidence must prove beyond a reasonable doubt that the defendant killed Della Tordrup while he was in the commission of some unlawful act. The instructions of the trial court limited the jury to one or more of the following unlawful acts alleged to have been negligently committed by the defendant: (1) The operation of a motor vehicle in such manner as to indicate an indifferent or wanton disregard for the safety of persons or property; and (2) that the defendant failed to come to a full stop on entering or crossing the state highway on which stop signs were erected, or to give right-of-way to vehicles on said highway.

This court held, in Benton v. State, 124 Neb. 485, 247 N. W. 21, that: "When one drives an automobile in

violation of law pertaining to the operation of such vehicles on the public highway and in so doing, as a result of the violation of law, causes death to another, he is guilty of manslaughter." See Fielder v. State, 150 Neb. 80, 33 N. W. 2d 451, and cases cited therein.

The record discloses that during the evening of October 6, 1948, Lydia Lipker, driving her father's car, a 1935 black Chevrolet coach, came to Superior to get her sister Della Tordrup to take her to their parents' farm home to do some work. They did some chores in Superior and later met Della's husband at the Hill-Top Cafe at the north edge of the city where the three of them had sandwiches and coffee. Before the women left Della's husband checked the tires and the lights, and found "everything in perfect condition." Lydia got into the driver's seat and Della was seated to her right. They proceeded north on State Highway No. 14 to State Highway No. 3 which is a graveled-surface highway runing in an east and west direction. They turned east on Highway No. 3 to proceed to their parents' home. On this route there is an intersection three miles west of Ruskin. The weather was somewhat cold and clear, and the highways were dry.

The defendant, at the time of the accident, lived three miles west and three miles north of Ruskin. He testified that he had been in Nelson to procure some corn-picker equipment. He obtained gas for his car there and proceeded to Hardy to fulfill a dental engagement after which he went to a pool hall, finished playing a game of cards for some other person, and drank a bottle of beer. The evidence showed that he might have drunk two bottles of beer that evening. Contrary to the State's contention, there is no competent evidence of the defendant being intoxicated, and the court properly declined to submit this issue to the jury. The defendant left the pool hall about 11 p. m. and went to his car which was parked in front of the dental office. Upon leaving Hardy and proceeding to his home, the defendant took a dirt

road running north and south which intersects State Highway No. 3. He remembered crossing a bridge which crosses Spring Creek and is half a mile south of the intersection where the accident occurred. He was driving a Ford V-8 which was in good mechanical condition. The next thing he remembered was trying to loosen his denture when he was in the hospital at Superior.

A witness testified that he left Ruskin about midnight. He was traveling on State Highway No. 3, and when he arrived three miles west of Ruskin he observed two cars on the north side in the ditch. This point is an intersection and there is a dirt road upon which this witness would turn north to go to his home. The Lipker car was on the north side of the highway lying on its right side, about 75 or 80 feet east of the intersection along the fence line. The defendant's car was pointed a little to the northeast, lying on its right side, 12 or 13 feet from the intersection, next to the corner post on the northeast corner of the intersection. No lights were burning on either car. The intersection is practically straight. There is a little raised strip about a quarter of a mile north of the intersection. The road south of the intersection is level with just a little slope. The highway east and west is practically level.

The next morning a witness looked over the scene of the accident to ascertain if either of the cars had tried to swerve. The tracks of the Lipker car were on the south side of the road east of the center of the intersection. It appeared as though the defendant had tried to turn a little to avoid striking the Lipker car. This witness was unable to tell where the accident happened due to the large amount of travel at the intersection.

The sheriff arrived at the scene of the accident about 12:15 a. m. The defendant and Bill Krogh were there. The two girls were lying on the south side of the Lipker car. He testified that the defendant's car was a little to the northeast of the intersection on the east side of the road running north and south. The Lipker car was

further east, on the north side of State Highway No. 3, lying on its side. Della was lying on the south side of the Lipker car wrapped in blankets. The sheriff did not talk to her. Her pulse was weak. The sheriff and Bill Krogh took her to a hospital in Superior, a distance of 16 miles from the scene of the accident, and returned to the scene of the accident about 1:30 a. m.

There were stop signs located at this intersection. The stop sign on the south side of the intersection was in line with the fence row that ran east and west, and the stop sign on the north side of the intersection was a little south of the east-west fence line on that side of the highway. The stop sign on the south side of the highway is located south of the shoulder of the highway along the edge of the north-south road 15 to 18 feet south of the shoulder of the highway. The actual measurement of the distance between the stop sign located on the southeast corner of the intersection and the center of the intersection is 41 feet. The highway is 81½ feet from corner post to corner post, from north to south. The traveled portion of State Highway No. 3 is 30 feet. The distance from the rear of the defendant's car to the center of the intersection was 20 or 22 feet. There was a mark from the rear of the defendant's car which extended 18 feet. Near the Lipker car there was a mark which came from the intersection on the north side of State Highway No. 3 off of the shoulder and looked as though it might have been made by a wheel turning and pushing, making the mark along the shoulder of the road. It hit and missed, that is, it would show the mark for a space and then would not show it. The rear end of the Lipker car was 70 feet northeasterly from approximately the center of the intersection. The sheriff discovered some glass about 15 feet east of the center of the intersection. It was headlight glass from the defendant's car. The defendant was coming from the south and the Lipker car was coming from the west, as the sheriff observed the posi-

tion of the cars and the physical facts at the scene of the accident.

The hood of the defendant's car was sprung and damaged, the grille was badly bent, the transmission was broken, the lens of one headlight was broken, the fender was bent and damaged, a tire was down, and the tire rim was bent. The right side of the Lipker car was caved in, the top was dented, the frame was sprung, the left rear fender was damaged, and the window glass was broken out on the left side of the Lipker car. The lights were not damaged. The Lipker car was caved in just about the center of the car.

The doctor who attended Della was acquainted with her. He testified that he saw her at the hospital. She was suffering from shock, and had severe bruises, injuries, and cuts. She was not conscious. Her death was attributed to head injuries and a hemorrhage under the skull. She passed away at 5 a. m., the morning of October 7, 1948.

The same doctor was acquainted with the defendant. He saw him in the hospital at Superior the early morning of October 7, 1948. The defendant was bruised about the head and had an admission diagnosis of concussion. He was unable to furnish a history as to how the accident happened. He was not clear mentally, did not remember what he had been through, and was suffering from amnesia.

At no time in the testimony is there any statement made by the defendant as to how the accident happened or that he knew how it happened. On the Saturday following the accident, at the home of John Lipker, several witnesses, principally Lipker relatives, testified that the defendant and his wife were present at the home and stated to John Lipker, the father of Della, and her mother, that he came to give his sympathy, that he was sorry, and said: "It is my fault." The latter statement is denied by the defendant and his wife.

The foregoing constitutes the relevant and material

evidence preseented to the jury upon which a verdict of guilty was returned.

We fail to see in what manner the statement made by the defendant, when he gave his sympathy to Della's parents, that he was sorry and it was his fault could constitute an admission of any unlawful act committed by him. While it is true that admissions by defendant of facts tending to establish a criminal charge against him are generally considered direct and not circumstantial evidence, as set forth in Fisher v. State, *ante* p. 166, 47 N. W. 2d 349, and cases cited therein, the admissions must be of such character as to meet the requirement of the rule as stated. In this case there is no such admission. It is apparent that all the evidence to prove one or more of the unlawful acts alleged to have been committed by the defendant is circumstantial, and consists entirely of physical facts observed by witnesses after the accident.

"If circumstantial evidence is relied upon in a criminal prosecution, proof of a few facts or of a multitude of facts all consistent with the supposition of guilt is not sufficient to warrant a verdict of guilty. In order to convict, it is necessary not only that the circumstances all concur to show beyond a reasonable doubt that the defendant committed the crime and be consistent with the hypothesis of guilt, since that is to be compared with all the facts proved, but that they be inconsistent with any other rational conclusion and exclude every other reasonable theory or hypothesis except that of guilt. The facts proved must be consistent with each other and with the main fact sought to be established. Any fact or circumstance susceptible of two interpretations must be resolved most favorably to the accused. * * *

"When circumstantial evidence is relied upon, the facts and circumstances must form a complete chain and point directly to the guilt of the accused in such a conclusive way as to exclude any other reasonable conclusion, every element essential to the conclusion must

be proved by competent evidence beyond a reasonable doubt, and the existence of a reasonable doubt as to any one of them requires an acquittal." Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539, and cases cited therein.

This record is void of evidence as to the speed of either the Lipker car or the defendant's car. Likewise, it is void of evidence that the defendant did not stop at the stop sign, that he operated his automobile in an unlawful manner, or that he violated the rules of the road with reference to yielding the right-of-way, nor is there any evidence that he would be required to yield the right-of-way. There is no evidence as to how the accident happened. The physical facts do not disclose the manner in which the accident happened, nor do the same designate the place of the accident.

We conclude that the evidence is insufficient to sustain the judgment of conviction. The conviction and sentence of the defendant should be, and they are, set aside with directions to the trial court to dismiss the case and discharge the defendant.

REVERSED WITH DIRECTIONS TO DISMISS.

RAYMOND FRERICHS, ADMINISTRATOR OF THE ESTATE OF DAVID M. WIGGINS, DECEASED, APPELLANT, V. EASTERN NEBRASKA PUBLIC POWER DISTRICT, A CORPORATION, ET AL., APPELLEES.

49 N. W. 2d 619

Filed November 6, 1951. No. 33014.

1. **Trial.** In the consideration of a motion of a defendant for a directed verdict or to dismiss on the ground that a cause of action has not been proved, all competent evidence adduced by plaintiff together with all reasonable inferences to be drawn therefrom favorable to the plaintiff must be accepted as true.
2. **Negligence.** The cause which will afford the basis for an action for damages for negligence must be a proximate cause of the accident and the ensuing injuries or death.
3. ———. Negligence to be regarded as a proximate cause of an

accident must be of such a character that it may be said that the accident was the natural and probable result of the negligence of which complaint is made.

4. ———. Where a negligent act creates a condition from which injury flows only by a subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not a proximate cause of the injury.

APPEAL from the district court for Otoe County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

Cline, Williams, Wright & Johnson, for appellant.

Chambers, Holland & Groth, John R. Dudgeon, Lee, Bremers & Lee, and *Edwin Moran,* for appellees.

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

YEAGER, J.

This is an action by Raymond Frerichs, administrator of the estate of David M. Wiggins, deceased, plaintiff and appellant, against Eastern Nebraska Public Power District, a corporation, defendant and appellee, to recover damages in favor of the widow and children of the deceased on account of the death of the said deceased which plaintiff claims was by the wrongful, unlawful, and negligent acts of this defendant. B-K Construction Company, a corporation, is also a named defendant but against it no liability is asserted in this action. It was made defendant because of the legal obligation it had to the deceased under the Workmen's Compensation Act as employer of the deceased at the time of his death and because of its right of subrogation in case of recovery in this action. Hereinafter plaintiff and appellant will be referred to as plaintiff; the deceased, David M. Wiggins, as the decedent; the Eastern Nebraska Public Power District as defendant; and B-K Construction Company as the company.

The case was tried to a jury which returned a verdict in favor of the defendant on which verdict judgment was entered. A motion for new trial was filed which

was overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

Numerous errors are assigned as grounds for reversal but before approaching them it appears necessary to set forth and make some observations upon the factual situation as it is disclosed by the record.

On and several years prior to July 2, 1946, the defendant was a public power district which had constructed, owned, and maintained electric power lines and furnished electric current in seven counties in Nebraska including Otoe County. Among them was a line 3,419 feet in length extending generally east and west between what are described in the record as the Catron and the McKee farmsteads both in Section 4, Township 8, Range 9, Otoe County, Nebraska. The Catron farmstead is near the west side and the McKee near the east side of the section. This line was constructed by extension in 1941 from the Catron place to the McKee place to furnish electric current for the latter. The line crossed no roads or public ways. It was constructed by the setting of poles in the ground and the stringing of wires between transformers at the two ends. The line was grounded at both transformers. It was also grounded 1,843 feet west of the ground at the McKee end. There was no other grounding of the line. The line has been described as a 7,200 volt single phase multi-grounded Y-type circuit. It consisted of two wires mounted vertically, that is one was strung in position from pole to pole and the other parallel therewith but on a vertical plane below. The exact distance of separation is not made known but it appears to have been near three feet. The higher wire was attached to insulators on the top of the poles. The lower was attached without insulation to the sides of the poles. The higher carried the current from the source of supply to the point of use. The design of the lower was not to carry current but with grounding was to complete the return circuit. There is no contention

that this lower wire would not have performed in accordance with its design had it been properly and sufficiently grounded.

On July 2, 1946, the company was constructing under contract a gas transmission or pipe line over and across the McKee land. This line was being laid in a channel dug by the company. The line of construction passed under the power line from northeast to southwest at a point about 800 feet west of the east end of the power line. The defendant had no notice of this construction. The decedent was an employee of and was engaged in the services of the company in this construction. At that time, employed in this work of construction, the decedent had a fellow employee whose name is W. J. Reeds. Reeds was the operator of what has been described as a boom tractor. This tractor was heavy equipment and was equipped with a Diesel motor. On its left side attached about one foot from the ground it had a boom or arm about 17 feet in length. This boom could be elevated to a vertical or almost vertical position and it could be lowered by allowing the upper end to be extended outward from the tractor. Extending from a point of attachment on the right side of the tractor up over the end of the boom and down on the left side were metal cables. This equipment was used, among other things, to lift and hold in suspension progressive portions of the pipe for cleaning and painting before finally lowering the pipe into the channel. This was described as cradling pipe.

On the day in question Reeds took the tractor and boom under the power line without incident while he was cradling pipe except that he saw the line, asked a fellow employee if there was clearance, and was assured that there was. Some time later, on request of his superior communicated to him by decedent, he discontinued cradling and came back up the pipe line under the power line. The boom caught and broke the lower wire of the power line. At the time decedent was standing,

leaning on a pick-up truck which was parked probably directly under the power line. As a result of this in a manner not disclosed except by inference the decedent suffered a severe electric shock from which very soon thereafter he died.

The general theory of plaintiff's cause of action is that by reason of illegal construction of the line, and negligent failure to properly ground, the lower wire became charged with a high voltage which was transmitted to the decedent when it was broken thus causing his electrocution and death. The negligence charged is particularized in the petition but it is not deemed necessary to set forth the particulars here.

The defendant by its pleadings denies any illegal or negligent act on its part and says substantially that the decedent came to his death as a direct result of the act of the employee of the company in driving the tractor under the electric line with the boom in such position that it struck and broke the line, the existence of which was well known to him.

At the close of plaintiff's evidence the defendant moved for a dismissal on the ground that there was no evidence of negligence on the part of the defendant. At the close of all the evidence this motion was renewed and joined with it was an alternative motion for directed verdict on the same ground. It becomes necessary therefore to make a determination on this question before entering upon a consideration of plaintiff's assignments of error.

Of course in the consideration of this question all of the competent evidence adduced by plaintiff together with all reasonable inferences to be drawn therefrom favorable to him must be accepted as true. Parish v. County Fire Ins. Co., 139 Neb. 726, 298 N. W. 702.

The plaintiff has inferred from the evidence that the lower wire of the line carried the electric current which caused the death of the decedent. This inference is based on the proved fact that this wire was broken and fell to the ground and proof of improper and insufficient

grounding by departure from what he contended was proper, safe, and lawful construction and grounding. There was no evidence of test of the wire with respect to current either before or after it was broken and no proof that either the decedent or the truck on which he was leaning was touched by the wire.

Without, however, accepting or rejecting the inference as reasonable it will for present purposes be assumed that the broken wire carried the electric charge which caused the death. So assuming, does it follow under law that the defendant may be held accountable for the death? The defendant contends that it may not.

The theory of the defendant is that the power line was an existing condition over which the defendant had no control and was in nowise a proximate cause, that the proximate cause was the driving of the tractor under the long existing, observable, and observed condition.

It may be reasonably said that the plaintiff does not contend herein that danger flowed from the wire to the decedent without the contact which was made therewith by the employee of the company.

The rule with reference to cause which will afford the basis for an action for damages for negligence is that the act must be a proximate cause of the accident and the ensuing injuries or death. Brotherton v. Manhattan Beach Improvement Co., 48 Neb. 563, 67 N. W. 479, 58 Am. S. R. 709, 33 L. R. A. 598; Wagner v. Watson Bros. Transfer Co., 128 Neb. 535, 259 N. W. 373; Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825.

In distinguishing between proximate cause and condition this court said in Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117:

"To constitute proximate cause, under authority of the adjudicated cases, the injury must be the natural and probable result of the negligence, and be of such a character as an ordinarily prudent person could have known, or would or ought to have foreseen might probably occur as the result. It is not sufficient that the

negligence charged does nothing more than furnish a condition by which the injury is made possible, and if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury. There may have been carelessness and negligence on the part of the country club in placing the flagpole across its driveway, but this, in itself, no matter how careless and negligent it might be, would not and could not alone cause the injury."

The observations made in this statement are supported by other authority cited and quoted from in the opinion. Numerous other authorities sustain this viewpoint. Bunten v. Eastern Minnesota Power Co., 178 Minn. 604, 228 N. W. 332; American General Ins. Co. v. Southwestern Gas & Electric Co., 115 F. 2d 706; Reardon v. Florida West Coast Power Corp., 97 Fla. 314, 120 So. 842; Webb v. Louisiana Power & Light Co. (La.), 199 So. 451; Oklahoma Gas & Electric Co. v. Wilson, 172 Okl. 540, 45 P. 2d 750; Hayden v. Paramount Productions, Inc., 33 Cal. App. 2d 287, 91 P. 2d 231; Buell v. Utica Gas & Electric Co., 259 N. Y. 443, 182 N. E. 77; Watral's Adm'r. v. Appalachian Power Co., 273 Ky. 25, 115 S. W. 2d 372; Keep v. Otter Tail Power Co., 201 Minn. 475, 277 N. W. 213; Morton's Adm'r. v. Kentucky-Tennessee Light & Power Co., 282 Ky. 174, 138 S. W. 2d 345; Wyatt v. Chesapeake & Potomac Telephone Co., 158 Va. 470, 163 S. E. 370, 82 A. L. R. 386.

For the purposes of analysis and application of this rule to the case at bar it has, for present purposes, been assumed that there was negligence in the construction of this line in the respects hereinbefore indicated. Under the rule this in and of itself furnishes no basis for a claim of proximate cause since it may not reasonably be said that the occurrence here considered could be regarded as the natural and probable result of this negligence or that this occurrence was of such a character as an ordinarily prudent person could have known, or

would or ought to have foreseen might probably occur as the result. Under the rule if the negligent act creates a condition from which injury flows only by a subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not a proximate cause of the injury.

Here was a condition which had existed for several years. The line was over a field and not over any public way. The height of this line at the point of the break was estimated to be from 15 to 17 feet. There is no information that any farming operation could be calculated to extend that distance above the ground. It cannot well be said under this evidence that the defendant, measuring its duty by what an ordinarily prudent person could or would know or ought to foresee should have anticipated the occurrence which has been described herein.

If therefore the rule as announced in Steenbock v. Omaha Country Club, *supra,* is to be adhered to it must be said that the record in this case fails to disclose any act on the part of the defendant which was a proximate cause of the death of the decedent.

The plaintiff seeks to distinguish this case in principle from that case and to point out that it does not come within the rule there laid down as to proximate cause. By factual comparison this case is at least as clearly, if not more so, one where it must be said that the act producing the result could not have been one known or foreseen by an ordinarily prudent person.

In Steenbock v. Omaha Country Club, *supra,* a flagpole was placed across a driveway customarily used by the members of the club. The chauffeur of a member drove over the pole in consequence of which Steenbock was injured. It could be reasonably anticipated or foreseen there that contact might be had with the pole. This court held that the placing of the pole was only a condition and not a proximate cause. Here the electric line was suspended well up above the ground entirely across

farm lands where only farming operations could be anticipated. It cannot well be said that the defendant acting as an ordinarily prudent person could have foreseen such an occurrence as this.

Plaintiff cites numerous authorities to sustain his position. None of them however depart from the proposition that if the act producing the result complained of is the independent act of a third person that act must be regarded as the proximate cause. Also for the most part the pronouncements upon which reliance rests are not based upon legal and factual situations comparable to that involved in the case at bar.

In Harrison v. Kansas City Electric Light Co., 195 Mo. 606, 93 S. W. 951, 7 L. R. A. N. S. 293, death by electrocution was involved and improper grounding was charged as negligence. In that case the contact was direct and there was not any element of independent intervening cause.

The case of City of Altus v. Wise, 193 Okl. 288, 143 P. 2d 128, was one where a barbed wire on a high school ground became charged with current. Contact with this wire caused death. No independent act of a third person was involved.

Brunell v. Mountain States Power Co., 81 F. 2d 305, was a case where the power company had constructed a power line along a public way. A pole was struck by an automobile out of control causing a dislocation of wires as a result of which plaintiff was injured. It was held that it was a question of fact for a jury as to whether or not this was a probable occurrence which the company should have anticipated. The opinion says inferentially that the duty of protection to the public extends only to situations where danger is reasonably to be anticipated.

Hickman v. Union Electric Light & Power Co. (Mo.), 226 S. W. 570, is in some aspects similar to the one at bar. In this case an elevated arm of sewer building machinery came in contact with an electric wire. The wire

was over a public street and was insulated from the beginning. The insulation had become defective in consequence of which on contact therewith death of a man engaged in the sewer construction ensued. The opinion points out that the use was public and it was the duty of the company in this use to so operate as not to interfere with the right of the public to use the remainder, in the particular instance, to keep its wire properly insulated. Also it is pointed out that the company was charged with notice of the sewer construction and that it was thereby charged with a duty to guard against danger from its wire.

Fassi v. Schuler, 349 Mo. 160, 159 S. W. 2d 774, is a case growing out of a fire in a three-story apartment or rooming house. The claim was that the house was not equipped as legally required with a fire escape. The court held that a jury could properly find that injury to the complaining occupant was the natural and probable consequence of the failure to have provided a fire escape.

McGinnis v. Delaware, L. & W. R. R. Co., 98 N. J. L. 160, 119 A. 163, is another case of an electric line over a public way. On this public way a gas main was being constructed. It was held that there was a jury question as to whether or not the company took the necessary precautions under the circumstances.

The case of Futrell v. Arkansas-Missouri Power Corp., 104 F. 2d 752, was a case where a clothesline became charged from a power line. Negligence was held to be a question for the jury.

Conowingo Power Co. v. State of Maryland, 120 F. 2d 870, was a case where a high tension wire came into contact with a cable on bridge construction equipment. The work in bridge construction was known to the power company. Prior to the incident causing death it took precautions to protect those engaged in the construction but had at the time abandoned all or part of the precautions.

Other cases are cited in the brief but none of them appear to furnish any more light upon the subject under inquiry than those herein referred to.

From a study of these cases, and with good reason it is thought, certain conclusions are to be arrived at as follows: Electricity is an unseen, powerful, and dangerous force. In the construction and maintenance of lines for its transmission the degree of care required is that which will protect against known and foreseen dangers and such as in the light of the agency itself and its known propensities may reasonably or in probability be foreseen or anticipated taking into consideration at all times the time, place, and conditions of such construction and maintenance.

On the facts of this case the defendant cannot be said to have known, reasonably anticipated, or foreseen in the absence of notice that any such operation as was carried on in this field would in probability ever come about. It had no notice. The inescapable conclusion therefore is that the decedent came to his death as the result of an independent act of the employee of the company and that within the meaning of law no act of the defendant may be regarded as a proximate cause thereof. No cause of action was proved against the defendant. The assignments of error therefore require no consideration herein.

This being true no verdict or judgment other than the one rendered would have been proper.

The judgment of the district court is affirmed.

AFFIRMED.

DORIS C. BERRY, APPELLANT, V. SCHOOL DISTRICT OF OMAHA, DOUGLAS COUNTY, NEBRASKA, APPELLEE.

49 N. W. 2d 617

Filed November 6, 1951. No. 33017.

1. **Workmen's Compensation.** 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.

2. ———. The general rule is that if an employee is injured while absent from the employment for lunch, the injury does not arise out of nor in the course of the employment.

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

Frank C. Heinisch and *William H. Mecham,* for appellant.

King, Haggart & Kennedy, for appellee.

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

SIMMONS, C. J.

This is a workmen's compensation case. It presents the question as to whether or not plaintiff's injuries were caused by an accident arising out of and in the course of her employment by defendant, as provided in sections 48-109 and 48-110, R. S. 1943. Plaintiff's petition was dismissed after hearing by the workmen's compensation court. On appeal and after trial de novo, it was dismissed by the district court. Plaintiff appeals. We affirm the judgment of the trial court.

The facts are not in dispute. Plaintiff suffered an accident and serious injury on September 6, 1949. Plaintiff was at the time of the accident a teacher under annual contract with the defendant. She taught school in the kindergarten at Franklin School, an elementary school. All her duties and service were performed at the Franklin School.

The defendant maintained a lunchroom in Technical High School for the benefit of pupils and employees. The high school is some 9 or 10 blocks from the elementary school where plaintiff taught. Teachers in the high school and in some of the surrounding schools ate there where they had prompt service, good food, and reasonable prices. Eating there was optional with the teachers. It was the most convenient hot-lunch place. Plaintiff

usually drove to the high school for her lunch with another teacher.

Usually plaintiff dismissed her pupils at 11:15 a. m. She was required to remain in the building one-half hour thereafter and required to return twenty minutes before the opening of the afternoon session; or, stated otherwise, she was not to leave for lunch before 11:45 a. m., and was to be back at 12:40 p. m. On occasion she was required to return early for a conference. Such a requirement was not involved on the day of the accident. Occasionally plaintiff remained after 11:45 a. m., if all her young pupils had not left for home. On the day of the accident plaintiff, because of such a situation, did not leave for lunch until 11:55 a. m. She and another teacher then drove to the high school; secured, ate, and paid for their lunch; and visited with another teacher. She performed no service and had no service to perform at the high school. Leaving the lunchroom she slipped, fell, and sustained serious injuries.

Plaintiff's rights and defendant's liabilities are fixed by statute. Lincoln Traction Co. v. Reason, 143 Neb. 512, 10 N. W. 2d 344; Nelms v. Mahoney, 147 Neb. 626, 24 N. W. 2d 558.

Our statute provides in part: "Without otherwise affecting either the meaning or the interpretation of the abridged clause, 'personal injuries arising out of and in the course of employment,' it is hereby declared: Not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen, and not to cover workmen who, on their own initiative, leave their line of duty or hours of employment for purposes of their own." § 48-151, R. S. Supp., 1949.

Tested by this statute it is patent that plaintiff has no right of recovery.

We have held that the general rule is that if an em-

ployee is injured while absent from the employment for lunch, the injury does not arise out of nor in the course of the employment. McDonald v. Richardson County, 135 Neb. 150, 280 N. W. 456. The rule is applicable here. The fact that the lunch place was a facility made available by the defendant for teachers, if they elected to use it, does not prevent the application of the general rule under the facts of this record.

The judgment of the district court is affirmed.

AFFIRMED.

ELLIS N. PHILLIPS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

49 N. W. 2d 698

Filed November 6, 1951. No. 33032.

1. **Indictments and Informations.** A complaint or information is fatally defective only if its allegations can be true and still not charge a crime.
2. **Burglary.** The essential elements of an offense under section 28-534, R. R. S. 1943, required to be charged and proved by the State, are the possession of instruments or tools suitable for breaking and entering with the intent to use them for a burglarious purpose.
3. **Criminal Law.** A plea of abatement for variance is unavailing where the information which charges an offense is based upon the same transaction for which defendant had a preliminary hearing upon a complaint substantially charging the same offense as in the information.
4. **Burglary.** The material elements of the crime of possession, custody, or control of instruments or tools with intent to break and enter may be proved by direct circumstantial evidence.
5. **Criminal Law: Trial.** The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt.
6. ———: ———. It is the province of the jury to determine the circumstances surrounding and which shed light upon the alleged crime; and if, assuming as proved the facts which the

evidence tends to establish, they cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.

7. ———: ———. 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.

8. **Burglary.** In a prosecution for possession of burglar's tools and implements, the ownership thereof is ordinarily immaterial.

9. ———. In such a case, the possession may be actual or constructive, and unless expressly provided by statute, possession upon one's person is not necessary. Two persons may have constructive possession or one may have actual possession and the other, constructive possession.

10. ———. The possession of burglarious implements or tools with a guilty intent may be joint as well as several, and where the guilty intent of several is manifested by their joint act, it becomes a joint offense.

11. **Criminal Law: Trial.** When complaint is made of the refusal of the district court to give an instruction requested, the burden is upon the party complaining to show not only that he was probably prejudiced by the refusal of the court to give the instruction, but he must also show that the entire instruction was correct as a proposition of law and applicable to the facts in evidence in the case.

12. **Criminal Law.** Under our code of criminal procedure, the law does not distinguish between principals in the first and second degrees, and whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender.

13. **Indictments and Informations: Criminal Law.** The same rule as to the information, conduct of the case, and punishment, applicable to a principal in fact now governs his aider, abettor, or procurer, and no additional facts need to be alleged in an information against the latter than are required against his principal.

14. **Trial.** An instruction will not be held to be prejudicially erroneous merely because of a harmless imperfection which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining.

15. **Criminal Law: Trial.** The word "or" when used not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the

same result, states but a single ground, and not the alternative.

16. **Burglary: Criminal Law.** The words "possession, custody or control" as used in section 28-534, R. R. S. 1943, express an alternative of terms, definitions, or explanations of the same thing in different words.

ERROR to the district court for Cass County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

Casey & Chovanec, and *Warren C. Schrempp,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *William T. Gleeson,* for defendant in error.

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

CHAPPELL, J.

An information charged defendant with unlawful possession of certain described instruments and tools, with intent feloniously to break and enter into a building containing valuable property. Upon a plea of not guilty, he was tried to a jury and found guilty as charged. His motion for new trial was overruled, and in the light of plaintiff's previous record, as was done and approved in Maher v. State, 144 Neb. 463, 13 N. W. 2d 641, the trial court sentenced defendant to serve four years in the Nebraska State Penitentiary. In that connection, the sentence imposed was less than the five year maximum authorized by section 28-534, R. R. S. 1943.

Therefrom defendant prosecuted error to this court, assigning substantially that the trial court erred: (1) In failing to sustain defendant's motion to quash the information; (2) in failing to sustain defendant's plea in abatement for want of a preliminary hearing because of an alleged fatal variance between the original complaint, which allegedly did not charge an offense under section 28-534, R. R. S. 1943, and the information, which admittedly did allege an offense thereunder; (3) in the admission and exclusion of certain evidence; (4) in the

refusing and giving of certain instructions; and (5) that the verdict was not sustained by the evidence but contrary thereto and contrary to law. We conclude that the assignments should not be sustained.

In the light of the record before us, the first assignment of error may be considered as waived. In that regard, defendant conceded in his brief that the information properly charged an offense under the statute. His brief argued none of the grounds alleged in his motion to quash, and none of such grounds could logically be said to raise the issue that on the record he had been denied a preliminary hearing. That objection was, however, concededly raised for the first time by his plea in abatement, which the second assignment alleges was erroneously overruled.

Since the information admittedly charged an offense under section 28-534, R. R. S. 1943, then by analogy the second assignment of error has no merit if the original complaint to which defendant pleaded not guilty and upon which he was concededly given a preliminary hearing in the county court was sufficient to charge the same offense. We conclude that it was.

The answer is found in O'Neill v. State, 105 Neb. 824, 182 N. W. 503, wherein it was concluded that an information identical with the complaint at bar in all material respects was sufficient to charge an offense under the same statute. We have heretofore held that a complaint or information is fatally defective only if its allegations can be true and still not charge a crime. Hunt v. State, 143 Neb. 871, 11 N. W. 2d 533.

The essential elements of an offense under section 28-534, R. R. S. 1943, required to be charged and proved by the State, are the possession of instruments or tools suitable for breaking and entering with the intent to use them for a burglarious purpose. O'Neill v. State, *supra;* 12 C. J. S., Burglary, § 69, p. 753; 9 Am. Jur., Burglary, § 86, p. 281, § 88, p. 282; Annotation, 103 A. L. R. 1313. Both the complaint and information alleged

such elements, and sufficiently stated an offense under the statute. The applicable rule is that where the record, as here, clearly shows that an information which charges an offense was based upon the same transaction for which defendant had a preliminary hearing upon a complaint substantially charging the same offense as in the information, then a plea of abatement for variance is unavailing. Wheeler v. State, 79 Neb. 491, 113 N. W. 253; Mills v. State, 53 Neb. 263, 73 N. W. 761. Therefore, we conclude that defendant had a preliminary hearing upon the offense charged in the information, and the second assignment has no merit.

For clarity of discussion we will next turn to the fifth assignment. In doing so, we conclude that evidence adduced by the State was amply sufficient to sustain the verdict. In that regard, defendant offered no competent evidence to refute or deny the State's evidence. In Kitts v. State, 153 Neb. 784, 46 N. W. 2d 158, a case strikingly similar to that at bar in its factual aspects, this court concluded that the material elements of the crime of possession, custody, or control of instruments or tools with intent to break and enter, as defined by section 28-534, R. R. S. 1943, may be proved by direct or circumstantial evidence, and that this court in a criminal action 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. That opinion also specifically held: "The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt.

"It is the province of the jury to determine the circumstances surrounding and which shed light upon the alleged crime; and if, assuming as proved the facts

which the evidence tends to establish, they cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed."

Bearing such rules in mind, we have examined the record, which discloses that on July 6, 1950, in Union, Cass County, Nebraska, a witness left his house about 11:30 p. m. to deposit some letters in the post office. As a matter of habit, he walked west through an alley, upon which his house abutted, immediately south of Main Street, which runs east and west, until he came to the first north and south street, intersecting such alley, then proceeded north to Main Street, thence west to the post office. While still walking in the alley and before he had reached its intersection with the north and south street, he observed a car facing north, parked in the street-alley intersection where he never had previously seen one parked. Walking within 10 feet of it, he noticed that there were three persons in the car, and as he approached, it was set in motion, going north toward Main Street, where it stopped at a stop sign, and a man alighted from the vehicle. The witness noted the Douglas County license, No. 1-16375, and observed that the vehicle was a 1939 or 1940 Buick.

A few minutes later, having mailed his letters and stopped in a nearby cafe for a cup of coffee, he retraced his route, and observed that the same vehicle was again parked at the same alley-street intersection. As he approached, it again contained three persons, and, starting up, moved north toward Main Street.

When the witness reached his house, he made a note of the vehicle's license number, and then and there telephoned a part-owner of a liquor store located in the so-called Banning Building so situated as to front on Main Street and abut upon the alley through which the witness had walked.

On cross-examination, the witness affirmed that he had regarded the presence of the vehicle and the persons

in it at that time and place as suspicious, and for that reason had taken particular note of the license number.

Another part-owner of the liquor store testified that at about 12:30 a. m., July 7, 1950, in response to a telephone call from his co-owner, he arrived at Union from Nebraska City, and drove his automobile slowly south down the street which bounded the block containing the Banning Building. At the intersection of the alley this witness also observed a car parked at the same spot as heretofore recited. It was a Buick, and its lights were off.

Such witness then called the sheriff and gave him the license number of the car. The sheriff arrived in Union at approximately 1:00 a. m., and was met by the witness, and riding in the sheriff's car, they permitted the same to coast down Main Street to the west, with lights and motor off, to a point one-quarter of a block east of the street intersection, where the Buick had been observed. They alighted from the vehicle and were walking toward the intersection when a dog started to bark. Thereupon there was a sound of running feet, a door slammed, lights went on, the motor started, and the parked car was driven north into Main Street without stopping, and turned west. The sheriff returned to his car, took off in pursuit, and, sounding his siren, forced the vehicle to the side of the road, where he arrested the three occupants of the car, a Buick bearing license No. 1-16375.

While the party who accompanied the sheriff held the sheriff's revolver on the three men, one of whom was defendant driver of the vehicle, the sheriff searched the car, there finding the following items, which were admitted in evidence: From the rear floor of the car, back of the front seat, he found and removed a pinch bar, two car spring halves, a steel punch, a tire tool, three chisels, a pair of pliers, an axe, a sledge hammer, and a flashlight. Also, he found and removed from under the right front seat a flashlight and two loaded revolvers concealed but readily accessible. The trial court

excluded a pair of black gloves found on the rear floor of the car, and also three nail setters and a screw driver, which the sheriff had taken from the person of one Orrin T. Fasnacht, who was alone in the back seat of the car.

At the sheriff's direction, three men present at the arrest went into the east-west alley immediately south of Main Street to inspect the rear of the building. There they found the east window on the rear of the Banning Building over the liquor store open one or two inches; a board fitted into the interior casing obstructed further elevation of the window; and the sill bore indentation marks. The lower sash of the window was removed later that morning and the pinch bar and punch taken from the car, upon being inserted by the sheriff, fitted the marks found on the window. The window had been closed on July 6 and prior to that day had borne no marks of any instrument. There was some dried putty on the window sill, and a white substance still adhered to the pinch bar when it was removed from the car. Such substance dropped off the bar during the defendant's preliminary hearing.

The defendant, in response to questions put to him by the sheriff immediately after his arrest, denied knowing that the guns were in the car, said that he did not know to whom the tools belonged, and that the car belonged to his brother. The man in the back seat at the time the car was searched said that some of the tools belonged to him.

The sheriff, on the basis of his experience and training as a law enforcement officer, testified that in his opinion the tools removed from the car operated by defendant were suitable and capable of being used for breaking and entering buildings. We conclude that by whatever test the evidence was sufficient to sustain the verdict.

When the instruments and tools were offered in evidence by the State, defendant objected to their admis-

sion for want of foundation. They were admitted over such objections, and the third assignment of error contended that the trial court erred in doing so. The record discloses that the State was required and did show by competent evidence, in addition to circumstances heretofore recited, that: (1) Defendant was operating the motor vehicle immediately prior to his arrest; (2) the tools were observed on the floor of the vehicle by the sheriff and other witnesses; (3) they were removed therefrom in the presence of defendant, the other two men in the car, and other witnesses; (4) they remained in the custody of the sheriff from the time of their removal from the car until their production in court; (5) with one immaterial exception heretofore noted, they were in the same condition at the trial as they were at the time of removal from the car; and (6) they were suitable and capable of being used for breaking and entering buildings. Defendant has pointed out in the brief no respect in which foundation was insufficient. As a matter of fact, under the circumstances heretofore recited, we conclude that ample foundation was laid for their admission.

Defendant also complained because the trial court excluded an exhibit purporting to be an information filed in the same court against one Orrin T. Fasnacht. The clerk of the district court, as a witness for defendant, identified the information only as one "filed in the case of State of Nebraska vs. Lloyd D. Jacks and others." When it was offered in evidence by defendant, the State objected to its admission as irrelevant, incompetent, and immaterial. The objection was sustained, whereupon counsel for defendant said: "This offer is made for the purpose of showing that Orin T. Fasnacht is charged with the crime of possession of the burglary tools, the same tools, being those with which this defendant at the bar is charged with; this offer being made for the purpose of showing that, by the admission of the State, the tools were in the ownership and possession of someone

other than the defendant at this bar." The State then objected to such offer as "irrelevant, incompetent, and immaterial. Tends to neither prove or disprove any issue in this case * * * Not the best evidence." The objection was sustained and we conclude that the trial court properly did so.

The information itself did disclose that one Orrin T. Fasnacht, not otherwise identified, was charged with the crime of possession of burglary tools. However, it did not disclose that they were the same tools as those involved in this case, or by analogy that they were in the ownership and possession of someone other than defendant, and in that regard, defendant produced no evidence to sustain any such contention.

In any event, the fact that defendant was separately charged with the same offense would not be a controlling element. As stated in 12 C. J. S., Burglary, § 69, pages 754 and 755: "To convict defendant of the crime of possessing burglar's tools and implements, the state must show that he was in possession thereof in a legal sense of the term 'possession,' although it need not prove an actual possession, or that the tools were taken from the person of defendant. Possession, for the purposes of such statutes, may be joint or individual, and two or more may be in possession of burglar's tools where they have the power of control and an intent to control jointly. * * * In a prosecution for possession of burglar's tools and implements, the ownership thereof is immaterial." Also, as stated in 9 Am. Jur., Burglary, § 86, p. 281: "The possession may be actual or constructive. Unless expressly provided, possession upon one's person is not necessary. Two persons may have constructive possession or one may have actual possession and the other, constructive possession." And again in section 87, p. 282: "The possession of burglarious implements with a guilty intent may be joint as well as several; and where the guilty intent of several is manifested by their joint act, it becomes a joint offense."

See, also, Annotation, 103 A. L. R. 1314, and State v. Furlong, 216 Iowa 428, 249 N. W. 132, wherein similar tools were also found in a car occupied by three men, as in the case at bar. It follows that the exhibit was entirely immaterial, irrelevant, and incompetent in any manner to prove the offer as made.

The fourth assignment charges that the trial court erred in refusing to give defendant's requested instructions Nos. 1, 2, 3, and 4, and in the giving of instructions Nos. 1, 6, 9, and 13. We conclude that the contention has no merit.

In Jones v. State, 147 Neb. 219, 22 N. W. 2d 710, this court held: "It is the duty of the court to instruct the jury on the law of the case, whether requested so to do or not; and an instruction or instructions which, by the omission of certain elements, have the effect of withdrawing from the consideration of the jury an essential issue or element of the case, is erroneous; but where the jury is instructed generally upon the law, and when the instructions given do not have the effect above stated, error cannot be predicated upon the failure of the court to charge upon some particular phase of the case unless a proper instruction was requested by the party complaining." Also, as stated in Owens v. State, 152 Neb. 841, 43 N. W. 2d 168, quoting with approval from Davis v. State, 51 Neb. 301, 70 N. W. 984: " 'When complaint is made of the refusal of the district court to give an instruction asked, the burden is upon the party complaining to show, not only that he was probably prejudiced by the refusal of the court to give the instruction, but he must also show that the entire instruction was correct as a proposition of law and applicable to the facts in evidence in the case.' " Such cases are controlling here.

In that connection, defendant's requested instruction No. 1 would have erroneously told the jury among other things that: "In this connection, you are instructed that to have possession one must control the object ex-

clusive of others and must have the right to exclude others from meddling with it; in other words, possession means actual control and management." The court properly refused to give the instruction.

In Moore v. State, 148 Neb. 747, 29 N. W. 2d 366, this court held: "Under our code of criminal procedure the law does not distinguish between principals in the first and second degrees, and whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender.

"The same rule as to the information, conduct of the case, and punishment, applicable to a principal in fact now governs his aider, abettor, or procurer, and no additional facts need to be alleged in an information against the latter than are required against his principal."

In that connection, defendant's requested instruction No. 2 would have erroneously told the jury that: "There is no allegation or proof in this case of conspiracy or joint enterprise; therefore, if you find that the tools and instruments alleged, were owned and in the possession of someone other than the defendant Ellis N. Phillips for any purpose whatsoever, the possession cannot be imputed to this defendant and your verdict should be one of not guilty." The court properly refused to give such an instruction. Further, the foregoing authoritatively discloses that, contrary to defendant's contention, instruction No. 13, given by the trial court, properly stated the applicable rule. See, also, McMahon v. State, 70 Neb. 722, 97 N. W. 1035. Such instruction was not erroneously given.

Defendant's requested instruction No. 3 would have erroneously told the jury that: "You are instructed that the intent to break and enter must exist at the same time as the possession complained of and proved, and that if, at the time it is alleged that the tools were found in the automobile, the defendant had no intent to break and enter a building containing property of value, then you must return a verdict of not guilty as to this de-

fendant." It will be noted that the instruction erroneously confined defendant's intent to the time the tools were found in the automobile after his arrest. The crime, if one had been committed, was complete at the moment of arrest, and at all pertinent times prior thereto as well, while defendant possessed the tools with intent to break and enter. The instruction was properly refused.

Defendant's requested instruction No. 4 would have erroneously told the jury with regard to the two revolvers found concealed but readily accessible under the front seat of the automobile which he was driving, that: "* * * the fact that there has been testimony that two revolvers were found in the car in which defendant was, would not, of itself, be wrongful or unlawful, as it is no crime against the laws of the State of Nebraska to carry in an automobile a loaded or unloaded revolver."

In that connection, section 28-1001, R. R. S. 1943, containing exceptions having no application here, makes it a felony to carry a revolver concealed on or about his person. In Bright v. State, 125 Neb. 817, 252 N. W. 386, a conviction was affirmed where the evidence disclosed that defendant was carrying a revolver concealed but readily accessible either in a motor vehicle operated by him or on his person while operating the same. The weight of authority sustains such position. See, 56 Am. Jur., Weapons and Firearms, § 10, p. 996; Annotation, 50 A. L. R. 1534; Annotation, 88 A. L. R. 807. The instruction was properly refused.

In Hampton v. State, 148 Neb. 574, 28 N. W. 2d 322, this court held: "An instruction will not be held to be prejudicially erroneous merely because of a harmless imperfection which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining." Instruction No. 1, given by the trial court, could not for any reason have been confusing or misleading, and without further discussion it is sufficient to say that it comes squarely within the fore-

going rule. It was not prejudicially erroneous.

Defendant complained that instructions Nos. 6 and 9, given by the trial court, were prejudicially erroneous because they contained the words "possession, custody or control" when the information used only the word "possession," thus imposing an erroneous burden upon defendant. Instruction No. 9 simply recited the pertinent parts of the statute defining the crime. Instruction No. 6 told the jury: "The material allegations and elements in the amended information necessary to be established by the evidence beyond a reasonable doubt in order to convict the defendant of the crime charged are:

"1. That on or about July 7th, 1950, in the County of Cass and State of Nebraska, the defendant, Ellis N. Phillips, had in his possession, custody or control, certain instruments or tools as alleged in the amended information, suitable for burglarious purposes.

"2. That such possession, custody or control of said instruments or tools was with the intent on his part, feloniously, to break and enter some building containing valuable property.

"If you find from the evidence beyond a reasonable doubt that the State has established each of the foregoing elements, then it will be your duty to find the defendant guilty of the crime as charged in the amended information; but if the State has failed to so establish each of the foregoing elements by the evidence beyond a reasonable doubt, then it will be your duty to find the defendant not guilty."

At the outset it will be seen that the additional burden about which defendant complains was placed on the State rather than the defendant, who received the benefit thereof.

On the other hand, the words "possession, custody or control" as used in the statute do not mean three different things or state three different situations or elements of guilt. As stated in Smith v. R. F. Brodegaard & Co., 77 Ga. App. 661, 49 S. E. 2d 500: "They express

an alternative of terms, definitions, or explanations of the same thing in different words. They mean substantially the same thing, i. e., that the property is within the power and dominion of the defendant. It is hardly conceivable that a person could be in possession of personal property without having some kind of custody or control over the property, or could have it in his custody without some character of control or possession, or in his control without some measure of custody or possession. 'The word "or", when used not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same result, states but a single ground, and not the alternative.' 46 C. J., 1125 (4). This rule of construction has been recognized and applied by our courts in both criminal cases and civil cases." See, also, Wilson v. State, 153 Tex. Cr. 270, 219 S. W. 2d 86; Boyd v. Travelers Fire Ins. Co., 147 Neb. 237, 22 N. W. 2d 700; McMahon v. State, *supra*. In other words, possession as used in the information embraced custody or control, and instructions Nos. 6 and 9, given by the trial court, did not depart from the issue formulated by the information and defendant's plea of not guilty thereto, nor impose any additional burden upon defendant.

Finding no error in the record prejudicial to defendant, we conclude that the judgment should be and hereby is affirmed.

AFFIRMED.

EDITH JANE WAX, NOW EDITH JANE PLANANSKY, AS ADMINISTRATRIX OF THE ESTATE OF DALLAS E. WAX, DECEASED, APPELLANT, V. THE CO-OPERATIVE REFINERY ASSOCIATION, A CORPORATION, ET AL., APPELLEES.

49 N. W. 2d 707

Filed November 9, 1951. No. 32930.

1. **Fires: Negligence.** In the absence of any statute or ordinance prescribing a duty on the part of an owner or occupant of premises to a fireman or individual fighting a fire thereon, they are bare licensees, and such owner or occupant is not liable for injuries to such persons except those proximately resulting from willful or wanton negligence or a designed injury or a hidden danger or peril known to the owner or occupant but unknown to the fireman or individual and not, if reasonable opportunity is given, disclosed to such persons or their superiors who were unable to observe the same by exercising ordinary care.
2. ———: ———. In such cases it is immaterial whether or not the fire was started by negligence of the occupant or owner of premises or that such was continuing negligence, since a fireman or individual undertakes to fight a fire knowing that it exists and as licensee ordinarily assumes the risk of the premises as he finds them.
3. **Negligence.** The duty of an owner or occupant of premises owing to a licensee is not confined to real property, but applies as well to personal property.

APPEAL from the district court for Box Butte County: EARL L. MEYER, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Charles A. Fisher, for appellant.

Edwin D. Crites, for appellees.

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

CHAPPELL, J.

A former opinion in this case is reported as Wax v. Co-Operative Refinery Assn., *ante* p. 42, 46 N. W. 2d 769. Upon reargument, we arrive at the same result as in

such former opinion, but upon the basis of somewhat different reasoning. However, we still adhere to and reaffirm syllabus 7 and 8, together with that part of the opinion discussing and perfecting the propositions of law established by such syllabus. Otherwise, insofar as said former opinion is in conflict herewith, it is vacated and withdrawn.

The pleadings and pertinent facts appearing in the record are correctly reflected in that opinion, and they will not be generally restated. Further, the facts reflected by the opinion in Fentress v. Co-Operative Refinery Assn., 149 Neb. 355, 31 N. W. 2d 225, with exceptions which could not require a different result here, are identical with those at bar. Such exceptions appear in our former opinion, and they will not be generally repeated. It is sufficient for us to say that in the Fentress case plaintiff was a trained member of the Hemingford Volunteer Fire Department. In other words, he was a volunteer fireman.

In the case at bar, decedent was a professional paid fireman, in the employ of the United States government, at the Alliance Air Base, and not a member of the Hemingford Volunteer Fire Department. However, he resided in Hemingford, was there when the fire alarm siren sounded, and went to the fire, where, upon request, with knowledge and permission of and under direction of Hemingford Volunteer Fire Department officials, he voluntarily served as a fireman with other firemen. In other words, he was simply a fireman who volunteered.

Both the plaintiff in the Fentress case, and decedent in this case, were in fact firemen whose respective injuries or death occurred while they were fighting the same fire, under almost identical circumstances. In the light of the situation presented, they were both, in the eyes of the law, bare licensees, and the two cases are controlled by like or related propositions of law.

In the Fentress opinion, it was said: "The rule is that in the absence of any statute or ordinance prescribing a

duty on the part of the owner of premises to members of a public fire department, the owner is not liable for injuries to such a fireman except those proximately resulting from willful or wanton negligence or a designed injury. New Omaha Thomson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89. 38 Am. Jur., Negligence, § 125, p. 785; Annotations, 13 A. L. R. 637, 141 A. L. R. 584; 45 C. J., Negligence, § 200, p. 794.

"We are not here dealing with a hidden danger or peril. The condition of the burning transport was an obvious one."

The pertinent ordinances, rules, and regulations here involved and allegedly violated were doubtless enacted to prevent a fire and not to prescribe a duty on the part of an owner or occupant of premises to an individual or fireman or members of a fire department fighting a fire.

Each authority cited in the Fentress case affirms the fact that a fireman or individual fighting a fire on the premises of an owner or occupant is a bare licensee to whom the owner or occupant owes no greater duty than to refrain from injuring him by willful or wanton negligence or a designed injury, except in certain cases where there may be the duty to warn of hidden danger or peril known to the owner or occupant but unknown to or unobservable by the fireman in the exercise of ordinary care. Here the danger was not only obvious, but also defendant gave warning that there was danger of a second explosion which caused the injuries to and death of decedent. See, also, 65 C. J. S., Negligence, § 33, p. 490; 30 L. R. A. N. S. 60.

The fact that defendant owner's gas and oil trailer truck here involved was personal property and out in the road some distance from defendant's filling station at the time of the accident would be of no controlling consequence to change the rule, because the rule with respect to the duty toward a licensee is not confined to real property but applies to personal property as well.

45 C. J., Negligence, § 202, p. 798; 65 C. J. S., Negligence, § 35, p. 494.

In New Omaha Thomson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89, cited with approval in the Fentress case, *supra*, it was held: "In the absence of any municipal ordinance or statute changing the rule, a fireman who entered upon property without any special authority or invitation of the owner is a bare licensee, made such by public necessity and takes the risk of the premises as he finds them."

In Cities Service Oil Co. v. Dixon, 14 Ohio Law Abstract 203, a private individual who went to assist at a fire was held to be a bare licensee. In that opinion, quoting from Hannan, Admr. v. Ehrlich, 102 Ohio St. 176, 131 N. E. 504, it was said: "'A licensee takes his license subject to its attendant perils and risks, and the licensor owes him no duty except to refrain from wantonly and wilfully injuring him, and to exercise ordinary care after discovering him to be in peril; he should not be exposed to hidden dangers, pitfalls or obstructions.'" See, also, Eckert, Admr. v. Refiners Oil Co., 17 Ohio App. 221, a comparable case, which also quoted the foregoing statement with approval. In the last-cited case it was held: "A fireman, responding to an alarm of fire, is a licensee while on the premises where the fire is in progress, and the owner of such premises owes to such fireman only the duty to refrain from wilfully or wantonly injuring him and to exercise ordinary care after discovering him to be in peril."

It is generally held that a fireman, or individual who goes to assist in putting out a fire upon premises and is injured, cannot establish liability of the property owner or occupant therefor by simply establishing negligence in starting the fire, but only by showing that his injuries were designed or proximately caused by willful or wanton negligence of such owner or occupant or by some hidden danger or peril upon the premises, known by the occupant or owner but unknown by the

fireman or individual, and not, if reasonable opportunity is given, disclosed to such persons or their superiors, who were unable to observe the same by exercising ordinary care. Therefore, it is immaterial whether or not the fire was started by negligence or that such was continuing negligence as argued by plaintiff, since a fireman or individual who undertakes to fight a fire knows that it exists and as licensee ordinarily assumes the risk of the premises as he finds them. 141 A. L. R. 585.

Cases relied upon by plaintiff are entirely distinguishable both upon the facts and the law. In Suttie v. Sun Oil Co., 15 Pa. Dist. & Co. 3, it was held that consideration of public policy prevented the predicating of any liability upon the owner or occupant to a fireman upon negligence causing the fire. Therein the court said: "It is a well known fact that in the great majority of instances fires originate from the negligence of those in possession of property. To impose upon an owner liability for such negligence in favor of those who voluntarily assume all the dangers growing out of so hazardous an occupation, however commendably courageous and disinterested the assumption may be, would inflict an onerous and unfair risk upon one who is deprived of all control over the other's acts, who cannot even prevent him from assuming such risks, who, for the public good, has temporarily lost all control over his property, and who is helpless to protect himself. * * * This position is in accord also with the obvious public policy to which the situation gives rise. An owner, facing knowlege that he risks being mulcted in damages by those whom he summons to aid in the extinguishment of a fire, would be strongly tempted by self-interest to temporize with the dangerous situation, to adopt his own means of saving his property, and to delay summoning aid until perhaps greater danger would be threatened to the public." See, also, Lunt v. Post Printing Co., 48 Colo. 316, 110 P. 203, 30 L. R. A. N. S. 60, 21 Ann. Cas. 492.

In the light of the foregoing rules, we find in the rec-

ord no competent evidence which could reasonably sustain a conclusion that defendant was guilty of willful or wanton negligence or a designed injury, or that there was a hidden danger or peril upon which a recovery could be predicated. Therefore, we conclude that the trial court did not err in setting aside the verdict but did err in granting defendant a new trial, and that the cause should be and hereby is remanded with directions to render a judgment notwithstanding the verdict in favor of defendant.

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

YEAGER, J., concurring.

I find no fault with any of the determining conclusions arrived at in the second opinion in this case. I think it correctly reflects the facts and controlling principles of law.

I think however that a mistake was made in the withdrawal of parts of the earlier opinion. As I view it the two are in nowise inconsistent. The two point out that within the meaning of law the acts of the defendant were not the efficient cause of the accident and death. An efficient cause intervened which became the proximate cause. The only discernible substantial difference as I view it between the two opinions is that in the former the causative agent was denominated an intervening cause whereas in the latter it was not.

HERBERT E. RUHL ET AL., APPELLEES, V. JOHN H. JOHNSON ET AL., APPELLANTS.
49 N. W. 2d 687

Filed November 9, 1951. No. 32950.

Vendor and Purchaser. Courts of equity will decree a strict foreclosure of land contracts only under peculiar and special circumstances. Applications of that character are addressed to the sound legal discretion of the court, and they will be granted

in cases where it would be inequitable and unjust to refuse them.

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

Richard O. Johnson and *H. B. Muffly,* for appellants.

Cline, Williams, Wright & Johnson, for appellees.

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

SIMMONS, C. J.

This action began as one in ejectment brought by vendors against purchasers and based on alleged breaches of a contract of sale of real estate and personal property. It ended with a decree of strict foreclosure running in favor of the vendors and against the purchasers. The purchasers appeal. We reverse the judgment of the trial court and remand the cause with directions.

For convenience the vendors will be referred to herein as plaintiffs and the purchasers as defendants. The plaintiffs are husband and wife. The defendants are husband and wife.

This action was tried upon the petition of the plaintiffs, the answer and cross-petition of defendants, and the reply and answer to cross-petition of plaintiffs. We have here for examination and consideration the above pleadings and the court's decree, together with motions for new trial filed by both parties, a bill of exceptions not having been settled as required by statute.

By petition filed September 2, 1949, plaintiffs alleged in general that the plaintiff husband was the legal owner in fee simple of certain real estate in the city of Lincoln; that on October 10, 1947, plaintiffs and defendants entered into a contract of sale whereby the defendants agreed to buy the property for $38,000—$12,000 to be paid at that time and the balance payable in monthly installments of $256.46, including interest on the prin-

cipal due at 5 percent per annum; that defendants were to pay taxes and insurance; that plaintiffs put defendants in possession; that defendants paid thereon the $12,000, and the monthly payments to and including June 1949; that defendants defaulted in the payments due for July and August 1949; that they failed to pay taxes in the amount of $191.25; that demand for performance had been made; that defendants had advised plaintiffs they would not perform; that time was of the essence by the contract; and that notice of the termination of the contract had been given and demand for possession made. Plaintiffs prayed for ejectment and that they be put in possession.

Defendants moved to make more definite and certain and demurred. The motion and demurrer were overruled. Defendants assign these rulings as error. As we view the issues presented here, these assignments need not be determined.

Defendants answered, denied generally, and by cross-petition admitted in substance the contract and the payments made, alleged the payment of insurance and taxes, alleged false representations made by plaintiffs and relied on by defendants as to the condition, quality, and value of the buildings on the premises, alleged damage of $15,000, and prayed for credit of that amount on the purchase price. Defendants alleged that by virtue of payments made to plaintiffs and expenditures made on the property, they had an equitable title to the property, and that plaintiffs by action of ejectment were undertaking to deny a right to redeem under a judicial foreclosure.

By reply and answer to the cross-petition, plaintiffs joined issue on the allegations of misrepresentation.

The defendants moved that the cause be transferred to the equity docket. Plaintiffs waived a jury trial. The court sustained the motion to transfer.

The trial court did not make a general finding for the plaintiffs or the defendants. It found that the plaintiff

husband was the legal owner of the real estate; that a contract of purchase had been made; that defendants had been placed in possession of the property; that payment of $12,000 had been made on the principal sum, as well as monthly payments to and including June 10, 1949; that defendants refused to make further payments until an adjustment had been made as to the purchase price by reason of the representations of the plaintiffs as to the condition of the property; that defendants had failed to pay taxes or insurance as provided by the contract; that false representations had been made as to specific matters; and that defendants had relied on them and had been damaged in the amount of $989. The court credited that amount on delinquent payments due on the purchase price and found that there was due the plaintiffs on the payments on the contract down to and including June 1950, the amount of $2,088.52, to which the court added $105.89 for insurance paid by plaintiffs. These findings are obviously within the issues presented by the pleadings. Neither party challenges them here.

The court then decreed that defendants be allowed credit of $989 on the purchase price, and that plaintiffs have judgment for the balance then due on the contract, in the amount of $2,194.41, together with costs.

The court then ordered the defendants to pay all delinquent real estate taxes, make the monthly payments beginning July 1950, pay all real estate taxes assessed against the property, when due, and keep the property insured, all as provided by the contract.

The court further decreed that if defendants failed to pay the sums found due the plaintiffs and the delinquent taxes within 60 days or failed to make the monthly payments accruing during the 60-day period, plaintiffs should then be entitled to immediate possession and, on application, writ of assistance should issue. The court went further and decreed that if defendants paid the amounts then found due, and delinquent taxes, but

thereafter defaulted in payments due under the contract, plaintiffs could declare a forfeiture as provided in the contract and be entitled to immediate possession and writ of assistance.

The effect of this decree was to grant plaintiffs strict foreclosure of amounts then in default and to adjudicate and grant strict foreclosure in the event of future defaults. The defendants assign as error here that the decree in these respects is contrary to law. This assignment presents the question which we are here required to determine.

It is patent that the trial court denied the plaintiffs relief in ejectment. Plaintiffs do not appeal from that determination, but ask here that the judgment be affirmed.

The question then is, did the court err in granting strict foreclosure?

The applicable rule is: "Courts of equity will decree a strict foreclosure of land contracts only under peculiar and special circumstances. Applications of that character are addressed to the sound legal discretion of the court, and they will be granted in cases where it would be inequitable and unjust to refuse them." Harrington v. Birdsall, 38 Neb. 176, 56 N. W. 961. See, also, Farmers & Merchants State Bank v. Thornburg, 54 Neb. 782, 75 N. W. 45; Patterson v. Mikkelson, 86 Neb. 512, 125 N. W. 1104; Grove v. Dineen, 4 Neb. (Unoff.) 722, 96 N. W. 253; Swanson v. Madsen, 145 Neb. 815, 18 N. W. 2d 217.

In the light of the court's finding and decree it is patent that at the time plaintiffs undertook to terminate this contract and brought their ejectment action, the defendants were entitled to a credit on the purchase price in excess of the total delinquencies pleaded. Plaintiffs here contend that under the contract that credit could not be used to offset the monthly payments. The trial court held otherwise and decreed otherwise. Plaintiffs have not appealed from that determination.

It is patent also that as of the time this action was brought, the credit of $989 being included, defendants had paid on this obligation approximately $16,000, and had a substantial equity in the property. As of the time of the decree that situation remained unchanged except, of course, as to delinquencies accruing during the pendency of the action.

There are no peculiar and special circumstances shown that make it inequitable and unjust to refuse strict foreclosure. Everything in the record is to the contrary. It accordingly follows that the trial court erred in granting a strict foreclosure.

The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT, V. FRED O. BOETTCHER, APPELLEE.

49 N. W. 2d 690

Filed November 9, 1951. No. 32999.

Bridges: Automobiles. Section 39-722(4), R. S. Supp., 1949, providing in part that "If any truck shall cross a bridge with a total gross load in excess of the posted capacity of said bridge and, as a result of such crossing, any damage results to the bridge, the owner of such truck shall be responsible for all of such damage" creates a liability absolute in its terms when the facts set out therein are shown to have happened.

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

Johnson & Stuart, for appellant.

Baskins & Baskins, for appellee.

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

SIMMONS, C. J.

Plaintiff brought this action for damages to one of the bridges across its canal allegedly caused by defendant driving a truck weighing in excess of the posted capacity of the bridge upon and over the bridge. Defendant answered, denied generally, and alleged that the bridge broke down because of its deteriorated condition and not through any fault of his. Trial was had to a jury resulting in a verdict for defendant. Plaintiff appeals. We reverse the judgment of the trial court and remand the cause with directions to enter a judgment for the plaintiff.

At the close of all the evidence plaintiff moved for a directed verdict. The motion was overruled. Plaintiff later moved to set aside the verdict and enter judgment in accord with its motion for a directed verdict. That motion was denied. Plaintiff's first assignment of error is that the trial court erred in refusing to grant these two motions.

There is no material dispute in the evidence as to those matters involved in determining this assignment.

The bridge involved was built in 1939 in a north-south direction across plaintiff's canal. The land to the south of the canal is pasture. There was a county road to the north of the bridge, to the south was a trail road. The bridge was used largely by the occupants of the land to the south for local use and moving of cattle to and from the pasture lands.

The bridge was a wooden structure, 60 feet in length. It was supported by abutments at each end and by three bents consisting of four wooden piling in each bent. It had signs at each end showing a capacity of 10 tons. When built it had an actual load capacity much greater than the posted capacity.

Plaintiff was under contract with Dawson County to maintain, repair, and replace the bridge when replacement became necessary.

It was customary for ranchers to haul cattle to and

from their pasture lands in trucks described as pickups, straight trucks, and semi-trucks. The straight trucks when empty weighed 4 to 5 tons and, when loaded, 8 to 9 tons. The semi-trucks when empty weighed 10 tons or more and, when loaded, 20 tons or more.

The damage to the bridge here occurred on November 16, 1948. On that day in going for a load of cattle defendant crossed the bridge going south with a semi-truck weighing 11 tons and with an over-all length of 50 feet. He returned across the bridge with a load of cattle, the gross weight then being approximately 20 tons. The cattle were unloaded and he again went across the bridge with his empty truck. These three trips across the bridge were without mishap. Defendant then loaded his truck so that the approximate gross weight was 20 tons and with that load drove across the bridge.

Defendant testified that he did not see the load-limit markings but knew that the bridge was of the 10-ton type; that he knew the "kind of shape" those bridges were in; "* * * that is why I went kind of fast"; and that he went across at 15 to 20 miles an hour. As defendant went across, the four piling of the south bent gave way, and the bridge at that point went down, the rear wheels and end of the truck going down also. Defendant drove his truck on across without damage to truck or cargo.

The evidence is that the piling had been in the bridge 9 years and had deteriorated so that three of them had an effective diameter of 6 to 8 inches, i. e., the diameter or heart of the piling that had not weathered away, and one had less than 6 inches. The expert evidence is that the bridge was ample to carry the posted 10-ton load and actually had a conservative load capacity of over 22 tons; that an overload or excess of 10 tons put a lateral and increased stress on the bents; and that repeated overloading would weaken the fibers at the ground line.

As above indicated, the bridge that day had sustained on two occasions a load of 11 tons and on one occasion a load of 20 tons.

The bridge was repaired at a cost of $357.64. Plaintiff sued for that amount.

The substantial question presented is what rule of law applies to fix defendant's liability, if any?

Plaintiff pleaded and relied upon the provisions of section 39-506, R. S. 1943, which require a highway commissioner to post upon each bridge a sign showing the carrying capacity or weight the bridge will carry or bear, and that part of section 39-722(4), R. S. Supp., 1949, which provides: "If any truck shall cross a bridge with a total gross load in excess of the posted capacity of said bridge and, as a result of such crossing, any damage results to the bridge, the owner of such truck shall be responsible for all of such damage."

Defendant relies upon section 39-834, R. S. 1943, and certain of our decisions to which reference will be made. The provision of the act is: "If special damage happens to any person, his team, carriage or other property by means of insufficiency or want of repair of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in an action against the county * * *."

In Seyfer v. Otoe County, 66 Neb. 566, 92 N. W. 756, we stated the rule that "In constructing and maintaining a bridge for public use, a municipality is not limited in its duty by the ordinary business use of the structure, but is required to provide for what may be fairly anticipated for the proper accommodation of the public at large in the various occupations which, from time to time, may be pursued in the locality where it is situated."

Defendant further relies upon that part of the opinion in City of Central City v. Marquis, 75 Neb. 233, 106 N. W. 221, which is as follows: "The evidence shows conclusively that the use of traction engines on the highways in that locality had been common for some years.

Therefore the use of the bridge in moving such engines was one which might have been fairly anticipated by the defendant and for which it was bound to provide. Anderson v. City of St. Cloud, 79 Minn. 88. This case is cited with approval in Seyfer v. Otoe County, 66 Neb. 566. That being true, unless the plaintiff had knowledge of the unsafe condition of the bridge, he had a right to assume that the defendant had discharged its duty, and that the bridge was safe for the 'accommodation of the public at large in the various occupations, which from time to time may be pursued in the locality where it is situated,' and was not charged with the duty of 'planking' it. Besides, one of the questions for the jury was whether the plaintiff was making an unusual or extraordinary use of the bridge at the time of the accident." For continuity we here point out that we there also stated the rule that "A party attempting to cross a bridge which is a part of a highway in the absence of notice to the contrary, or facts sufficient to put him on inquiry, has a right to assume that it is reasonably safe for the accommodation of the public at large in the various occupations pursued in the locality where the bridge is situated."

In Kovarik v. Saline County, 86 Neb. 440, 125 N. W. 1082, 136 Am. S. R. 704, 27 L. R. A. N. S. 832, we made direct reference to the section of the statute relied upon by the defendant, and held that it clearly imposed the duty upon the counties of the state of maintaining the sufficiency, as well as the repairs, of their bridges. We there followed the above quoted rules from Seyfer v. Otoe County, *supra,* and City of Central City v. Marquis, *supra.* We further stated this rule: "The sufficiency and state of repair of bridges upon public highways referred to in section 117, ch. 78, Comp. St. 1909, must be applied to the uses to which a bridge is ordinarily exposed prior to and at the time of the accident by which it may be claimed injury to person or property

was suffered. It should be sufficient to meet the present ordinary necessities of the public."

Based on these authorities defendant contends that it was the duty of the county to keep its bridges in reasonable repair and to build such bridges as will carry the customary traffic over those bridges; that plaintiff has assumed these duties and obligations as to this bridge; and that defendant is within those rules and not liable for the damages following the customary use which he made of this bridge.

That situation has been changed.

In the course of the opinion in Kovarik v. Saline County, *supra,* we said: "We do not mean by this to announce an inflexible rule that it is the duty of the county to provide safe passage for extraordinary heavy loads at each and all of its bridges across streams. It might be, in counties where bridge burdens are heavy, as with defendant, that with safe bridges at reasonable distances apart, and suitable notices of warning conspicuously posted at others giving their capacity when not considered sufficient for loads exceeding a certain weight, the requirements of the law might be met. That question, however, is not involved in this case and is not decided." That opinion was filed April 9, 1910.

The 1911 Legislature provided with reference to the county highway commissioner that "* * * he shall firmly post or attach upon each bridge in a conspicuous place a board or metal sign showing the carrying capacity or weight which the bridge will carry or bear and any person driving across or going upon any such bridge with a greater weight than shown by such sign, shall recover no damages because of any accident or injury which may happen to him upon such bridge * * *." Laws 1911, c. 116, § 5, p. 406. That provision is now section 39-506, R. S. 1943. The same Legislature by an act approved the same day provided: "It is hereby made the duty of the county boards or other officials having charge of highways in the various counties when-

ever any bridge or culvert is constructed, re-constructed or overhauled, to use in floors of the same planking not less than three inches in thickness, when wood is employed, and to so construct or repair the same, whatever material is employed, that it will sustain a load of not less than 20 tons." Laws 1911, c. 113, § 1, p. 395.

The 1915 Legislature amended this act so as to provide that new wooden bridges should sustain a concentrated moving load of not less than 15 tons and all other new bridges not less than 20 tons, and provided that the county board should mark or cause to be marked all new or repaired bridges with signs showing their capacity. Laws 1915, c. 58, § 1, p. 152.

The 1917 Legislature again amended the act to provide, among other things, that it be a misdemeanor for officials to fail to perform their duties as required by the act. Laws 1917, c. 62, § 1, p. 162.

The act was again amended in 1923 so as to provide that new bridges should sustain a concentrated moving load of not less than 10 tons on some bridges and not less than 15 tons on others, and the requirement as to the posting of notices was changed accordingly. Laws 1923, c. 47, § 1, p. 165. These provisions, with subsequent amendments not material here, are now sections 39-803 and 39-803.01, R. S. Supp., 1949.

At this point we call attention to our decision in Higgins v. Garfield County, 107 Neb. 482, 186 N. W. 347. The action was brought under the provisions of section 39-834, R. S. 1943, relied upon by the defendant here. We there carefully pointed out that the bridge involved was not marked as to its carrying capacity and that had it been so marked, a different rule would apply. We there pointed out also that the liability of the county was statutory. See, also, Sharp v. Chicago, B. & Q. R. R. Co., 110 Neb. 34, 193 N. W. 150.

It will thus be seen that the Legislature, subsequent to the decisions upon which defendant relies, materially changed both the duties and the liabilities of a county.

This legislation above discussed and these decisions deal with the liability of the county to individuals. Section 39-722(4), R. S. Supp., 1949, deals with the liability of one who uses a bridge in violation of its provisions to respond in damages. It appears to have been a new provision in 1933. Laws 1933, c. 105, § 4, p. 426. The act creates a liability absolute in its terms when the facts set out therein are shown to have happened. State v. Yellow Baggage & Transfer Co., 211 Wis. 391, 247 N. W. 310. Here it is shown without dispute that a truck owned and driven by defendant crossed the bridge carrying a load in excess of the posted capacity. That damage followed as a result of such crossing is the only conclusion that can be sustained by the evidence. The amount of the damages resulting is not in dispute. The act makes the owner liable for the damage. The trial court erred in not sustaining the motion for a directed verdict.

The judgment of the trial court is reversed and the cause remanded with directions to enter a judgment for the plaintiff as prayed.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. EMIL JOHNSON, JR. ET AL., APPELLANTS, V. COUNTY OF GAGE, NEBRASKA, APPELLEE.
49 N. W. 2d 672

Filed November 9, 1951. No. 33005.

1. **Counties.** A county in this state has only such powers as are expressly conferred upon it by statute and such as are incidentally indispensable to carry into effect those expressly granted it.
2. ———. A grant of power to a county is strictly construed and any reasonable doubt of the existence of the power is resolved against the county.
3. **Highways.** The duty of maintenance and repair of county roads and rural mail and star route roads is placed upon the county board by statute.

4. **Counties: Highways.** The powers of a county board in regard to the maintenance and repair of such roads are commensurate with the duty imposed, and the performance thereof in any reasonable manner by the county may not be interfered with or defeated.
5. **Municipal Corporations.** A municipal corporation may, when authorized to engage in the business of furnishing services to its inhabitants, dispose of by private sale a surplus necessarily acquired, when to do so does not interfere with any prior rights of its inhabitants thereto.
6. **Counties.** A county in this state is not a municipal corporation but is a quasi corporation, governmental in character, charged with objects of necessary local administration and in that capacity acts as an agent of the state.
7. ———. A county does not possess the double governmental and private character that cities do.

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

Towle, Young & Mattson, for appellants.

William B. Rist and *Walter A. Vasey,* for appellee.

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

BOSLAUGH, J.

Appellants brought this action to enjoin appellee from selling crushed rock produced and owned by it to the general public. The trial in the district court resulted in a judgment of dismissal of the case. This appeal contests the correctness of the judgment and the order denying a motion for a new trial.

The appellants alleged that they were taxpayers of Gage County, Nebraska; that appellee had been and was, without authority of law, engaged in the business of operating a stone quarry, producing crushed rock, and selling it in the open market to the general public in competition with a similar privately owned enterprise in a nearby county; and that the acts of the county were ultra vires resulting in debts and obligations illegally

incurred and the application and disposition of public funds produced by taxation contrary to law to the prejudice and irreparable damage of all the taxpayers of the county. The answer of appellee was an admission that it is a county of Nebraska, and a general denial.

The appellee leased about 50 acres of land for 5 years commencing with June 1, 1947, for the sole purpose of removing rock therefrom with the right of ingress and egress to and from it, and the right to locate, use, and operate thereon a rock crusher and other appropriate machinery, equipment, and materials to engage in quarry, blasting, and crushing of rock without liability for damages to the lessor caused by the operations of appellee thereon.

Appellee purchased and used in its operations of removing, crushing, and transporting crushed rock a two-unit rock crusher, a Euclid rock truck, three Ford dump trucks, one Lorain and one General shovel with three-quarter yard buckets, two air compressors, water pump, bulldozer, Keystone well drill, jack hammers, and twelve trucks to transport the crushed rock produced by it.

The county engineer stated that during the year 1948, appellee produced 66,842 1/12 cubic yards of crushed rock, sold and delivered 14,241⅓ cubic yards to the general public at the quarry or stock pile for $1.50 a cubic yard, and placed on the surface of the county roads and Schroeder mail routes in the county and stock-piled the part produced and not sold to the public. During the year 1949, the crushed rock produced was 91,856 1/12 cubic yards, of which 11,994 7/12 cubic yards were sold to the general public for $1.50 a cubic yard, and the balance was used to surface roads in the county and for stock pile. The total crushed rock sold in these years, according to this evidence, was 26,235 11/12 cubic yards.

The county treasurer, who kept the records and collected and accounted for the proceeds of the sales, testified that the amount of crushed rock sold by the coun-

ty from April 1948, to January 1, 1950, was 39,525½ cubic yards for $1.50 a cubic yard. The proceeds from the sales were placed in a separate fund designated "crushed rock fund." Sales were made to purchasers from York, Lancaster, Johnson, Jefferson, and Seward counties. The county engineer had supervision of approving claims for the wages of employees, expenses of operating the rock quarry, and rental payments on the lease—five cents a cubic yard. These claims were paid out of the special rock fund. The amount of crushed rock stock-piled was no more definitely disclosed than the estimate that it was sometimes as much as six or seven thousand yards, and that of the amount produced in 1949, only 3,693½ yards were "left in stock pile."

The crusher owned by the county was rated at 120 yards an hour, but the maximum it produced was 100 yards an hour. The average daily production was from 700 to 800 cubic yards a day. The miles of road surfaced with rock in 1948 did not exceed 150, and in 1949, 168 miles, or a total of 318 miles. All of the roads for which the county is responsible have not been surfaced with rock. The quarry may become exhausted or the cost of using the available rock shelves therein may become prohibitive within another year or so. Search for another quarry site has already been made without success.

There is no record of any action of the county board authorizing the county or its employees to sell crushed rock. The county clerk stated he had not been in any meeting of the board when that subject was mentioned, and "The board has never discussed going in the open market and selling rock." A member of the board testified the matter of selling rock was authorized by the board talking it over and advising the engineer and treasurer to accept money for that purpose, but nothing was placed on the books of the commissioners concerning the sale of rock. He said the taking care of the roads of the county was first, and if there was any surplus

left over by continuous operation it could be sold and the price of $1.50 a cubic yard was determined by "jockeying around among ourselves"; that it is like any other business—"we have got to have a little profit, we don't dare show a loss." The engineer was told by the board to sell crushed rock to individuals when there was a surplus, and the decision of when sales should be made was left up to the engineer.

Appellee had twelve trucks to transport rock from where it was produced and crushed to where it was put on the roads, but their capacity was not sufficient to move all the rock produced. There were times when the surfacing of roads was discontinued on account of weather conditions, operating difficulties, and similar causes, and because of these facts the rock was placed in a stock pile. The sales of rock during periods of production did not deplete the stock pile. When production was discontinued, no sales were made, but refusal of sale or delivery of rock to any purchaser is not established. The needs of the county for crushed rock exceed the production. All the roads available to be surfaced with rock have not been surfaced.

A county in this state is a creature of statute and has no inherent authority. It has only such powers as are expressly conferred upon it by statute, and such as are incidentally indispensable to carry into effect those expressly granted it. A grant of power to a county is strictly construed, and any fair and reasonable doubt of the existence of the power is resolved against the county. Speer v. Kratzenstein, 143 Neb. 300, 9 N. W. 2d 306; Cheney v. County Board of Supervisors, 123 Neb. 624, 243 N. W. 881; Lindburg v. Bennett, 117 Neb. 66, 219 N. W. 851; State ex rel. Grady v. Board of County Commissioners, 18 Neb. 283, 25 N. W. 91.

The powers of a county are authorized and required to be exercised by the county board. § 23-103, R. S. 1943. County boards have supervision over the public roads of the county and the duty to see that the laws re-

lating to them are carried into effect. § 39-103, R. S. 1943. The duty of maintenance and repair of county roads, including suitable and adequate machinery, tools, appliances, and materials necessary for the efficient maintenance, and repair of the roads, is enjoined upon county boards. §§ 39-230 and 39-232, R. S. 1943. This responsibility was in 1947 enlarged to include rural mail and star mail route roads. §§ 39-1001 to 39-1009, R. S. Supp., 1949.

The powers of a county board in this regard are commensurate with the duty and responsibility imposed upon it, and their performance in any reasonable manner adopted by it will not be interfered with. Gage County had power to contract for a supply of stone and to provide means for processing it for use in surfacing and resurfacing county roads and mail route roads and placing the material on such roads. Cheney v. County Board of Supervisors, *supra;* Annotation, 104 A. L. R. 1342.

Appellee processed stone for the purpose of putting and keeping its public roads in proper and satisfactory condition. It claims the efficient management and operation of its quarry required as constant and continuous operation as possible to avoid excessive cost and to enable it to secure and have skilled labor and truckers. It asserts this resulted incidentally in a quantity of crushed stone in excess of the amount it could immediately transport to and deposit on the roads, and the amount prudently required for placing and having in a stock pile. It was this amount, designated by it as excess or surplus, that it sold to anyone, individual or corporate, who desired to purchase rock. This so-called excess or surplus rock was to some extent produced during each period of operation of the quarry. The sale of rock was profitable. The charge was $1.50 a cubic yard, and the cubic yard cost in 1948 was $.99½, and in 1949 was $.86½.

The explanation by appellee of the reason for selling rock is an easy one without concrete facts to support

it, but it is not entirely convincing. The total crushed rock produced by it in 1949, as told by its engineer, exceeded by more than 25,000 cubic yards the amount produced in 1948, but the amount sold in 1949 was more than 2,000 cubic yards less than the quantity sold in 1948. The increased production in 1949 was nearly twice as much as the quantity sold in 1948, and more than double the quantity sold in 1949. It may be at least speculated that the challenge of the right of the county to sell stone by the commencement of this litigation in December 1948, had something to do with the ease with which the county handled the increased production in 1949, notwithstanding the decreased sales that year. In any event, the greatly increased quantity of stone was disposed of by the county without material difficulty or a point of it would surely have been made at the trial of this case. These facts mildly indicate more than an incidental desire and a fixed determination to sell rock.

The legality of the sales by appellee is not sustained by any direct or decisive adjudication or text. Appellee appeals to the doctrine applicable, with limitations, to a municipal corporation that it may, when authorized by law to engage in the business of furnishing services to its inhabitants, sell or furnish a surplus necessarily acquired to persons residing without or within the municipality, though not expressly authorized to do so by charter or a statute, but subject to the prior rights of its inhabitants. Carroll v. City of Cedar Falls, 221 Iowa 277, 261 N. W. 652; 38 Am. Jur., Municipal Corporations, § 570, p. 258; Dillon, Municipal Corporations (5th ed.), § 1300, p. 2124; McQuillin, Municipal Corporations (3d ed.), § 35.34, p. 667. There is much support of this doctrine, but the thing disposed of by virtue thereof must be surplus in fact and reasonably produced by a municipal corporation in its business or proprietary capacity, and it is generally limited to such commodities as water, electric current, and like commodities. A persistent search has failed to locate any decision of a court

or any observation of a law writer that has ascribed applicability of this doctrine to a county or any political subdivision of like character. Appellee does not suggest or claim that there is such authority.

It is said in Hyre v. Brown, 102 W. Va. 505, 135 S. E. 656, 49 A L. R. 1230, that: "The implied power of municipalities which operate electric lighting and power plants and water works, to sell light, power, heat and water for private purposes, is based on a surplus of the commodity on hand, and that the sale of that surplus will not impair the main purpose. * * * A city in furnishing such commodities acts in its proprietary or business capacity as distinguished from its governmental functions and powers. * * * It will be observed that these decisions that it may do so are based largely on the proposition of an excess of the commodity beyond the use of the city's needs; and having such surplus, it would be for the general corporate welfare to dispose of it in order to keep up the plant and reduce taxation. One of the cases naively says that the city may make 'two blades of grass grow where one formerly grew.' In the case at bar there is no suggestion of surplus electricity on hand."

A municipal corporation authorized to own and operate a utility is treated as a private corporation engaged in a purely business enterprise, as separate and distinct from the performance of its governmental functions and corporate duties as if it were not a municipal corporation at all. In Nelson-Johnston & Doudna v. Metropolitan Utilities District, 137 Neb. 871, 291 N. W. 558, it is said: "The authority given a municipality to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances."

Appellee is not a municipal corporation. A county in this state is a quasi corporation, governmental in character only, charged with certain objects of necessary

local administration, and in that capacity acts purely as an agent of the state. It does not possess the double governmental and private or proprietary character that cities do. State ex rel. City of Omaha v. Board of County Commissioners, 109 Neb. 35, 189 N. W. 639; Lindburg v. Bennett, *supra;* State v. Cheyenne County, 127 Neb. 619, 256 N. W. 67; Ahern v. Richardson County, 127 Neb. 659, 256 N. W. 515.

Appellee refers to numerous cases to sustain the rule that a municipal corporation may dispose of its surplus products, whatever the character of the products may be—electricity, water, or even unused space in a public building. It then argues that if a city may build in anticipation of future needs or lease premises which it owns and not then capable of immediate use by the city to obtain an income therefrom, or if a city can build to supply power load during certain hours or certain seasons and as a result thereof have a surplus it may dispose of in the market, that since appellee has developed a plant capable of producing a commodity in excess as it claims of its immediate needs, it is authorized and should be permitted also to sell in the market what it decides is the surplus or excess, notwithstanding the supply it produces has not equaled requirements of the roads of the county for which the commodity is produced, and notwithstanding the obvious fact that the product is not perishable but durable and capable of being retained indefinitely without depreciation or loss. It may properly be remarked here, as it has been before stated, that the rule relied on is born of the facts in the particular case. The facts are not born of, neither can they demand as of right that they be adopted by, the rule.

This case concerns a durable material not capable of deterioration, and no surplus rock incidentally produced required private sale as is frequently true in a municipal supply of water, electric energy, or a like commodity. This record fails to show in any proper or legal sense

any surplus of rock produced by appellee. In City of Los Angeles v. Lewis, 175 Cal. 777, 167 P. 390, the validity of a statute was involved which authorized the board of supervisors of any county in the state to purchase, acquire, or lease a cement manufacturing plant and to sell the products of the same in such manner and upon such terms and conditions as they should deem proper. The county of Los Angeles leased and was engaged in operating a cement manufacturing plant. Litigation resulted involving the legality of the actions of the county and the validity of the law. In an attempt to sustain both it was argued that the legislative enactment should be construed as authorizing the county to acquire or lease a cement plant and to use its products solely for the public purposes of the county with power to sell cement, limited to "the surplus cement incidentally produced." The court in disposing of this contention said: "Moreover, from the nature of that product itself, there could be, if force be given to respondents' construction of the act, no 'surplus cement incidentally produced' demanding private sale, as is not infrequently the case in the public supply of water or hydro-electric energy. Portland cement is a product which can be carried over without deterioration. The necessary products for the needs of a county for a given year can unquestionably be closely estimated in advance by the county authorities. Their factory can, therefore, manufacture that amount and no more. But if there should chance to be an incidental surplus, the exigencies of the situation do not demand that that surplus should be sold, since it may safely and economically be carried over for next year's consumption. The theory, therefore, of a surplus 'incidentally produced' is as wholly without reason as it is wholly without the purview of the law under review * * *."

What has been said herein is not that a county of the State of Nebraska may not sell or lease property owned by it under proper circumstances. A county has such right and power. § 23-104, R. S. 1943. The selling

of crushed rock produced by appellee under the circumstances of this case is not within the authority granted to sell property owned by a county.

The judgment herein should be and is reversed and the cause is remanded with directions to the district court to enter a judgment enjoining appellee from selling crushed rock produced and owned by it.

REVERSED AND REMANDED WITH DIRECTIONS.

HELEN CRAWFORD ET AL., APPELLANTS, V. CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, A CORPORATION, APPELLEE.

49 N. W. 2d 682

Filed November 9, 1951. No. 33013.

1. **Eminent Domain.** 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.
2. ———. Special benefits may go to reduce the damages to what remains of the land, but cannot be set off against the value of the part taken.
3. ———. The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the peculiar relation of the land in question to the public improvement. In other words the general benefits are those which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. The special benefits are ordinarily merely incidental and may result from physical changes in the land, from proximity to a desirable object, or in various other ways.
4. ———. Everything which affects the market value is to be taken into consideration. The burden of additional fencing, and like matters, are to be included, not by being added together item bv item, but to the extent that, taken as a whole, they detract from the market value of the property.

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

Dryden, Jensen & Dier, for appellants.

Ralph O. Canaday, Aten & Chadderdon, Anderson, Storms & Anderson, and *S. G. Lowe,* for appellee.

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

WENKE, J.

This is a condemnation action originally instituted by The Central Nebraska Public Power and Irrigation District, a public corporation, in the county court of Phelps County, Nebraska. The purpose of the action was to acquire a right-of-way across the northeast quarter of Section 14, Township 8 North, Range 19 West of the 6th P. M., in Phelps County on which to construct a drainage ditch. The district court for Phelps County, appeal thereto having been taken from the appraiser's award, awarded the owners of the land a total of $722.50, being $222.50 for 4.45 acres of land actually taken and $500 as damages to the balance of the land. From this award, their motion for new trial having been overruled, the landowners have appealed.

The principal contention made by appellants is that the amount awarded is clearly inadequate.

The principle here applicable is stated in McGinley v. Platte Valley Public Power and Irrigation Dist., 133 Neb. 420, 275 N. W. 593, as follows: "* * * 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."

And in Prudential Ins. Co. v. Central Neb. Public Power and Irrigation Dist., 139 Neb. 114, 296 N. W. 752, 145 A. L. R. 1, as follows: " 'This court has held that there are two elements of damage involved in a case of

this character: First, the market value of the land actually appropriated; and second, damages suffered by diminution in value of the remainder of the land, less special benefits received.' Stull v. Department of Roads and Irrigation, 129 Neb. 822, 263 N. W. 148." See, also, Rasmussen v. Central Nebraska Public Power and Irrigation Dist., 139 Neb. 456, 297 N. W. 897; Snyder v. Platte Valley Public Power and Irrigation Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154; Schulz v. Central Neb. Public Power and Irrigation Dist., 138 Neb. 529, 293 N. W. 409.

This being a law action in which a jury was waived the judgment of the trial court has the same force and effect as a jury's verdict and will not be set aside unless clearly wrong.

Appellants are the owners of the east half of Section 14, and lots 6, 7, 8, and 9 in Section 11, Township 8 North, Range 19 West of the 6th P. M., in Phelps County, and lots 3, 4, and 5 in Section 11, Township 8 North, Range 19 West of the 6th P. M., in Dawson County, all in Nebraska. These tracts are all farmed as one unit. The land taken, on which a drainage ditch has been dug, runs in a southwesterly to northeasterly direction from west to east across the northeast quarter of Section 14. The nature of the land through which it runs is pasture.

The record discloses competent evidence of well-qualified witnesses on which to base the court's finding that the reasonable market value of the 4.45 acres actually taken was $50 an acre. It also contains competent evidence of well-qualified witnesses on which to base the court's finding that the remainder of the land has, by reason of the taking, suffered damages by diminution in value to the extent of $500. In this respect it should be stated that during the course of the trial the judge viewed the premises. In view of the foregoing it cannot be said that the judgment of the trial court is clearly wrong.

Appellants complain of the trial court's finding that the land was specially benefited by the constant flow of fresh water in the ditch and the offset of the value thereof against the damage to the remainder of the land. There is competent evidence given by many well-qualified witnesses to support this finding.

"Special benefits may go to reduce the damages to what remains of the land, but cannot be set off against the value of the part taken." Fremont, E. & M. V. R. R. Co. v. Whalen, 11 Neb. 585, 10 N. W. 491. See, also, Trabert v. Boyes, 98 Neb. 671, 154 N. W. 231.

In Prudential Ins. Co. v. Central Neb. Public Power and Irrigation Dist., *supra,* we cited with approval the following from 2 Nichols, Eminent Domain (2d ed.), § 249, p. 765: "The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the peculiar relation of the land in question to the public improvement. * * * In other words the general benefits are those which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. The special benefits are ordinarily merely incidental and may result from physical changes in the land, from proximity to a desirable object, or in various other ways."

As stated in 18 Am. Jur., Eminent Domain, § 298, p. 943: "In cases arising under the exercise of the right of eminent domain, benefits are usually divided into but two classes, general and special, the general benefits as a rule being those derived by the community from the use of the improvement, and special benefits being those derived by particular pieces of property because of their advantageous relation to the improvement, and differing in kind rather than merely in degree from the general benefits. * * * Special benefits include both neighborhood benefits and peculiar benefits; a benefit

does not cease to be special because it is participated in by every lot fronting upon the improvement."

" 'Few general rules can be laid down for ascertaining whether or not a given benefit is general or special; the question must be determined largely by the circumstances of the particular case.' 20 C. J. 822." Prudential Ins. Co. v. Central Neb. Public Power and Irrigation Dist., *supra*.

Whatever benefits appellants' land received from this stream of fresh water, which was created by the construction of appellee's drainage ditch, were special in character and could properly be used to reduce the damages to the remainder of the land. See, Trabert v. Boyes, *supra;* Stocker v. Nemaha Valley Drainage Dist., 99 Neb. 38, 154 N. W. 862.

Appellants further contend the trial court erred in the trial of the issues in considering the failure to fence the right-of-way as an element of damage unless the cost of fencing was allowed as damages. The judgment shows the court gave consideration to the fencing of the right-of-way taken. There is evidence in the record that in order to make the pasture safe for livestock it would be necessary to fence off the right-of-way. There is also evidence in the record that no fence is necessary. There is also evidence of the cost thereof in case it should be determined that it is necessary to do so.

As stated in 18 Am. Jur., Eminent Domain, § 282, p. 922: "Everything which affects the market value is to be taken into consideration. The creation of noise and dust, the invasion of privacy, the deprivation of light and means of access, the burden of additional fencing, and like matters, are to be included, not by being added together item by item, but to the extent that, taken as a whole, they detract from the market value of the property."

"Where, by taking a part of a tract, additional fencing will be rendered necessary in order to the reasonable use and enjoyment of the remainder, as it probably

will be used in the future, and the burden of constructing such additional fence is cast upon the owner of the land; then the burden of constructing and maintaining such fence in so far as it depreciates the value of the land, is a proper element to be considered in estimating the damages. * * * It is a question of damage to the land, as land. If, in view of the probable future use of the land, additional fencing will be necessary, of which the jury or commissioners are to judge, and the owner must construct the fence if he has it, then the land is depreciated in proportion to the expense of constructing and maintaining such fencing. Nothing can be allowed for fence, as fence. The allowance should be for the depreciation of the land in consequence of the burden thus cast upon it. Evidence of the cost of suitable fencing is competent as affording a means of arriving at the extent of the burden." 2 Lewis, Eminent Domain (3d ed.), § 741, p. 1316.

We find no merit to this contention as the matter was properly considered by the trial court.

The judgment of the trial court shows that in rendering the decision which it made it gave consideration to the matter of a bridge constructed across the ditch. There is no evidence that a bridge had been constructed. There was evidence introduced at the trial as to the necessity for a bridge and the probable cost thereof. Appellants raise the question of whether or not their rights, if any, under section 46-255, R. S. 1943, are proper issues in a condemnation proceeding and adjudicated by the award therein made.

Section 46-255, R. S. 1943, insofar as here material provides: "Any person, constructing a ditch or canal through the lands of another, having no interest in such ditch or canal, shall build such ditch or canal in a substantial manner so as to prevent damage to such land. In all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or

those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch, * * *."

In determining the damages arising to cause a diminution in the value of the balance of the land by reason of the taking of the right-of-way and the digging of the drainage ditch thereon, the appellants were entitled to have considered the severance, the inconveniences in operation of their farm arising therefrom, and what is necessary for relief from that condition. On the other side the appellee was entitled to show what it had done to relieve that condition, such as, in this case, putting in the 48-inch culvert and a fill 25 to 30 feet wide. See Stocker v. Nemaha Valley Drainage District, *supra*.

If section 46-255, R. S. 1943, is applicable, a question which we do not here decide, then mandamus is a proper remedy. See State ex rel. Johnson v. Central Neb. Public Power and Irrigation Dist., 140 Neb. 471, 300 N. W. 379. The question of whether or not, within the provisions thereof, the construction of the ditch made necessary the construction of a bridge for the free and convenient use of the lands on both sides thereof is an issue to be determined when an action is brought for that purpose. Whether or not the matters determined in this action are an adjudication of any rights appellants may have under the provisons of said section are not properly before us until an action is brought to enforce such rights and a plea to that effect is made thereto.

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

AFFIRMED.

VICTOR A. WEISENMILLER, APPELLANT, V. GUNNAR A. NESTOR, APPELLEE.

49 N. W. 2d 679

Filed November 9, 1951. No. 33015.

1. **Appeal and Error: Trial.** Ordinarily it is reversible error for the court to include, in its instructions to the jury, issues found in the pleadings but which have not been supported by any evidence.
2. **Negligence: Trial.** Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is prejudicial error to submit such issue to the jury.
3. **Appeal and Error.** Where on appeal findings of fact are made which become the law of the case and there is a remand for a new trial, on such retrial, such findings are binding on the parties, the trial court and this court, unless on the retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial.

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

Max Kier and *Charles Bocken,* for appellant.

C. Russell Mattson, for appellee.

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

MESSMORE, J.

This is an action at law brought by the plaintiff against the defendant to recover damages for personal injuries alleged to have been proximately caused when he was run over on a highway at night by an automobile owned and negligently operated by the defendant.

This is the second appearance of this case in this court. In the first trial in the district court, at the conclusion of all of the evidence the trial court sustained the defendant's motion for a directed verdict and instructed the jury accordingly, whereupon it returned a verdict for the defendant, and judgment was entered thereon. Plaintiff's motion for new trial was subsequently overruled and he appealed. The assignments of

error relied upon by the plaintiff were as follows: (1) The trial court erred in sustaining the defendant's motion for directed verdict; (2) in failing to submit the cause to the jury for determination; and (3) in overruling plaintiff's motion for new trial. We sustained these assignments of error. We also sustained the plaintiff's contention that there was sufficient competent evidence adduced by him from which it could have been reasonably concluded that the defendant was negligent in one or more of the particulars alleged, which proximately caused personal injuries and damages to the plaintiff. We reversed the judgment and remanded the cause for new trial. Our opinion in Weisenmiller v. Nestor will be found in 153 Neb. 153, 43 N. W. 2d 568.

We deem it unnecessary to again relate the evidence for the reason that it is substantially in accord with the record in the first case with little variation therefrom, and is properly and sufficiently stated in the opinion.

The cause was retried in the district court to a jury, resulting in a verdict in favor of the defendant. Judgment was entered on the verdict. The plaintiff filed a motion for new trial which was overruled, and plaintiff appeals.

For convenience we refer to the parties as designated in the district court.

On this appeal the plaintiff's assignments of error necessary to be considered are as follows: (1) The trial court committed reversible error by including in its instructions to the jury issues found in the pleadings but which were not supported by any evidence; and (2) the trial court erred in failing to follow the "law of the case" as announced in Weisenmiller v. Nestor, *supra*.

In instruction No. 2, given by the trial court on its own motion, the court set forth the alleged negligent acts charged to the defendant which proximately caused the personal injuries sustained by the plaintiff, and in the same instruction informed the jury as follows: "In his answer the defendant denies all the material allega-

tions in plaintiff's petition, and alleges that if plaintiff did sustain the injuries as alleged in his petition they were due to acts of negligence on his part, or the negligence of a third party or parties, or by the negligence of the plaintiff and of a third party or parties, and were not caused or contributed to by any negligence on the part of the defendant, and he prays that the petition of plaintiff be denied. In his reply the plaintiff denies all allegations of the answer except only such as admit the allegations of plaintiff's petition. These pleadings make up the issues which you are to determine by your verdict."

In instruction No. 3, the court told the jury: "The above and foregoing is an abstract or synopsis of the claims and allegations made by the respective parties to this action in the pleadings which they have filed in this case. This summary is made for your convenience and it is, of course, not to be taken as a statement of facts, matters, or acts proved by either of the parties."

In instruction No. 4, the court informed the jury: "You are further instructed that it is your duty to consider these instructions as a whole."

In Weisenmiller v. Nestor, *supra,* we said: "In the record before us, we find no competent evidence from which it could be reasonably concluded that plaintiff was placed in a position of peril by his own negligence. Therefore the only question presented is whether or not defendant was negligent in some manner alleged which proximately caused the accident and resulting injuries and damages to plaintiff. True, plaintiff was in a position of peril, but how he got there is not shown. We conclude that under the circumstances presented, the last clear chance doctrine had no application."

It will be observed that there was no issue of contributory negligence on the part of the plaintiff to submit to a jury. The facts being substantially in accord with the record in the first case and without sufficient variance therefrom to make an issue of contributory

negligence on the part of the plaintiff to submit to the jury, the question presented is, did the trial court in instruction No. 2 present the issue of contributory negligence to the jury? Plaintiff's contention is that the trial court did so. Contra thereto, the defendant contends that under the instructions so given there was no prejudicial error, and the issue of contributory negligence was not submitted to the jury, for the reason that instruction No. 3 fully qualified instruction No. 2 to the extent as stated therein, and no other instruction thereafter presented the issue of contributory negligence on the part of the plaintiff to the jury.

It is apparent that instruction No. 2, in setting out the defendant's answer, informed the jury on the issue of contributory negligence on the part of the plaintiff.

In Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439, this court said: "Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is prejudicial error to submit such issue to the jury" and clearly indicated the rule that ordinarily it is reversible error for the court to include, in its instructions to the jury, issues found in the pleadings but which have not been supported by any evidence. This court has repeatedly so held in cases too numerous to cite.

In Franks v. Jirdon, 146 Neb. 585, 20 N. W. 2d 597, the court said: "This court has frequently criticized the practice of copying the pleadings as a method of stating the issues to a jury and where they contain allegations not supported by evidence it may be reversible error to include such allegations in defining the issues if the reviewing court is satisfied that the jury may have been misled thereby." See, also, Hutchinson v. Western Bridge & Construction Co., 97 Neb. 439, 150 N. W. 193; McClelland v. Interstate Transit Lines, 139 Neb. 146, 296 N. W. 757; Conley v. Hays, 153 Neb. 733, 45 N. W. 2d 900.

It is difficult for a jury in a case such as this to discriminate between charges of negligence submitted to

them in instructions of the court from those which have been established by the evidence, and they may think that if these were not in evidence they would not have been mentioned by the judge. See Culver v. Union P. R. R. Co., 112 Neb. 441, 199 N. W. 794.

We conclude that the trial court committed reversible error as contended for by the plaintiff, and other instructions given did not cure the error.

In Callahan v. Prewitt, 143 Neb. 787, 10 N. W. 2d 705, wherein on motion for rehearing former judgment of affirmance was vacated and set aside and the cause reversed in 143 Neb. 793, 13 N. W. 2d 660, this court, in citing Anheuser-Busch Brewing Assn. v. Hier, 61 Neb. 582, 85 N. W. 832, said: " 'The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case, and, for the purposes of the litigation, settles conclusively the points adjudicated.' In Kuhns v. Live Stock Nat. Bank, 138 Neb. 797, 295 N. W. 818, this court said: 'So, too, all matters decided expressly or by necessary implication by this court in its opinion in reversing the first judgment became the law of the case. This applies not merely to all questions actually and formally presented, but to all existing in the record and necessarily involved in the decision. Such points will not be reconsidered in this appeal.' " See, also, Blum v. Truelsen, 139 Neb. 282, 297 N. W. 136; Bohmont v. Moore, 141 Neb. 91, 2 N. W. 2d 599.

The foregoing cited rule is applicable in the instant case, and it was the duty of the trial court to follow the law of the case in conformity with the rule, and not submit the issue of contributory negligence on the part of the plaintiff to the jury.

For the reasons given in this opinion the judgment on the verdict is reversed and the cause remanded.

REVERSED AND REMANDED.

JOSEPH E. STRAWN, APPELLANT, V. COUNTY OF SARPY, NEBRASKA, APPELLEE, SCHOOL DISTRICT NO. 1, SARPY COUNTY, NEBRASKA, ET AL., INTERVENERS AND APPELLEES.

49 N. W. 2d 677

Filed November 9, 1951. No. 33024.

1. **Counties.** The county board has exclusive original jurisdiction in the examination and allowance of claims against the county arising ex contractu.
2. **Courts: Counties.** The jurisdiction of the district court as to claims against a county arising on contract is appellate only.
3. **Judgments: Counties.** A judgment of the district court entered in an original action in that court as to claims against a county for legal services rendered the county is void for want of jurisdiction.

APPEAL from the district court for Sarpy County: STANLEY BARTOS, JUDGE. *Affirmed.*

Louis Lightner, Paul I. Manhart, and *Joseph E. Strawn,* for appellant.

Orville Entenman, W. R. Patrick, and *Gerald E. Collins,* for appellees.

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

YEAGER, J.

This is an action by Joseph E. Strawn, plaintiff and appellant, against the County of Sarpy, Nebraska, defendant and appellee, to recover $6,510.93 with interest for legal services claimed to have been performed by him under a written contract entered into by and between the parties. School District No. 1, Sarpy County, Nebraska, and the City of Bellevue, Nebraska, filed petitions of intervention in the action in opposition to the claims of the plaintiff. The action as it was tried in the district court is in five causes of action. Each is predicated on a separate theory on which plaintiff contends he is entitled to recover the amount named. The first is at

law on contract; the second, at law on quantum meruit; the third is in equity on the theory of estoppel; the fourth, in equity on the theory that to deny a recovery would bring about unjust enrichment of the county; and the fifth is in equity to foreclose an attorney's lien against a special or trust fund.

The case was tried to the court without the interposition of a jury, at the conclusion of which judgment was rendered in favor of the interveners and the defendant.

It is inferable from the transcript filed in this court that this is an appeal from action of the district court in denying a claim of plaintiff against the defendant which claim had been previously filed with the county and denied by the county board. It is also inferable from the transcript that this is an original action against the defendant. There is a transcript from the county board which shows the filing of a claim against the county for $6,510.93 dated January 5, 1948. That transcript shows a denial of the claim dated January 21, 1948.

Plaintiff's third amended petition, which is the one on which the case was tried and is the only petition appearing in the transcript, however, does not identify this action as an appeal from action of the district court denying the claim. The petition recites only that claim was filed on January 5, 1948; that the claim was denied by the board; and that appeal was taken to the district court. It contains nothing with reference to disposition of the appeal lodged in the district court.

Whether the action be treated here as an appeal coming from the county board or an original action in the district court the ultimate result must be the same.

The basis of the action is a claim against a county arising ex contractu. It is clearly pointed out in County of Sarpy v. Gasper, 149 Neb. 51, 30 N. W. 2d 67, that the case could properly come here only by appeal from the district court having come to that court by appeal

agreeable to the terms of section 23-135, R. S. 1943. In that case it was said:

"The county board has exclusive original jurisdiction in the examination and allowance of claims against the county arising ex contractu."

"The jurisdiction of the district court as to claims against a county arising on contract is appellate only."

"A judgment of the district court entered in an original action in that court as to claims against a county for legal services rendered the county is void for want of jurisdiction."

From this it becomes clear that if, as inferable from the third amended petition, it was intended that this should be and become an original action in the district court, that court was without jurisdiction to entertain it.

Treated as an appeal the relief claimed must be denied. This claim in all of its legal aspects has been previously before this court where it was fully adjudicated unfavorably to the plaintiff.

By petition in intervention in County of Sarpy v. Gasper, *supra,* the plaintiff herein and Christine S. Marth, executrix of the estate of Ralph J. Nickerson, deceased, sought to recover for the identical service for which the present claim is made.

The contract which is the basis of the action here as well as there was one entered into jointly by Ralph J. Nickerson and Joseph E. Strawn on the one side and the County of Sarpy on the other. By the petition of intervention there the interveners' effort was to recover the entire amount claimed to be due under the contract, whereas in this action the plaintiff seeks to recover one-half of that amount, or as he says, his share of the avails of the contract. This constitutes the only difference between the two actions.

The judgment of the district court is affirmed.

AFFIRMED.

JACK LAWSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

50 N. W. 2d 99

Filed November 23, 1951. No. 32957.

Appeal and Error. Where the record contains no bill of exceptions or the bill of exceptions has been quashed, no question will be considered, the determination of which necessarily involves an examination of the evidence adduced in the trial court. In such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed.

ERROR to the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

L. R. Doyle, for plaintiff in error.

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

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

CARTER, J.

The defendant was convicted in the district court for Lancaster County for driving an automobile while under the influence of intoxicating liquor. The trial court imposed a fine of $50 and revoked the driver's license of defendant for a period of six months. The defendant appeals.

The record discloses that defendant was charged in the municipal court of the city of Lincoln, Lancaster County, Nebraska, with driving an automobile within the corporate limits of the city on January 11, 1950, while under the influence of intoxicating liquor. After conviction, an appeal was taken to the district court where the case was submitted to a jury and a verdict of guilty returned. An appeal was then taken to this court. The defendant complains that the district court erred in overruling his objections to certain alleged hypothetical questions and to certain instructions given by the trial court.

No bill of exceptions appears to have been filed in this court. The rule is stated in Dryden & Jensen v. Mach, 150 Neb. 629, 35 N. W. 2d 497, as follows: "Where the record contains no authentic bill of exceptions or the bill of exceptions has been quashed, no question will be considered, the determination of which necessarily involves an examination of the evidence adduced in the trial court, and in such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed." The question raised by the appeal can be resolved only by reference to a bill of exceptions. Consequently, the assignments of error are not established by the record before us.

The complaint is sufficient to charge the offense for which defendant was convicted. The sentence imposed is within the limits prescribed by the ordinance under which the case was commenced. Consequently, no error in the proceedings held in the district court is affirmatively shown. Under such circumstances the judgment of the district court must be affirmed.

AFFIRMED.

MARGARET HEENEY, ADMINISTRATRIX OF THE ESTATE OF RAYMOND HEENEY, DECEASED, APPELLANT, V. LLOYD CHURCHILL, APPELLEE.

50 N. W. 2d 72

Filed November 23, 1951. No. 32988.

1. **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.
2. ———: ———. 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.
3. **Automobiles: Negligence.** The general rule with exceptions, which provides that it is negligence as a matter of law for a

motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by the lights on the automobile, should embrace in the exceptions all situations wherein reasonable minds may differ on the question of whether or not the operator of the automobile exercised the care, caution, and prudence required of a reasonably careful, cautious, and prudent person under the circumstances of the particular situation.

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

Mark J. Ryan, George W. Leamer, and *Charles E. McDermott,* for appellant.

Warner & Warner, Harper, Gleysteen & Nelson, and *Charles N. Woolery,* for appellee.

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

MESSMORE, J.

This is an action at law brought by Margaret Heeney, administratrix of the estate of Raymond Heeney, deceased, as plaintiff, against Lloyd Churchill, defendant, to recover damages for the alleged wrongful death of plaintiff's decedent. The case was tried to a jury resulting in a verdict in favor of the defendant. Plaintiff filed a motion for new trial. From the order overruling the motion, plaintiff appeals.

For convenience we will refer to Raymond Heeney as the deceased, the appellant Margaret Heeney as the plaintiff, and the appellee Lloyd Churchill as the defendant.

The pleadings, insofar as necessary to consider in this appeal, are as follows: The plaintiff's petition alleged in substance that the defendant drove his automobile in a reckless and negligent manner, at an excessive rate of speed along the road in question, without keeping the proper lookout to enable him to stop his automobile within his view, and that the negligence of the defendant,

as alleged, was the direct and proximate cause of the death of the deceased.

The defendant's answer is in effect a general denial. Although it alleges the deceased did not keep a proper lookout and warn the defendant of his presence on the highway, and placed himself in a position where he could not, by the exercise of ordinary care, be seen by the defendant, there is no affirmative allegation therein charging the deceased with contributory negligence.

The record discloses that the defendant lives about 2½ miles northwest of Hubbard. On August 21, 1947, in the evening he, his wife, and daughter, went to a ladies club party at Dose's, approximately 7 miles southwest of Hubbard. The defendant drove his 1936 Ford coupe. They stayed at Dose's, had a midnight lunch, and left for home. The defendant and his family followed Marion Grove and his family into Hubbard where Grove stopped to let his wife's folks out of the car. The defendant went on by Grove and proceeded toward his home. The headlights and taillight on his car were working. To go to his home the defendant took the road north of Hubbard which is a dirt road and is smooth. This road goes straight north for half a mile out of Hubbard, then turns west, and proceeds about 40 rods when it turns north again. There is a gradual rise in the road west. Where the road turns north there is a rounding corner. After rounding the curve proceeding north, the road is level or flat for a distrance estimated by witnesses as being from the length of a car to 50 or 60 feet from the brow of the hill. The road slopes down to the north. There are trees and shrubs east of the curve where the road turns north, west thereof, and on the east side of the road that slopes to the north.

The defendant, after he proceeded upgrade to turn north, was traveling at a rate of speed of 20 miles an hour. His wife was seated to his right, and to her right was seated their daughter. His car was on the right side of the center of the road. As the defendant pro-

ceeded around the corner the lights of his car would show across the road to the west bank and upward. The defendant testified it would be necessary to round the curve at the top of the hill before the lights would shine down the hill to the north on the right side of the road. The defendant saw no object or man standing or lying down as he made the turn to the north, but in so doing he felt a "bump" such as if running over something. After he hit the bump in the road he drove 20 feet and came to a stop. His wife asked him what it was. He did not know of any object that might have come in contact with his car. He drove down to the bottom of the hill and turned around and came back. On his return he saw a man's body lying in the road. He drove to the west side a distance of about 4 feet from the body and got out of his car. He had a flashlight with him and flashed it on the body. The feet were approximately one foot from the east grade of the road, and the head was to the west. All of the body was east of the center line of the road. The body was lying on its right side facing south. The defendant then drove toward Hubbard and had gone approximately a half mile when he met Grove and stopped him. Grove was on the road north of Hubbard near a bridge at that time. The defendant told Grove he had run over somebody, and asked Grove to go back to Hubbard and call the sheriff, which he did.

The sheriff arrived at the scene of the accident about 1 a. m. The defendant and his wife were there. The defendant's car was parked to the north on the west side of the road. The sheriff parked well over to the west side of the road, south of and close to the body, and he could see the body in the lights of his car. He had a conversation with the defendant. The defendant said he struck something in the road, and the further he proceeded down the road the more he thought it was peculiar. He went to the bottom of the hill and turned and went back to see what it was.

The defendant testified that the body was from 2 to 4 feet north, over the top of the hill 15 or 20 feet past the curve, lying on the north side of the slope. The witness Grove testified that the body was lying 30 feet from the corner of the road going north after you get to the brow of the hill. The sheriff testified the body was lying 50 to 60 feet north of the top of the hill, and the plaintiff's son placed the body 40 or 50 feet from the curve.

The sheriff testified that as you proceed around the corner north, your lights shine against the road to the west bank and upwards. There are trees and brush at the corner of the road, and it would be difficult to see through the trees at the corner of the road at night.

The witness Bill Hogan had been to the fair at Homer. He met the defendant standing in the road where the body was lying. He stopped his car 10 to 15 feet south of the body, and could see the body by the lights of his car. He did not get out of his car. The defendant said he had hit someone. Hogan flashed a light on the body and identified it as the body of Raymond Heeney. He could not tell what part of the body had been run over. He had seen the body before the defendant flagged him down with a flashlight. He came up the right side of the road as you go around the corner, and he testified that his lights picked up the parked car of the defendant which was 15 feet north of the body on the right side of the road.

The sheriff testified to finding some tracks along the side of the road south of the body at an approximate distance of 15 to 20 feet. These tracks led in the direction of the body. The sheriff did not notice anything to indicate that the body had been dragged or rolled.

The plaintiff's son testified that his father was dressed in blue overalls, and wore a light blue work shirt and a cap.

The plaintiff and the deceased lived northwest of Hub-

bard. On August 21, 1947, the deceased and his wife were in Hubbard. They intended to return home together. The plaintiff waited for their daughter, a school girl, who was attending the fair at Homer. Upon her return to Hubbard the mother and daughter left for home in the family car. The deceased had often walked home or caught a ride, and did not go with them. He was apparently on his way home when the accident occurred.

Raymond Heeney, deceased's son, had talked to his father the morning of August 21, 1947, just before leaving for Omaha. He returned to Hubbard at about 10 p. m. He saw his father about 10:30, and talked to him again. On Wednesday after his father was killed he talked to the defendant at the defendant's home. He asked the defendant if he could tell how the accident happened. Defendant said he was "coming along about 15 to 20 miles an hour and he felt something hit the car." He had hauled grain over that road that day and knew there were no bumps there that he could hit, so when he felt the bump he went to the bottom of the hill, turned around, and went back and found the deceased lying in the road.

The defendant made tests to determine how much he could see from his car. Sitting in his car looking over the front end of it he would have to look 16 feet to pick up an object approximately 8 inches off the ground, indicating that there was a distance of 16 feet in front of the car where he could not see the road. Likewise a test was made looking to the right-hand side with reference to an object lying in the road directly in front of the car. There was a distance of 23 feet from the object in the road back toward the car that you could see nothing in the road, that is, an object 8 or 10 inches high.

Before discussing the plaintiff's assignments of error we note the following upon which the trial court properly instructed the jury: The duties of a pedestrian using a public highway and the operator of a motor ve-

hicle using the same are reciprocal. A pedestrian, though he has a legal right to walk on the highway, is also required to use reasonable care for his own safety. The driver of a motor vehicle using the highway in the exercise of his legal rights is required to exercise due care for the safety of others who might reasonably be expected to be on the highway. Such driver is likewise required to anticipate that pedestrians may be using the highway and to use due care and protect any such who may be using it. See, Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N. W. 2d 114; Floyd v. Edwards, 150 Neb. 41, 33 N. W. 2d 555.

The plaintiff contends the trial court erred in failing to adequately instruct the jury as to the duties of the defendant to observe the rules of the road so as to operate his motor vehicle in such manner that he could stop the same within the area lighted by the lights of his automobile and avoid striking the deceased who was lawfully using the highway. In support of this contention the plaintiff relies on the cases of Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473; Cotten v. Stolley, 124 Neb. 855, 248 N. W. 384; Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439.

In Roth v. Blomquist, *supra*, this court held: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps." In the opinion, it is said: "When applicable to the facts a violation is of itself negligence precluding a recovery * * *." The rule with recognized exceptions has been followed since it was first announced. See, Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610, and cases cited therein p. 423; Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106; Pierson v. Jensen, 148 Neb. 849, 29 N. W. 2d 625.

In Fulcher v. Ike, *supra*, this court said: "It would appear, therefore, that the general rule with exceptions, which provides that it is negligence as a matter of law

for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by the lamps on the automobile, should embrace in the exceptions all situations where reasonable minds may differ on the question of whether or not the operator of the automobile exercised the care, caution and prudence required of a reasonably careful, cautious and prudent person under the circumstances of the particular situation."

The facts in the instant case disclose that the defendant was driving his car upgrade west at à speed of 20 miles an hour and did not increase his speed when he turned north on the highway to proceed downgrade. In making the turn north there is a flat surface estimated in length as from the length of a car to 50 or 60 feet. Along the north side of the road going west are trees, brush, and bushes, and also at the turn to the north, and on the east side of the highway where the road slopes downward to the north. The deceased was wearing blue overalls, a light blue work shirt, and a cap. The defendant did not see the deceased until after he felt a bump, turned around, came back, and saw the body lying on the highway. The evidence does not disclose whether the defendant was walking along the highway or was lying down at the time the defendant felt a bump as if his car has struck some object. The body was lying over the crest of the hill. There is a variance in the testimony as to just what distance north of the top of the hill the body was lying, as heretofore set out in the evidence.

It is contended by the plaintiff that the defendant drove at an excessive rate of speed and that he was unable to stop within the range of his vision. There is no evidence to sustain this conclusion in the record. The maximum rate of speed of defendant's car was 20 miles an hour ascending the upgrade, and it was not increased. This certainly was not excessive speed, but a reasonable rate of speed under the circumstances. The rule that it is negligence to drive a car so fast that you

cannot stop it within the distance you can see is based on the reckless speed that such a situation implies. The rule contended for, although correct, has no application to the facts before us. The negligence of the defendant, if any, must be predicated on some other theory.

The question of whether the defendant should have seen the deceased, and the inferences to be drawn from the evidence adduced are matters of evidence which a jury must decide. The only question properly determinable was whether the defendant was negligent in failing to see the deceased in time to avoid the accident. See Johnson v. Anoka-Butte Lumber Co., *supra.* The trial court instructed the jury with reference to whether or not the defendant, in rounding the turn, made use of his sense of seeing, and was exercising that degree of care that persons of ordinary prudence would ordinarily exercise under the circumstances. The issue was presented to the jury as to whether or not the defendant was keeping a proper lookout and had his automobile under control under the circumstances.

In Floyd v. Edwards, *supra,* a case wherein a pedestrian dressed in dark clothing was walking along the highway at night and was struck by an automobile approaching from the rear, the plaintiff's petition alleged facts in accordance with the rule set forth in Roth v. Blomquist, *supra.* The plaintiff also offered and requested instructions in accordance with the rule, which the trial court refused. This court held that the defendant was not negligent as a matter of law, that the case was brought within the exceptions of the rule, and therefore the court was required to submit the issues on the driver's alleged negligence, if any, to the jury for its determination.

In the light of the evidence and foregoing cited authorities, we conclude the defendant was not guilty of negligence as a matter of law, and the case was brought within the exceptions to the rule which require submission of the issue of the driver's alleged negligence to

the jury. The plaintiff's contention cannot be sustained.

The plaintiff assigns as error the failure of the court to instruct the jury under the rule that where there are no eyewitnesses and no direct evidence of the accident causing the injury, the facts and circumstances may be proved by circumstantial evidence, and the presumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of contributory negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown.

The presumption of due care arising out of the natural instinct of self-preservation is not evidence, but a mere rule of law, and obtains only in the absence of direct or circumstantial evidence justifying reasonable inferences one way or another upon that subject. When such evidence is produced the presumption disappears and is not entitled to be considered. Eggeling v. Chicago, R. I. & P. Ry. Co., 119 Neb. 229, 228 N. W. 361. See, also, Anderson v. Nincehelser, 152 Neb. 857, 43 N. W. 2d 182, on rehearing, 153 Neb. 329, 44 N. W. 2d 518. The trial court did not commit prejudicial error as contended for by the plaintiff.

We have examined the plaintiff's other assignments of error and conclude they are without merit.

For the reasons given in this opinion, the judgment entered on the verdict is affirmed.

AFFIRMED.

CHAPPELL, J., concurring.

I find no fault with propositions of law appearing in the opinion and agree with the result, but believe that disposition of the last assignment of error could have been predicated upon another ground.

In this case the trial court evidently concluded either that defendant had not affirmatively pleaded contributory negligence of plaintiff's decedent, or that there was no evidence to ultimately support such issue if properly pleaded. Therefore, no instruction was given by the trial court upon the question of contributory negligence.

In that situation plaintiff had the benefit of the failure to submit such issue and cannot complain. The only issue submitted was the alleged negligence of defendant and whether or not it proximately caused the accident and resulting death.

It appears logical to say that in such a case there can be no necessity of giving an instruction that it was presumed that plaintiff's decedent was not guilty of negligence in order to avoid prejudicial error, because whether or not he was negligent was never an issue submitted to the jury. Thus, the failure to give such presumptive instruction could not be prejudicial error because it had no place in the issues as ultimately submitted.

WENKE, J., joins in this concurring opinion.

HENRY SCHACHT, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
50 N. W. 2d 78

Filed November 23, 1951. No. 33009.

1. **Evidence.** There is a presumption that articles transported by regular United States mail and delivered in the ordinary course of the mails are delivered in substantially the same condition in which they were sent. Such presumption, however, is one which may be rebutted.
2. **Intoxicating Liquors: Evidence.** In a prosecution for driving an automobile while under the influence of alcoholic liquor, a bottle containing intoxicating liquor found in the car at the time of defendant's arrest is admissible as circumstantial evidence tending to support the charge.
3. ———: ———. Where sufficient foundation has been laid, the evidence of a qualified chemist that blood samples taken from the defendant showed an alcoholic content sufficient to produce intoxication is admissible where the requirements of sections 39-727, 39-727.01, and 39-727.02, R. S. Supp., 1949, have been met.

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

Bernard A. Ptak, for plaintiff in error.

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

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

CARTER, J.

The defendant was convicted in the district court for Pierce County for driving an automobile while under the influence of alcoholic liquor. The trial court sentenced the defendant to serve four days in the county jail, pay a fine of $40 and costs, and revoked the driver's license of defendant for a period of six months from the date of his discharge from the county jail. The defendant instituted error proceedings in this court, seeking a reversal of the judgment of the district court.

The evidence shows that defendant was driving his automobile on U. S. Highway No. 20 in Pierce County, Nebraska, on June 18, 1950, about 6:00 p. m., at which time he was arrested by officer Otis J. Knotwell of the Nebraska State Safety Patrol for driving while in an intoxicated condition. Officer Knotwell testified that defendant was driving his car from one side of the highway to the other, that there was a strong odor of intoxicating liquor on his breath, that his eyes were bloodshot, that he was unsteady on his feet, and that in his opinion he was intoxicated. He testified also to finding a pint of intoxicating liquor in the glove compartment of defendant's car. Defendant was delivered into the custody of officer Willard Clark, who transported him to the county jail at Pierce. Officer Clark corroborates the evidence of officer Knotwell as to the intoxicated condition of the defendant. Dr. John H. Calvert saw defendant at the county jail shortly after his arrival there and testified to facts tending to sustain the charge. The evidence of sheriff Elmer Kuhl of Pierce County also tends to sustain the charge that defendant was intoxicated.

The defendant attempted to excuse his bad driving by his testimony that he suffered a coughing and sneezing attack which caused him to expel his false teeth, and that any deficiency in his driving was due to his efforts to retrieve them. This raised an issue which the jury considered and determined. The evidence was ample to sustain the verdict of the jury.

The questions here raised go to the correctness of the court's rulings on the admission of certain exhibits, the admission of certain evidence over objection, and the alleged excessiveness of the sentence.

The record shows that Dr. Calvert, with the consent of the defendant, took samples of the defendant's blood for the purpose of having a chemical analysis made to determine if defendant was under the influence of intoxicating liquor, as provided by sections 39-727, 39-727.01, and 39-727.02, R. S. Supp., 1949. The evidence shows that Dr. Calvert came to the jail and took the blood samples. He took the samples home with him and, it being Sunday, he placed them in a refrigerator until the next morning when he mailed them to the laboratory of the state Department of Health at Lincoln. They were received at the laboratory in due course of mail by A. E. Johnson, whose duty it was to open such packages and deliver them to the proper persons in the department. Defendant asserts that, as there is no evidence by the person who obtained the package at the post office and delivered it to Johnson, the foundation is insufficient to admit the result of the test into evidence. The evidence shows that Dr. Calvert placed the samples of blood in two vials and marked them with defendant's name and the time of taking. He wrapped them in an invoice requesting a blood examination and mailed them as heretofore stated. The blood specimens when received were clotted, and the tests were made on the blood serum. Dr. Calvert testified that he placed potassium oxalate in one of the vials to prevent coagulation of the blood. It is the contention of de-

fendant that this indicates that the blood in one of the vials could have been that of some other person. The vials were marked and wrapped as described by Dr. Calvert when received at the laboratory. The foundation was sufficient. We think there is a presumption that articles transported by regular United States mail and delivered in the ordinary course of the mails are delivered in substantially the same condition in which they are sent. This presumption is a rebuttable one, but where there is no evidence tending to overcome the presumption it is sufficient to establish the identity of the article mailed and that it is in substantially the same condition as at the time of mailing. The rule for which the defendant contends would place a great burden upon addressee, such as the one here involved, to keep meticulous records of mail deliveries to protect against the mere possibility that articles so delivered might possibly become pertinent in a court proceeding. We think the objection as to foundation on this ground was properly overruled.

The defendant assigns as error the admission of the pint bottle found in the glove compartment of defendant's car. The bottle was identified by officer Knotwell and sheriff Kuhl as the one taken from the defendant's automobile. It was shown by the evidence to contain intoxicating liquor, although ingredients had been added which made it difficult to describe by name. The evidence was ample to sustain its admissibility as evidence pointing to the guilt of the defendant.

The defendant assigns as error the evidence of the chemist in the laboratory of the state Department of Health who tested the blood samples taken from the defendant, and the result which showed an alcoholic content in the blood sufficient to produce intoxication. Objection is also made to instruction No. 6 which informed the jury of the effect of sections 39-727, 39-727.01, and 39-727.02, R. S. Supp., 1949. The chemist described in detail the method employed, as well as her qualifica-

tions for doing this work. Ample foundation was laid for the admission of her findings as to the alcoholic content of the blood specimens. Instruction No. 6 correctly informs the jury as to the evidence required on the part of the State by the sections of the statute hereinbefore cited. No error in the admission of the result of the test or in the giving of the instruction in connection therewith is shown.

The defendant urges that the sentence was excessive. In this respect the evidence definitely establishes that defendant was driving his automobile on a public highway in an intoxicated condition. The handling of his automobile was so dangerous immediately prior to his arrest that other persons using the highway pointed it out to the patrolman. The defendant's condition, voluntarily brought upon himself, was such that in operating his automobile he was a menace to the safety of all others using the highway in the vicinity of his car. Under such circumstances we cannot say that a sentence of four days in jail, a fine of $40 and costs, and a six months' suspension of his driver's license bears any resemblance to excess punishment.

AFFIRMED.

VIRGIL LONG, APPELLANT, V. ROY M. CARPENTER, APPELLEE.
50 N. W. 2d 67

Filed November 23, 1951. No. 33010.

1. **New Trial.** If an appellee desires to insist upon his right to a new trial in case the entry of a judgment notwithstanding the verdict is held to be erroneous, he must assign such errors contained in his motion for a new trial upon which he intends to rely to obtain it.
2. **Trial.** A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against

whom the motion is directed, who is entitled to have every controverted fact resolved in his favor, and have the benefit of every inference that can reasonably be deduced from the evidence.

3. **Sales.** The positive statement of a dealer in livestock, or an assertion or affirmation of fact, as to quality or condition made in the course of exchange or purchase, indicating that he intended to bind himself to its truth, and which was so understood and relied upon by the other party, is an express warranty.
4. ———. An express warranty that an animal is sound implies the absence of any then-existing defect or disease which impairs or in its progress will impair the animal's natural usefulness for the purpose for which it was purchased, and is breached by any defect or disease existent at time of sale which renders it less serviceable for such purpose, although the defect or disease may not be fully developed at the time of sale, and although its existence was not known by the seller.
5. **Sales: Damages.** Ordinarily, the measure of damages for breach of express warranty of quality or condition is the difference between the value of the property at time of sale and the value it would have had if as warranted.
6. ———: ———. However, all damages in contemplation of the parties to the contract or which directly and naturally result from a breach of warranty accrue in favor of the party injured by such breach.
7. ———: ———. In other words, special damages may also be recovered in an action for breach of warranty if they are such as may fairly be supposed to have entered into contemplation of the parties when they made the contract, that is, are such as might naturally be expected to follow the breach, and if they are certain both in their nature and in respect to the cause from which they resulted.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Frost, Peasinger & Meyers, and *Bernard A. Ptak,* for appellant.

Towle, Young & Mattson, Webb & Kelley, and *H. B. White,* for appellee.

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

CHAPPELL, J.

Plaintiff brought this action to recover damages from defendant for breach of express warranty that a show mare, by name Hattie Carnegie, purchased from defendant for show purposes on October 21, 1947, was sound, when, at the time of purchase, she was allegedly unsound and unfit for use as a show horse because of a latent, progressive, incurable defect or disease, known as side bones in both front feet, which was not reasonably discoverable by physical examination and was not discovered by plaintiff until June 9, 1948.

The defense in substance was a general denial plus an express denial that any warranty of soundness was ever made by defendant or that plaintiff was induced thereby or relied thereon in making the purchase, together with a contention that the animal was sound and without side bones when sold to plaintiff, and if such side bones subsequently developed, they were induced and brought about by improper care, training, conditioning, and handling by plaintiff or his agents, employees, or trainers.

During the trial defendant's motion for directed verdict, made at the conclusion of plaintiff's evidence and renewed at conclusion of all the evidence, was overruled, and the issues were submitted to a jury. Plaintiff was awarded a verdict and judgment thereon for $2,000 with interest at 6 percent from July 26, 1948. Thereafter defendant timely filed a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial. Upon submission thereof, the trial court rendered and entered its order, whereby the motion for new trial was overruled, but the motion for judgment notwithstanding the verdict was sustained and plaintiff's cause of action was dismissed at plaintiff's cost. Thereupon, plaintiff appealed, assigning that the trial court erred in sustaining defendant's motion for judgment notwithstanding the verdict and in dismissing plaintiff's cause of action. We sustain the assignment.

On the other hand, defendant alternatively assigned that in any event the trial court erred in overruling his alternative motion for new trial, for the reasons in substance that: (1) The verdict and judgment entered thereon were not sustained by the evidence but contrary thereto; (2) there was no issuable question of fact submissible to a jury and a verdict should have been directed; and (3) plaintiff's damages were not a loss directly and naturally resulting in the ordinary course of events from the claimed breach of warranty.

In that connection, it will be observed and in the brief defendant concedes that such grounds are identical with those urged in support of the order sustaining defendant's motion for judgment notwithstanding the verdict. No assignment or contention whatever was made by defendant that the trial court otherwise erred in any manner or for any other reason than aforesaid, and we find no plain error unassigned requiring discussion.

In Armer v. Omaha & Council Bluffs St. Ry. Co., 153 Neb. 352, 44 N. W. 2d 640, it is said: "On the other hand, if appellee desires to insist upon his right to a new trial, in case the entry of the judgment notwithstanding the verdict is held to be erroneous, he must assign such errors contained in his motion for a new trial upon which he intends to rely to obtain it." Defendant, appellee here, did not comply with that rule, so, by analogy, as in the afore-cited case, he waived all errors unassigned. In the final analysis, it must be said that he relied solely upon the correctness of the trial court's action in sustaining his motion for judgment notwithstanding the verdict. Therefore, since we conclude that it was error to sustain defendant's motion for judgment notwithstanding the verdict, it follows that the trial court properly overruled defendant's alternative motion for new trial.

The primary question for decision then is whether or not plaintiff adduced sufficient competent evidence from which it could have been reasonably concluded

that: (1) Defendant made an express warranty of soundness, the natural tendency of which was to induce plaintiff to purchase the animal; (2) in making the purchase plaintiff relied thereon; (3) a breach thereof because the animal was unsound and unfit for use as a show horse at time of purchase by reason of a latent, progressive, incurable defect or disease called side bones; and (4) plaintiff suffered damages directly and naturally resulting therefrom and the amount of such damages. We conclude that the evidence was sufficient.

At the outset there are applicable statutes and rules of law which should be stated. In that regard, section 69-412, R. R. S. 1943, provides: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty."

In McGuire v. Thompson, 152 Neb. 28, 40 N. W. 2d 237, this court held: "The positive statement of a dealer in livestock, or an assertion or affirmation of fact, as to the quality or condition made in the course of exchange, indicating that he intended to bind himself to its truth, and which was so understood and relied upon by the other party to the exchange, may constitute a warranty."

As stated in 55 C. J., Sales, § 737, p. 770: "An express warranty of soundness of an animal may arise from representations by the seller made to induce a sale and relied on by the buyer, but not unless relied on by the buyer. Such a warranty need not be affirmed to be effective. * * * A warranty that an animal is sound implies the absence of any defect or disease which impairs or in its progress will impair the animal's natural usefulness for the purpose for which it is purchased, which defect must be existent at the time of

sale, and is breached by any defects which render it permanently less serviceable, as, for example, a disease, or malformation of the animal's body or the animal's disposition, although the defect may not be fully developed at the time of the sale, and although the defect was not known to the seller." See, also, Lentz v. Omar Baking Co., 125 Neb. 861, 252 N. W. 410.

Section 69-469, R. R. S. 1943, provides in part: "(6) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty." In that connection, section 69-470, R. R. S. 1943, also provides: "Nothing in this act shall affect the right of the buyer * * * to recover * * * special damages in any case where by law * * * special damages may be recoverable, * * *."

Ordinarily, the measure of damages for breach of warranty of quality or condition is the difference between the value of the property at time of sale and the value it would have had if as warranted. Cox v. Greenlease-Lied Motors, 134 Neb. 1, 277 N. W. 819.

However, as held in Burr v. Redhead, Norton, Lathrop Co., 52 Neb. 617, 72 N. W. 1058: "All damages in contemplation of the parties to the contract, or which naturally may result from a breach of a warranty, accrue in favor of the party injured by such breach.

"What are sometimes denominated 'consequential damages' may be recoverable in an action for a breach of warranty, if they are certain and determinate in nature or amount, or can be rendered so by evidence, and are also directly attributable to the breach of the contract as their cause." See, also, Punteney-Mitchell Mfg. Co. v. Northwall Co., 66 Neb. 5, 91 N. W. 863.

As stated in 88 A. L. R. 1440, quoting from 24 R. C. L. 76: "'The right to recover special damages is subject to two conditions or limitations: (1) That the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they

made the contract, that is, must be such as might naturally be expected to follow its violation; and (2) they must be certain, both in their nature and in respect to the cause from which they proceed.' " In that connection, the record discloses that plaintiff adduced competent evidence in support of both such conditions or limitations.

That the foregoing rules apply to the breach of warranty of animals under such circumstances as those appearing in the case at bar, is clearly stated in 46 Am. Jur., Sales, § 752, p. 880, which cites supporting authorities too numerous to here enumerate.

Finally, it is elementary that: "A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, who is entitled to have every controverted fact resolved in his favor, and have the benefit of every inference that can reasonably be deduced from the evidence." Trebelhorn v. Bartlett, *ante* p. 113, 47 N. W. 2d 374.

Bearing the foregoing rules in mind, we have examined the record. It discloses without dispute that plaintiff purchased the animal, a three-gaited show mare, from defendant, a dealer in show horses, on October 21, 1947, for $1,750, at a horse show in Kansas City, Missouri, where, on that date, she had won second place in her class as a show horse at the American Royal Horse Show. It is also not disputed that while the sale took place in Missouri, the law of that state was neither noticed, pleaded, nor proved, and it is presumed to be the same as the law of this state.

There is competent evidence adduced by plaintiff that early in the morning of the sale plaintiff was talking with defendant about buying the animal and asked defendant if the "mare was sound." Plaintiff then told defendant that he "wouldn't buy a horse unless it was either guaranteed sound by him or I would call in a vet to

examine her." Thereupon, defendant said, "'Yes, sir; absolutely,' * * * there was no use, that he would guarantee her a hundred per cent sound."

Thereafter, at noon, just before the sale was made and concluded, plaintiff again asked defendant if the animal was sound, whereupon defendant said: "'Yes sir; a hundred per cent.' * * * 'If you find anything wrong with her you know where you got her.'" At that time, plaintiff again told defendant that "unless he guaranteed the mare sound I wanted her looked over by a vet." Plaintiff stated that he "would not buy her" unless that was done. To which defendant again replied that "there was no use doing that, that he guaranteed her a hundred per cent sound." Plaintiff testified also that "his statments (statements) that morning influenced me to buy the horse" because "She was more in the price range that I wanted to pay for a horse."

We conclude that there was ample competent evidence to sustain a conclusion that defendant made the warranty above set forth. Defendant denied that he made any warranty, but in his brief here conceded that such issue was for the jury. In that connection, we also conclude that the natural tendency of the aforesaid statements, if made, was to induce plaintiff to purchase the animal and that there was ample evidence from which it could have been reasonably concluded that plaintiff purchased her relying upon an express warranty of soundness.

There is competent evidence that by pre-arrangement with defendant, plaintiff took possession of the animal at Hamburg, Iowa, about the middle of November, and brought her to Norfolk, Nebraska, where he exercised her for a couple of weeks. From December 13, 1947, to June 9, 1948, she was in training at stables in Sioux City, Iowa, operated by an experienced horse trainer. There she was being trained for the Waterloo, Iowa, show which took place in April 1948. It was noticed by such trainer before taking her to Sioux City that she was not raising her front legs as high as she should, and after-

wards, at Sioux City he noticed that she worked better on soft ground, so a long straw runway was built on which to train her. There, not knowing what was wrong, but believing that her feet were too long, hard, and dry, they were trimmed, shod, and soaked in mud, without noticeable beneficial results. At the Waterloo show, she did not place because she did not perform well. There she refused to bend her knees naturally, and walked stiff-legged or gimpy.

In June she was taken by plaintiff to the veterinary clinic at Iowa State College, Ames, Iowa, where she was physically examined and X-rays were taken by outstanding veterinarians employed by that school, who testified at the trial. The physical examination did not show any evidence of side bones. However, the X-ray pictures taken on June 9, 1948, and again on August 1, 1949, clearly disclosed the presence of side bones, latent, progressive, incurable bony growths on each side of her front feet, which, in the opinion of the examining veterinarians who qualified as experts, had, with reasonable certainty, been in existence for at least a year prior to June 9, 1948, and possibly longer, making her unsound at the time of purchase and worthless as a show horse. It was also shown by plaintiff that in such condition she was worth only $400 or $500 as a brood mare. Special damages, established by evidence adduced in plaintiff's behalf, to which no objection was made at the trial, amounted to $740.75. In that connection we conclude that the amount of the verdict and judgment awarded was amply supported by competent evidence.

A short time after June 9, 1948, plaintiff drove to defendant's home in Hamburg, Iowa, told him what the veterinarians at Iowa State College had told plaintiff about the condition of the mare, and sought a settlement therefor. There defendant did not deny that he had guaranteed the mare to be sound, but simply stated that he would make no adjustment with plaintiff for his damages.

Concededly, the animal did develop a founder or laminitis sometime after the Waterloo show, caused, it was thought, by the jar of her hot and fevered feet working on hard roads. In that regard, however, the veterinarians, as experts, testified that side bones would not produce but could well be a contributing cause of laminitis, while laminitis would not produce or be a contributing cause of side bones.

We find no evidence adduced by plaintiff from which it could be concluded, as a matter of law, that plaintiff or anyone employed by him, had subsequently caused or contributed to the side bones which, as shown by evidence adduced in plaintiff's behalf, made her unsound at the time of purchase and then unfit as a show horse, the purpose for which she was purchased by plaintiff. Defendant contended otherwise, but that was a question for the jury. In that regard, by instruction No. 5-A, the jury was told substantially that if the mare became unsound and unfit for use as a show horse, not for any reason that existed at the time of the sale but subsequently, through the neglect of the plaintiff, his agents, trainers, or employees, as contended by defendant, then plaintiff could not recover, and their verdict should be for defendant. The jury evidently found against defendant upon that issue, as they had a right to do, but concluded that the animal was unsound and unfit for use as a show horse because of latent side bones that existed at the time of purchase. If she was so latently unsound at time of purchase, then the fact that she subsequently acquired other defects or diseases would not bar plaintiff's right of recovery as a matter of law. Cases cited by defendant are distinguishable upon the facts and applicable law.

We conclude that the trial court properly overruled defendant's alternative motion for new trial, but erred in rendering and entering the order or judgment sustaining his motion for judgment notwithstanding the verdict, and dismissing plaintiff's cause of action. Therefore,

such judgment should be and hereby is reversed and the cause is remanded with directions to reinstate plaintiff's case, together with the verdict and judgment thereon.

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

CHRISTINE SHIPLEY, APPELLANT, V. JOSEPH SHIPLEY, APPELLEE.
50 N. W. 2d 103

Filed November 23, 1951. No. 33033.

Appeal and Error. An order sustaining a general demurrer to a petition, not followed by a judgment of dismissal or other final disposition of the case, is not a final order or judgment, and is not reviewable in this court.

APPEAL from the district court for Douglas County: HERBERT RHOADES, JUDGE. *Dismissed.*

Burbridge & Burbridge, for appellant.

Frost, Peasinger & Meyers, for appellee.

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

MESSMORE, J.

The plaintiff filed a petition in the district court to modify a decree of divorce. The defendant, cross-petitioner, demurred to the petition. The demurrer was sustained. The plaintiff appeals.

The ruling on the demurrer was not followed by a judgment of dismissal nor any order showing final disposition of the case.

In Larson v. Sloan, 77 Neb. 438, 109 N. W. 752, this court held: "An order sustaining a general demurrer to a petition, not followed by a judgment of dismissal or other final disposition of the case, is not a final order

or judgment, and is not reviewable in this court." See, also, Miller v. B. & M. R. R. Co., 7 Neb. 227; State ex rel. Sorensen v. State Bank of Omaha, 131 Neb. 223, 267 N. W. 532; Cozad Ditch Co. v. Central Nebraska Public Power & Irrigation Dist., 132 Neb. 547, 272 N. W. 560; State ex rel. Johnson v. Consumers Public Power Dist., 142 Neb. 114, 5 N. W. 2d 202; § 25-1902, R. R. S. 1943.

For the reason given herein, the plaintiff's appeal is dismissed.

DISMISSED.

DELMAR H. HUCKFELDT, ADMINISTRATOR OF THE ESTATE OF LETA HOLLENBECK, DECEASED, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLEES.

50 N. W. 2d 110

Filed November 30, 1951. No. 33026.

1. **Trial: Evidence.** When on direct examination an objection to a question is interposed by the adverse party and sustained, there must be an offer of proof of the facts sought to be put in evidence by the question in order to present the ruling to this court for review.
2. **Negligence: Railroads.** It is more than slight negligence as a matter of law under the comparative negligence statute for one to stop an automobile on a railroad track without looking or listening for approaching trains. This rule prevails even though the whistle was not blown, the bell not rung, or the speed of the train excessive.

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

Dryden, Jensen & Dier, for appellant.

C. B. Matthai, G. C. Holdrege, and *J. C. Tye,* for appellees.

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

CARTER, J.

This is an action brought by the administrator of the estate of Leta Hollenbeck, deceased, to recover damages for her death resulting from a collision between the automobile of the deceased and a train owned by the Union Pacific Railroad Company and operated by locomotive engineer Bruce Eshom. The trial court directed a verdict for the defendants and the plaintiff appeals.

The evidence of the plaintiff as it bears upon the question of negligence on the part of the defendants consists primarily of the testimony of one Vern F. Barr. This witness testified that he was standing on the street corner in front of the First State Bank of Shelton, Nebraska, at about 3:14 a. m. on September 6, 1948, when the accident occurred. The railroad crossing was approximately 150 feet south of the corner where the witness was standing. There was a light drizzle falling and visibility was described as "not too bad." The witness testified that he could have seen the headlights of a train approaching the crossing for several miles in either direction. The witness was waiting to take a bus to North Platte when the accident happened. He testified that a few minutes before the accident he saw an automobile occupied by two persons, subsequently identified as the deceased and one Ann Wagner, approach from the east, turn south, and cross the railroad tracks. Shortly thereafter he saw a train approaching from the east and heard its whistle several times. He watched the highway to the east for the approach of the bus he intended to take, and continued to observe the approach of the train from that direction. The train was a streamliner traveling about 80 miles an hour. Its whistle was sounding and its wig-wag headlight was lit and operating. As the rear of the streamliner crossed the street at the point of the accident the witness for the first time observed a passenger train, pulled by a steam locomotive, traveling east on the track south of the track traveled by the streamliner. The steam locomotive apparently

came into the view of the witness at or near the west side of the crossing. He first identified it by some little "sparklers" that he saw at the front of the engine some four feet above the ground. He testified that he did not see the automobile of the deceased and that he did not know an accident had occurred until he heard the moans of the deceased. He then investigated and found the wrecked automobile and plaintiff's decedent, fatally injured. The witness testified that he did not see the train approaching from the west, heard no whistle or bell, and saw no headlight burning on it. He says the train came to a stop about three-quarters of a mile east of the crossing. A part of the train crew came back to the scene of the accident before the train proceeded. He testified that no more than two seconds elapsed after the streamliner cleared the crossing before the east-bound train entered the street crossing.

The engineer of the east-bound train testified that his train was traveling about 80 miles an hour as it approached Shelton. He testified that he pulled two longs and two shorts on the whistle for the crossing west of the one here involved. After passing over the west crossing he started to pull four similar blasts for the crossing where the accident happened. During the first blast his headlight disclosed an automobile standing on the track on which his train was traveling. He testified that he gave several short blasts of the whistle and applied the air-brakes. He said that the occupant of the car, later identified as plaintiff's decedent, apparently did not see or hear the train coming from the west until about the time the car passed from his view under the front of the engine. The engineer testified that he had driven locomotives for 34 years and that it was impossible to stop the train traveling at 80 miles an hour in 1,000 to 1,500 feet. He testified that the headlight on his engine was lit before and after the accident, and that the whistle and bell were working and properly operated.

The evidence of the fireman on the engine was similar to that of the engineer, he having seen the automobile on the track at the same time as the engineer by virtue of the projected rays of the headlight. The engineer on the streamliner testified that when he met the engine of the east-bound train west of the crossing the headlight was lighted and properly operating. The wrecked automobile indicated it had been struck in the middle, the front end being found farther down the track than the rear portion. In addition to the foregoing evidence concerning the contention that the east-bound train was without a lighted headlight immediately prior to the collision, the evidence of Barr was impeached by a statement over his signature that, while he thought the headlight was out, he was not certain because of the position from which he viewed the passing trains, the short time he had to make an observation, and the distance that the headlight was set to reflect objects ahead of the engine.

The evidence in this case is conclusive that the deceased drove her automobile upon the south track and stopped to permit a west-bound train to pass. While her automobile was standing squarely across the track it was struck by a fast-moving train approaching from the west. Such conduct on the part of the deceased constitutes contributory negligence more than slight under the comparative negligence statute and bars a recovery as a matter of law. It is more than slight negligence for one to stop an automobile on a railroad track without looking or listening for an approaching train. This is particularly so when the driver is familiar with the crossing and the possibility of train movements in both directions on a double track railroad. The rule applies even though the whistle was not blown, the bell not rung, or the speed of the train excessive. Lewis v. Union Pacific R. R. Co., 118 Neb. 705, 226 N. W. 318; Askey v. Chicago, B. & Q. R. R. Co., 101 Neb. 266, 162 N. W. 647; Mundt v. Chicago, R. I. & P. R. R. Co., 136

Neb. 478, 286 N. W. 691. See, also, Moreland v. Chicago & N. W. Ry. Co., 117 Neb. 456, 220 N. W. 692.

Complaint is made that the court rejected certain evidence offered by the plaintiff. No offer of proof appears to have been made. The rule is: Where on direct examination an objection to a question is interposed by the adverse party and sustained, there must be an offer of proof of the facts sought to be put in evidence by the question in order to present the ruling to the court for review. Dean v. State, 128 Neb. 466, 259 N. W. 175; Employers Mutual Casualty Co. v. Brazda, 152 Neb. 633, 42 N. W. 2d 195.

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

IN RE APPLICATION OF PETERSEN & PETERSEN, INC. PETERSEN & PETERSEN, INC., APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

50 N. W. 2d 222

Filed November 30, 1951. No. 33027.

Public Service Commissions. A certificate of public convenience and necessity granted and issued by the Nebraska State Railway Commission is not property within the terms of section 75-240, R. R. S. 1943, and the commission has no jurisdiction to transfer or assign it from the holder thereof to another.

APPEAL from the Nebraska State Railway Commission: *Reversed.*

John J. Burchell and *A. W. Scribner,* for appellant.

Robert E. Powell, for appellee.

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

BOSLAUGH, J.

Appellee was a motor carrier of property over regular

routes in Nebraska by authority granted it by the Nebraska State Railway Commission, hereinafter designated commission. Ivan H. Franzen was the holder of a certificate of public convenience and necessity issued to him by the commission for the transportation by motor vehicle of commodities over irregular routes within the state. They made a joint application to the commission for an order effectuating a sale and transfer of the operating rights of Ivan H. Franzen as evidenced by his certificate of public convenience and necessity to appellee, as provided by the terms of a contract between them, a copy of which was attached to and made a part of the application. Appellant by written protest objected to the granting of the application.

The hearing of the matter resulted in findings by the commission that appellee should be authorized to purchase the operating rights of Franzen and to conduct the motor operations specified in the certificate of public convenience and necessity issued to him, and that it, as modified in one particular, be assigned to appellee. The order of the commission approved the application and authorized appellee to conduct operations under the Franzen certificate, canceled the certificate of public convenience and necessity of appellee, and issued a new one to it. This appeal challenges the validity of the findings and order.

The single thing sought to be acquired by appellee in the proceedings shown by the record was the certificate of public convenience and necessity issued to and held by Ivan H. Franzen. Appellant asserts that the commission does not have jurisdiction to transfer a certificate of public convenience and necessity. The position of appellee is that the commission has such authority and that it properly exercised it in this case.

The source of the claimed authority in this regard is section 75-240, R. R. S. 1943. The pertinent parts of this are: "It shall be lawful, under conditions specified below, but under no other conditions, for two or more

motor carriers to consolidate or merge their properties, or any part thereof, into one ownership, management or operation of the properties theretofore in separate ownership, or for any such motor carrier, or two or more such motor carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another such carrier; * * *. Whenever a consolidation, merger, purchase, * * * is proposed, the carrier or carriers or person seeking authority therefor shall present an application to the State Railway Commission * * *. If, * * * the commission finds that the transaction proposed will be consistent with the public interest and does not unduly restrict competition, it may enter an order approving and authorizing such consolidation, merger, purchase, * * * upon such terms and conditions as it shall find to be just and reasonable."

The certificate issued to Franzen and sought to be acquired by appellee is not property within the terms "properties, or any part thereof" as used in the parts of the section of the statute set out above. It has been considered in this jurisdiction that a certificate of convenience and necessity is a permit or license, and is not property in a legal or constitutional sense. In Effenberger v. Marconnit, 135 Neb. 558, 283 N. W. 223, this court said: "We necessarily conclude that a certificate of convenience and necessity is in the nature of a permit or license and that it is not property in any legal or constitutional sense. It is a mere license that can be amended or revoked by the power authorized to issue it. Such being the case, it is personal in its character, is not transferable, and does not pass by succession. It is purely a regulatory measure that can vest no property right in the holder." See, also, In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552.

The commission has power to approve and allow applications by virtue of section 75-240, R. R. S. 1943, only when one or more of the situations therein set forth is present and when the conditions therein spe-

cified exist. In In re Application of Neylon, *supra,* this court said: "But section 75-240, R. S. 1943, does not relate to the commission's authority to issue certificates of convenience and necessity. It relates to the commission's authority to approve and authorize, upon such terms and conditions as it finds to be just and reasonable, the consolidation, merger, purchase, lease, contract to operate, or acquisition of control by the purchase of stock, of the properties of motor carriers for the purpose of ownership, management, or operation thereof. However, the commission, under this section, has such authority only when the situations therein set forth are present and when the conditions therein specified are found to exist." See, also, In re Application of Silberman, 153 Neb. 338, 44 N. W. 2d 595.

Appellee concedes that the conclusion of the case of Effenberger v. Marconnit, *supra,* as to the status of certificates of convenience and necessity was correct when announced, and that it was the generally accepted view, but it contends that recent decisions "have somewhat changed the situation and the modern view is that under certain circumstances and conditions a certificate of public convenience and necessity may properly be classified as 'property' or a 'property right'." The authorities discussed by appellee are neither so persuasive nor convincing as to justify retreat by this court from the considered view expressed and repeated by it that such a certificate is a permit or license and not property or a property right in any legal or constitutional sense. It is not claimed by appellee that any court of final decision has departed from or changed its expressed view on this subject. All that justifiably may be asserted in this regard is that there is not unanimity of view on the question by all courts.

The action of the commission in the matter presented to the court by this appeal was administrative or legislative in nature and the court has the duty to determine whether or not the order of the commission was within

its authority. In re Application of Neylon, *supra*. The record does not show any situation within the provision of the statute relied upon by the parties and by virtue of which the commission attempted to act.

The order of the commission should be, and it is reversed.

REVERSED.

THOMAS UMBERGER ET AL., DOING BUSINESS AS THE UNION AIR SERVICE, APPELLEES, V. ROY A. SANKEY, APPELLANT.
50 N. W. 2d 346

Filed November 30, 1951. No. 33028.

1. **Work and Labor.** An action based on quantum meruit for labor and materials furnished is grounded upon an implied promise to pay the reasonable value thereof.
2. **Work and Labor: Pleading.** Evidence in an action based on quantum meruit that defendant did not agree to pay the reasonable value of labor and materials furnished does not constitute a material variance with an allegation of the petition that defendant orally agreed to pay such reasonable value.
3. **Pleading.** It is not necessary in a pleading to state facts which the law implies. When they are so pleaded they do not change the identity of the cause of action and they will ordinarily be treated as surplusage.
4. **Work and Labor: Account, Action on.** An action based on quantum meruit for labor and materials furnished is not a suit upon an unsettled account within the meaning of section 45-104, R. S. 1943.
5. **Interest: Work and Labor.** Interest is properly allowable in an action based on quantum meruit for labor and materials furnished from the date the judgment is rendered.

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

T. R. P. Stocker, for appellant.

Hammond & Parker, for appellees.

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

CARTER, J.

This is an action to recover the reasonable value of labor and materials furnished by the plaintiffs in repairing an airplane belonging to the defendant. The verdict of the jury was for the plaintiffs in the amount of $455.40. Judgment was entered for this amount with interest from June 1, 1947, and costs. The defendant appeals.

Plaintiffs were partners doing business as the Union Air Service at the Union Airport in Lincoln, Nebraska. They were engaged generally in the sale, operation, and servicing of airplanes and in approved licensed flight and pilot instruction. On October 22, 1946, there was a collision between a plane owned by the plaintiffs, operated by a student pilot engaged in taking flight training from plaintiffs, and a plane owned and operated by the defendant. Plaintiffs repaired defendant's plane. They testified that the reasonable value of the new parts required and the services rendered was $455.40. The evidence is sufficient to sustain the jury in finding this amount as the reasonable value of the repairs made.

The defendant asserts, however, that he never requested plaintiffs to make the repairs and that it was his understanding they were to be made without cost to him because the accident was the result of negligence on the part of the pilot flying plaintiffs' plane. The defendant testified that Ayabe, one of the partners, told him that plaintiffs were going to fix the planes, that they carried insurance and would check to see if it covered the damage to defendant's plane. Ayabe denies that he ever told defendant that plaintiffs would repair the plane without charge. The other two partners, Umberger and Nelson, also deny that any such statement was made to the defendant.

The plaintiff Umberger testified that defendant had been a customer of the plaintiffs for about two years. He said that on the day after the accident the defendant asked how soon they could get the airplane repaired.

Defendant stated he had a prospective buyer for the plane, that he wanted it repaired as soon as possible, and requested that parts be ordered by telephone. Umberger testified that defendant's plane was disassembled, the parts ordered by telephone, and on the arrival of the parts the plane was repaired. Plaintiff Nelson testified to similar conversations with the defendant as to the repair of the plane. Nelson testified also that defendant never claimed the repairs were to be made at plaintiffs' expense until after defendant's plane had been put in flying condition.

The foregoing issues were for the jury to determine. The evidence is clearly sufficient to sustain the finding of the jury that plaintiffs' version of the facts was the correct one.

Defendant contends there was a fatal variance in the pleading and proof, and that the court erred in refusing instructions tendered by the defendant and in giving certain instructions on the court's own motion.

The petition alleges in part that defendant is indebted to plaintiffs in the sum of $455.40 for labor and materials furnished in repairing defendant's airplane, "which repairs were made upon said aircraft by the plaintiffs at the defendant's request on or about October 23, 1946, and upon his oral agreement to pay therefor; that the charge of $455.40 is a reasonable value of the labor and materials furnished; * * *." The evidence shows that there was no express oral agreement to pay for the repairs. It is contended by the plaintiffs that the promise to pay for the repairs was implied when defendant requested the repairs to be made. Defendant asserts that the implied agreement to pay for the repairs constitutes a variance from the petition which alleges "his oral agreement to pay therefor."

It is the rule in pleading a cause of action based on quantum meruit for the reasonable value of labor and materials furnished that an allegation of a promise to pay impliedly exists in the pleading. The petition be-

fore us is not one based upon contract. It is for the reasonable value of labor and materials furnished for which there must be implied agreement to pay. The fact that the petition alleges an oral agreement to pay when the evidence shows only an implied promise to pay does not change the nature of the action. It is still an action to recover for labor and materials furnished based on quantum meruit, and the use of the words "upon his oral agreement to pay therefor" does not in any manner change the identity of the cause of action. There is not, therefore, a variance in the pleading and proof within the meaning of the rule for which defendant contends. In any event, this court has held that a single cause of action may be set forth in more than one form of action so as to meet any possible state of the proof. In Stout v. Omaha, Lincoln & Beatrice Ry. Co., 97 Neb. 816, 151 N. W. 295, we held that an action on a quantum meruit may be joined with an action on an express contract where the verdict and judgment on either will satisfy the liability on both, where the origin of both is in the same transaction.

In Ball v. Beaumont, 59 Neb. 631, 81 N. W. 858, a case similar in principle to the one before us, the court said: "It may be that to some extent fictitious averments are still permitted; but they are certainly not required. Neither the letter nor the spirit of the law now requires a party to plead what is not true. The facts stated in the county court, and in the original petition in the district court, disclose a duty resting on the defendants to repay the money expended by the plaintiff at their request and for their use. From this duty the law infers a promise, and it was unnecessary to plead it. The rule is, that what the law implies need not be averred. The plaintiff might have rested his case on the legal duty alone; but the statement, in terms of a promise by the defendants to perform their legal obligation, was, at most, harmless." In the case before us the law implies a promise to pay when the

materials and labor were requested. It was not necessary to plead the promise to pay which the law implies. The pleading of such a promise was therefore not essential and was, at most, harmless. It added nothing but a fiction to the pleading and can afford no basis for a claim of a fatal variance between the pleading and proof.

We have examined the instructions given and refused by the court. The claimed primary error is dispelled by our holding on the claim of fatal variance in the pleading and proof. No prejudicial error in the giving or refusing of instructions is shown.

The record shows that the trial court entered a judgment for interest at 6 percent per annum beginning six months after the date of the last item. This portion of the judgment appears to have been based on that part of section 45-104, R. S. 1943, which provides: "Unsettled accounts between parties shall bear interest after six months from the date of the last item thereof." The defendant contends that interest should be allowed from the date the judgment was rendered.

In this respect we point out that this is an action based on quantum meruit upon an implied promise to pay the reasonable value of the labor and materials furnished. There is no specific standard by which such reasonable value is to be determined. In the present case the records of the plaintiffs showing the costs of the labor and materials used, which are testified to as being their reasonable value, were offered in evidence for this purpose. This does not constitute the action as one based on an unsettled account within the purview of the statute. In fact an action based on quantum meruit is not a suit upon an account at all and section 45-104, R. S. 1943, has no application thereto. Pollard v. Carlisle (Mo. App.), 218 S. W. 921; Sidway v. Missouri Land & Live Stock Co., Limited, 187 Mo. 649, 86 S. W. 150.

Interest is allowable in the present case from the date the judgment was rendered. The judgment is hereby

so modified. It is correct in all other respects and it will be affirmed as modified.

MODIFIED AND AFFIRMED.

SAM OKUDA, APPELLANT, V. GEORGE F. HAMPTON, APPELLEE.
50 N. W. 2d 108

Filed November 30, 1951. No. 33041.

Appeal and Error. Under section 25-1919, R. R. S. 1943, and Revised Rules of the Supreme Court, Rule 8 a 2 (4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned.

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

Lee Card, for appellant.

Charles A. Fisher, for appellee.

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

SIMMONS, C. J.

Plaintiff brought this action in replevin to recover the possession of certain specific items of restaurant equipment and provisions. The writ was issued, and the specific items, with one exception, were taken by the sheriff and appraised. The plaintiff failed to give the undertaking required by law and the property was delivered to the defendant. A special appearance was made by defendant, sustained by the trial court, and later overruled. The plaintiff later filed an amended petition claiming damages for loss of use of the property and loss of time. Defendant filed a general denial. The action was tried to a jury as one for damages and resulted in a verdict for the defendant. Judgment of dismissal with prejudice was rendered. Plaintiff filed motions for judgment notwithstanding the verdict and

for a new trial. These motions were overruled. Plaintiff appeals. We affirm the judgment of the trial court.

Plaintiff's evidence is that he was in possession of part of a building owned by the defendant and was operating a restaurant there. There is evidence that plaintiff was to pay gas, light, water, and other bills, and render janitor service in lieu of rent. Plaintiff testified that on February 16, 1949, defendant entered the building, claimed ownership of the "property," demanded the key and that plaintiff get out, and that under compulsion he complied. This action was started March 5, 1949. Plaintiff's evidence contains little, if any, identification of the property in the building with that described in his pleadings. We find no evidence of the value of any of the property alleged to have been taken. There is little or no evidence of damages otherwise.

Defendant's evidence is that several days or weeks before February 16, 1949, plaintiff allowed the water system to freeze, causing material damage; that plaintiff had not paid the gas or water bills; that further credit was denied; that plaintiff was unable to pay his bills and voluntarily closed his business; and that thereafter he voluntarily surrendered the key to defendant, told defendant that he was "broke," and did not care what happened to the property in the building. Defendant's evidence further was that a substantially large part of the property left in the building and claimed in replevin had been sold to plaintiff on conditional sales contracts; that the vendors demanded it; and that defendant bought it of them and paid for it.

Section 25-1919, R. R. S. 1943, provides: "The Supreme Court shall by general rule provide for the filing of briefs in all causes appealed to said court. The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous; but no petition in error or

other assignment of errors shall be required beyond or in addition to the foregoing requirement. The Supreme Court, may, however, at its option, consider a plain error not specified in appellant's brief."

Rule 8 a 2 (4) of this court provides: "Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned."

We have held: "Under section 25-1919, R. S. 1943, and Revised Rules of the Supreme Court, Rule 8 a 2 (4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned." Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482.

Plaintiff has separately numbered and paragraphed 15 assignments of error here. In his argument plaintiff makes no mention of these assignments of error. He states that one instruction given is contrary to law. It is not mentioned in his assignments of error. In his reply brief plaintiff undertakes to discuss alleged errors in several, and in one instance in all, instructions. Without determining his right to raise these matters in a reply brief, his difficulty again is that the giving of those instructions is not within the assignments of error with one exception. In assigned error No. 7, plaintiff's reference to instruction No. 2 is a patent error.

Plain error is not apparent from an examination of the record.

The judgment of the trial court is affirmed.

AFFIRMED.

VIRGIL E. GRAHAM, GUARDIAN OF CHRISTINA BEAUCHAMP, AN INCOMPETENT PERSON, APPELLANT, V. WESLEY C. BEAUCHAMP, APPELLEE.

50 N. W. 2d 104

Filed November 30, 1951. No. 33043.

1. **Guardianship: Judgments.** Where there is a present, actual, bona fide controversy and justiciable issues are presented and all interested persons are made parties, the guardian of an incompetent person may have a declaration of the rights or legal relations to determine the title to certain personal property in order to file a proper inventory in the guardianship estate.
2. **Judgments: Equity.** In an action for declaratory judgment the matter of entering a declaratory judgment is one of practice and procedure rather than one of jurisdiction. An action for such a judgment or relief is a special proceeding and is equitable in its nature, but it is not an exercise of general equity jurisdiction in which the court may grant consequential relief on a general prayer or upon general equitable considerations.

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

Beatty, Clarke, Murphy & Morgan, for appellant.

Baskins & Baskins, for appellee.

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

MESSMORE, J.

This is an action for declaratory judgment brought by the guardian of Christina Beauchamp, an incompetent person, seeking a declaration as to the rights, status, and legal relations with defendant, to determine the ownership of certain cattle to enable the guardian to file an inventory in the guardianship estate.

The trial court decreed that Christina Beauchamp and her husband Wesley C. Beauchamp, the defendant, entered into a written contract with Merle D. Ware by the terms of which Ware was to take possession of a herd of cattle from March 1, 1950, to March 1, 1953,

and furnish the work and necessary provisions for their keep. In consideration for so doing, Ware was to receive one-half the calf crop each year, Christina Beauchamp one-fourth of the calf crop, and the defendant one-fourth of the calf crop. Certain of the calves were sold and the proceeds of the sale were held pending this action. The court further decreed that the proceeds so held, subject to the order of the court, be divided equally between the plaintiff and defendant; that future calves born to the cows referred to in the pleadings, during the term of the contract, be owned and divided in the same manner as before set out; that the rights, status, and other relationship of the plaintiff and defendant in and to other cattle described in the pleadings be not determined or declared in this action, but that the ownership and rights of the parties herein be expressly undeclared and undetermined; and that each party pay one-half of the costs of the proceedings.

The plaintiff filed a motion for new trial. From the order overruling the motion the plaintiff appeals.

For convenience we will refer to Christina Beauchamp as Christina, her husband Wesley C. Beauchamp as the defendant, and Merle D. Ware as Ware.

It appears from the record that the defendant and Christina Hoatson were married on April 4, 1944. At the time of their marriage the defendant owned 14 head of cattle, some hogs, a team of horses, and some farm machinery. Christina owned no property. After the marriage they moved to the farm which had been rented and operated by the defendant near Ringgold. Christina's father died in 1944 after her marriage. She testified that she inherited 55 head of black cattle, including calves, from her father's estate. These cattle were taken up in the hills at Ringgold. At the time of trial there were 57 head of cattle. The calves out of the original cows were kept and grew up with the herd.

The defendant testified that he believed Christina inherited 54 or 55 head of cattle from her father. He

took possession of them and branded them with his brand. The defendant sold some of the cattle. He believed there were 10 head of the original number left. The defendant further testified that he never bought any black cattle, but did buy some red and white-faced cattle, three of which were with the herd at the time of trial. The defendant and Christina purchased a bull between them from the proceeds of the cattle sold and other farm proceeds. The defendant testified that he took care of the cattle, raised them, replaced the herd, and the herd was developed from whatever cattle the defendant had and those that Christina had. The cattle were assessed in his name and he paid the taxes on them.

On March 28, 1950, the defendant and Christina entered into a contract with Merle D. Ware, as heretofore referred to.

The plaintiff was appointed guardian of Christina Beauchamp, an incompetent person, on April 17, 1950. At the time of filing the petition in the guardianship estate there were 57 cows, 44 calves, and 1 bull. The plaintiff, as guardian, was unable to determine to whom the cattle belonged for the reason that there was a dispute between his ward and her husband with reference to the ownership of the cattle. As a consequence he is prevented from filing a proper inventory in the guardianship estate.

The plaintiff contends the trial court erred in entering judgment that the rights, status, and other legal relationship of the plaintiff and defendant in and to the cattle described in the pleadings, other than the calves, be not determined or declared in this action, but that such ownership and rights be expressly undeclared and undetermined.

Section 25-21,152, R. R. S. 1943, of the Declaratory Judgments Act, provides in part that any person interested as guardian in the administration of the estate of a lunatic may have a declaration of rights or legal

relation in respect thereto to determine any question arising in the administration of the estate or trust.

The Declaratory Judgments Act is applicable where there is a present actual controversy and all interested persons are made parties, and only where justiciable issues are presented. See, Dobson v. Ocean Accident & Guarantee Corp., 124 Neb. 652, 247 N. W. 789; Miller v. Stolinski, 149 Neb. 679, 32 N. W. 2d 199; Redick v. Peony Park, 151 Neb. 442, 37 N. W. 2d 801; § 25-21,159, R. R. S. 1943.

"A court may refuse to enter a declaratory judgment where it would not terminate the uncertainty or controversy giving rise to the proceeding." Dobson v. Ocean Accident & Guarantee Corp., *supra.*

The defendant contends that the trial court, in the exercise of its judicial discretion, entered the proper judgment for the reason that Merle D. Ware was an interested party by virtue of his contract with Christina and the defendant, and a necessary party to the controversy; that Ware has, under the contract, the right of possession of these cattle until March 1, 1953, therefore there is no present controversy between these parties as to the title to the cattle until the contract terminates, and no present necessity for determining the title; and that the guardian can make an inventory as to his ward's interest in the cattle according to the terms of the contract.

We are not in accord with this contention. The contract, by its terms, does not vest the title to the cattle in Ware. The contract is specific as to Ware's interest, and that is one-half the calf crop for the years the contract is in force. Likewise, it is specific with reference to Christina's interest and the defendant's interest in the calf crop. Ware has no interest in the title to the cattle here involved. This is a matter between the parties to this action. The trial court properly determined the interest in the calves of the respective parties to the contract.

The evidence without contradiction shows Christina inherited 28 cows, 14 yearling heifers, and 13 calves from her father's estate. The defendant never had title to any of these cattle, nor did he purchase any black cattle. He did purchase three red and white-faced cattle which were placed in the herd and were a part of the herd at the time of trial. In all there were 57 cattle in the herd at that time. While certain changes were made in the herd, it is apparent that the calves which constituted part of the original herd were kept with the herd.

We believe the case at bar is a proper case for a declaratory judgment for the reason that there is a present, actual, and bona fide controversy between the defendant husband and the guardian of Christina, justiciable issues are presented, and a judgment determining the title to the cattle here involved will remove the uncertainty that now exists.

The use of a declaratory judgment, while discretionary with the court, is nevertheless dependent upon facts and circumstances rendering it useful and necessary. The court's discretion should be exercised with caution. Jurisdiction should be assumed only where the court is satisfied that an actual controversy exists between competent parties who are before the court, and that the declaration sought will be a practical help in ending the controversy or in stabilizing disputed legal relations under the facts alleged and proved. It has been held that the court is charged with the duty of declaring the rights of the parties, where both seek a declaration, and should not enter a judgment merely dismissing the complaint. See, 1 C. J. S., Actions, § 18, p. 1033; Moeller, McPherrin & Judd v. Smith, 127 Neb. 424, 255 N. W. 551.

We conclude that under the evidence the title to the black cattle constituting a part of the herd is in the plaintiff's ward Christina, and the three red and white-faced cattle purchased by the defendant and with the herd are his separate property. The evidence is not clear whether Christina and the defendant purchased

one or two bulls. In any event they each own a one-half interest therein, and the evidence shows an understanding between them to that effect.

The defendant, by his answer, claims the title to all of the cattle for the management, the work, and the handling of the same; the paying of taxes on them; and in addition, the handling of certain real estate inherited by Christina from her father, changing the encumbrances thereon, and selling some of the real estate and purchasing other real estate which enhanced her estate that she received from her father and mother. While the defendant may have some equitable interest where property is accumulated by the joint efforts of a husband and wife, this is not a proper action in which such interests may be determined.

In an action for declaratory judgment the matter of entering a declaratory judgment has been held to be one of practice and procedure rather than one of jurisdiction. An action for such a judgment or relief is a special proceeding and is equitable in its nature, but it is not an exercise of general equity jurisdiction in which the court may grant consequential relief under a general prayer or upon general equitable considerations. See 1 C. J. S., Actions, § 18, p. 1046.

In Grosse Pointe Shores v. Ayres, 254 Mich. 58, 235 N. W. 829, the court said: "A requisite to the proceeding is an actual controversy over a specific issue to be set up in the pleadings, in order that a binding declaration of rights may be made thereon. The proceeding is special, is not a substitute for the regular actions, and is not an exercise of general equity jurisdiction in which the court may grant consequential relief under a general prayer or upon general equitable considerations. Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N. W. 618, (68 A. L. R. 105); 50 A. L. R. 42; 19 A. L. R. 1124, 12 A. L. R. 52, notes."

The defendant's contention cannot be sustained in the present action.

For the reasons given in this opinion the judgment of the trial court in refusing to determine the title to the cattle in question is reversed and the cause remanded with directions to enter judgment in conformity with this opinion. The ruling of the trial court ordering each party to pay their own costs is reversed, and the costs are to be taxed to the defendant. In all other respects the judgment of the trial court is affirmed.

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

STATE EX REL. WALTER H. SMITH, APPELLEE, V. WESTERN SURETY COMPANY, APPELLANT.
50 N. W. 2d 100

Filed November 30, 1951. No. 33048.

1. **Bail.** The object of bail in a criminal case is to relieve the accused of imprisonment before his trial; to save the county the expense incident to his confinement before trial; and to insure his attendance to answer the charge against him and that he will abide the judgment of the court.
2. ———. If the surety on a bail bond fails to deliver his principal into the custody of the proper officer of the law, or to procure his attendance in court, as the bond requires, the liability of the surety for the penalty of the bond becomes absolute and the bond should be forfeited.
3. ———. After default in performance of the conditions of a recognizance, the proper court may exercise its discretion and remit or reduce the penalty thereof according to the circumstances of the case and the situation of the accused, upon such terms and conditions as are just and reasonable.
4. ———. The court in which a judgment has been rendered for the penalty of a forfeited bail bond has power to remit or reduce the amount of the judgment only when it is shown that after the rendition of the judgment the accused has been arrested and surrendered to the proper court for trial of the charge against him because of which the bond was furnished.

APPEAL from the district court for Cass County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

Casey & Chovanec, for appellant.

Richard C. Peck and *James F. Begley,* for appellee.

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

BOSLAUGH, J.

John Daniel Brandon, Jr. was accused by complaint filed in the county court of Cass County of feloniously and illegally having in his possession a forged instrument with intent to utter and use it to the damage and prejudice of other persons with full knowledge that it was false and forged. He waived preliminary hearing, was ordered to appear in the district court to answer the charge, and was committed to jail in default of bail in the sum of $1,500.00. He later furnished bail as required by the court with appellant as surety and was released from the county jail. The condition of the bond was that he appear in the district court for Cass County from day to day and from term to term, until final judgment in the case or until he was finally discharged, to answer the charge made against him and to receive and abide the judgment of the court and not depart thereof without leave. He did not appear thereafter in the district court and at the time the case was set for trial an order of forfeiture of the bond was entered by the court. This suit seeks recovery of the penalty of the bond from appellant.

The petition alleged the matters above stated and asked judgment for $1,500.00, with interest at legal rate from the date the case was assigned for trial. Appellant admitted it executed the bond described in the petition and denied all other allegations thereof. The trial resulted in a directed verdict for appellee and a judgment entered thereon. The appeal is from the judgment and an order disallowing the motion of appellant for a new trial.

The evidence produced by appellee sustained each

element of the cause of action alleged. The appellant did not attempt to controvert any part of the evidence of appellee and there was no offer of proof by it of any matter responsive to any issue in the case. The facts in reference to the efforts of appellant to locate, apprehend, and produce the accused in court for trial, as the bond obligated it to do, were immaterial to any issue of the case. The answer was an admission of the execution of the bond by appellant and a denial. There was no offer of proof by appellant that any of the conditions of the bond were performed by it or of any fact that would operate as a discharge of the surety.

It is provided by statute that when any person under recognizance in a criminal prosecution fails to perform the conditions of it, his default shall be recorded and the recognizance forfeited, and when it has been forfeited it is made the duty of the prosecuting attorney of the county in which it was taken to prosecute a civil action for the penalty of the bond. §§ 29-1101 and 29-1102, R. R. S. 1943.

In Bartling v. State, 67 Neb. 637, 93 N. W. 1047, this court said: "We think that a surety on a recognizance must take notice of the obligations imposed upon him by the law providing for such recognizance; that the object of the recognizance in a criminal proceeding is to secure the presence of the accused at the next term of court actually held after such recognizance has been entered into and approved; and that when the surety fails to either deliver his principal into the custody of the proper officers of the law or to procure his attendance at a term of court actually held, his liability upon the recognizance becomes absolute."

In King v. State, 18 Neb. 375, 25 N. W. 519, it is said: "It is next insisted that the surety was exonerated by operation of law by the imprisonment of Greek on a charge of felony in the state of Arkansas. The answer alleges and the proof tends to show that after the execution of the recognizance Greek went to the state of

Arkansas, was there arrested upon a charge * * * and upon trial was convicted and sentenced to the penitentiary, he being under arrest at the time of the forfeiture of the recognizance mentioned in the petition of the defendant in error * * * it is clear that the commission of the crime for which he was arrested in Arkansas was subsequent to the execution of the recognizance, and was of course the voluntary act of the accused. * * * It is sufficient to say that it is no bar to a prosecution of this kind (suit for the recovery of the penalty of the bond), and it cannot be plead as a defense, that the accused voluntarily left the state, violated the laws of the state to which he went, and for such violation was imprisoned."

In Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287, the Supreme Court of the United States said: "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner."

In State v. Altone, 140 Me. 210, 35 A. 2d 859, the court remarked: "The general rule is that it is not an abuse of discretion on the part of a court to order the forfeiture of bail even though the failure of a respondent to appear is due to his imprisonment in another jurisdiction for an offense committed there." See, also, Fitzpatrick v. Williams, 46 F. 2d 40, 73 A. L. R. 1365; Annotation, 84 A. L. R. 446; 6 Am. Jur., Bail and Recognizance, § 100, p. 100.

The evidence of liability of appellant for the amount of the bond was free from conflict. This, and the mo-

tion by each of the parties for a directed verdict, justified the court in directing the jury to return a verdict for appellee. Swanback v. Sovereign Camp, W.O.W., 103 Neb. 34, 170 N. W. 354; Wax v. Co-Operative Refinery Assn., *ante* p. 42, 46 N. W. 2d 769; Witthauer v. Employers Mutual Casualty Co., 149 Neb. 728, 32 N. W. 2d 413.

The judgment herein was rendered on the 13th day of February 1951. The application of appellant to remit the judgment was filed on the 20th day of February 1951. The showing in support thereof was that appellant upon learning that Brandon had not appeared for trial and that the bond had been forfeited made extensive and persistent search at large expense to locate, apprehend, and surrender him to the court; that in May 1950, after the bond was forfeited on May 11, 1949, appellant learned Brandon had been taken in custody and was detained in jail in Marysville, California; and that it procured Tom Solomon, sheriff of Cass County, as its agent to go to that place and secure and return Brandon to Nebraska. Solomon went there, advised the officer of the facts, but was unable to induce the California officer to surrender Brandon to him without extradition. Appellant then requested the county attorney, on behalf of the county and state, to assist in securing the return of Brandon, and for that purpose to institute and prosecute extradition. This was refused. The essence of the complaint of appellant is that the state, the county, or their representative did not do or assist in doing what the bond required of appellant. It is not asserted that the state or county did anything to interfere with performance by appellant. The appellant did not claim that after the rendition of the judgment the accused had been arrested and surrendered to the district court for Cass County for trial on the pending charge against him. A judgment for the penalty of a forfeited recognizance may be by the court remitted or reduced only after the accused has been surrendered

to the proper court to be tried on the charge made against him. Section 29-1104, R. R. S. 1943, provides: "Whenever any judgment shall have been rendered against the defendants for the whole or any part of the penalty of a forfeited recognizance, as aforesaid, the court rendering such judgment shall have power to remit or reduce the amount thereof, when it shall be made to appear that after the rendition thereof the accused had been arrested and surrendered to the proper court, to be tried on such charge."

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

AFFIRMED.

CITY OF ALLIANCE, A MUNICIPAL CORPORATION, APPELLANT, V. COVER-JONES MOTOR COMPANY, A CORPORATION, ET AL., APPELLEES.

50 N. W. 2d 349

Filed November 30, 1951. No. 33073.

1. **Actions.** A cause of action, as used in section 25-805, R. R. S. 1943, is a primary right possessed by a plaintiff and a corresponding primary duty devolving upon a defendant, together with a delict or wrong done by the defendant which consists in a breach of such primary right and duty.
2. ———. A cause of action, when properly pleaded, consists of the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong.
3. ———. The remedial right is the consequence, the secondary right which springs into being from the breach of the plaintiff's primary right by the defendant's wrong, while the remedy is the consummation or satisfaction of this remedial right.

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

Metz & Metz, for appellant.

Reddish & Reddish, P. E. Romig, J. W. Weingarten, and *W. P. Loomis,* for appellees.

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

SIMMONS, C. J.

In this action the plaintiff City of Alliance, a municipal corporation, sought a decree annexing certain real estate to it; that certain parts of the real estate be opened and dedicated to the use of the public as streets; that the streets so designated be named; that the addition be named as set out in the petition; and for equitable relief.

City of Alliance will be hereinafter referred to as plaintiff. The defendants were Cover-Jones Motor Company, a corporation; Chicago, Burlington & Quincy Railroad Company, a corporation; and all persons having or claiming any interest in the land.

Cover-Jones Motor Company filed a motion to require the plaintiff to separately state and number its two causes of action, asserting that by one cause plaintiff sought to annex its property to the city, and by the other to appropriate and dedicate a portion of its property to the plaintiff for public use. The trial court sustained the motion. The plaintiff elected to stand upon its petition. Cover-Jones Motor Company then moved to dismiss the petition as to it. The trial court sustained the motion without prejudice. Plaintiff appeals. We affirm the judgment of the trial court.

Cover-Jones Motor Company will be hereinafter referred to as the defendant.

In its petition plaintiff alleged the enactment of an ordinance providing for the annexation to it of certain described lands of the two named defendants. The ordinance as pleaded was described as one annexing certain lands, compelling the laying out of certain streets and avenues, and naming them and the area so annexed. The ordinance set out that the lands were contiguous

and adjacent to the city and by act of the owners had been subdivided into parcels containing not more than five acres each and would receive material benefits from annexation. The ordinance further described certain lands by metes and bounds and provided that a certain part of it be dedicated to the use of the public as a street and another part as an avenue, and shall forthwith be laid out and opened by the owners, in part as a street and in part as an avenue. The lands so described are owned by the defendants. From a study of the descriptions it appears that the land so to be laid out was to widen an existing street and open an extension of an avenue. The ordinance then directed that an action be brought in the district court for the annexation and for the laying out of the street and avenue.

The petition then alleged that if the territory sought to be annexed was annexed, certain parts described by metes and bounds should be opened and dedicated to the public as a street and an avenue. Plaintiff prayed as above stated.

In essence plaintiff's argued assignments of error are that the trial court erred in sustaining the motion.

The motion of defendant is based on section 25-805, R. R. S. 1943, which provides: "Where the petition contains more than one cause of action, each shall be separately stated and numbered."

Defendant's position is stated in the motion made and sustained in the trial court.

The plaintiff's position is that it has pleaded but one cause of action and on that cause seeks two remedies.

In Johnson v. American Smelting & Refining Co., 80 Neb. 255, 116 N. W. 517, we quoted with approval this language: " 'What is a cause of action? We must keep in view the difference between the subject of action and the cause of action. The subject of action is what was formerly understood as the subject matter of the action. * * * The cause of action is the right claimed

or wrong suffered by the plaintiff, on the one hand, and the duty or delict of the defendant, on the other, and these appear by the facts of each separate case.' " That language was again cited with approval in Westover v. Hoover, 94 Neb. 596, 143 N. W. 946, 48 L. R. A. N. S. 984. See, also, Emel v. Standard Oil Co., 117 Neb. 418, 220 N. W. 685.

However, in Myers v. Moore, 78 Neb. 448, 110 N. W. 989, we held this: "And by the phrase 'cause of action,' as here used, is meant, not the formal statement of the facts set forth in the petition as a cause of action, but the subject matter upon which the plaintiff grounds his right of recovery." We approved this definition in Burke v. Northup, 98 Neb. 849, 154 N. W. 715; in Zelen v. Domestic Industries, 131 Neb. 123, 267 N. W. 352; in Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N. W. 2d 545; in Gergen v. The Western Union Life Ins. Co., 149 Neb. 203, 30 N. W. 2d 558; and in Schwank v. County of Platte, 152 Neb. 273, 40 N. W. 2d 863.

In Sickler v. City of Broken Bow, 143 Neb. 542, 10 N. W. 2d 462, we quoted with approval this language: " 'In determining whether more than one cause of action is stated, the main test is whether more than one primary right or subject of controversy is presented, other tests being whether recovery on one ground would bar recovery on the other, whether the same evidence would support the different counts, and whether separate actions could be maintained for separate relief.' "

Without attempting to reconcile these pronouncements we deem it advisable to state the underlying rule.

A recognized authority states: "Every action is brought in order to obtain some particular result which we term the remedy, which the code calls the 'relief,' and which, when granted, is summed up or embodied in the judgment of the court. This result is not the 'cause of action' as that term is used in the codes. It is true this final result, or rather the desire of obtaining it, is the primary motive which acts upon the will of the

plaintiff and impels him to commence the proceeding, and in the metaphysical sense it can properly be called the cause of this action, but it is certainly not so in the legal sense of the phrase. This final result is the 'object of the action' as that term is frequently used in the codes and in modern legal terminology. It was shown in the introduction that every remedial right arises out of an antecedent primary right and corresponding duty and a delict or breach of such primary right and duty by the person on whom the duty rests. Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the codes of the several States. They are the legal cause or foundation whence the right of action springs, this right of action being identical with the 'remedial right' as designated in my analysis. In accordance with the principles of pleading adopted in the new American system, the existence of a legal right in an abstract form is never alleged by the plaintiff; but, instead thereof, the facts from which that right arises are set forth, and the right itself is inferred therefrom. The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong." Pomeroy, Code Remedies (5th ed.), § 347, p. 527.

"If the facts alleged show one primary right of the plaintiff, and one wrong done by the defendant which involves that right, the plaintiff has stated but a single cause of action, no matter how many forms and kinds of relief he may claim that he is entitled to, and may ask to recover; the relief is no part of the cause of action." Pomeroy, Code Remedies (5th ed.), § 349, p. 533.

"The cause of action thus defined is plainly different from the remedial right, and from the remedy or relief itself. The remedial right is the consequence, the secondary right which springs into being from the breach of the plaintiff's primary right by the defendant's wrong, while the remedy is the consummation or satisfaction of this remedial right." Pomeroy, Code Remedies (5th ed.), § 348, p. 529.

Our inquiry is whether plaintiff has undertaken to allege one or two causes of action.

Plaintiff asserts that it has proceeded here in accord with the provisions of sections 16-106 to 16-109, and section 16-111, R. S. 1943, providing for the annexation of land. Reliance is placed upon section 16-106, R. S. 1943, which provides: "The corporate limits of such city shall remain as heretofore, and the mayor and council may by ordinance include therein all the territory contiguous or adjacent, which has been by the act, authority or acquiescence of the owners subdivided into parcels containing not more than five acres and any tract consisting of five or more acres which is entirely surrounded by land already embraced within the corporate limits of said city. The mayor and council shall have power by ordinance to compel the owners of lands so brought within the corporate limits to lay out streets, ways, and alleys to conform to and be continuous with the streets, ways, and alleys of such city, and may vacate any public road heretofore established through such land when necessary to secure regularity in the general system of its public ways."

Plaintiff asserts that under the above section it has

the right to compel the annexation of defendants' land, to compel the laying out of streets, and to compel them to conform to its existing streets. We think it patent that plaintiff is undertaking to assert a right of annexation and, in essence, a right of appropriation of private property for public use, and that each right so asserted is a primary right.

The error of plaintiff's position is demonstrated by its second contention here. It directs attention to sections 16-601 to 16-608, and section 16-645, R. S. 1943, and states that the procedures provided therein for condemning and appropriating private property for public use have, in part at least, not been followed; that, when followed, the jurisdiction of the district court is appellate only; and that accordingly it is impossible for it to allege a cause of action for condemnation and appropriation that would not be vulnerable to a demurrer. The net of this contention is that plaintiff seeks a remedy without having a primary right.

The trial court did not err in sustaining the motion to separately state and number. The judgment of the trial court is affirmed.

AFFIRMED.

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22. If a party does not file a motion for rehearing with the Nebraska State Railway Commission, or it is filed out of time but his appeal is timely perfected within one month from the date of the entry of the order to which complaint is made, the Supreme Court will not consider or review any assigned errors of law which allegedly occurred during the hearing, but will search the complete record to determine whether or not the commission acted within the scope of its authority and whether or not its order was arbitrary and unreasonable. *In re Application of Chicago, B. & Q. R. R. Co.* 281
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25. It is presumed in reviewing an action at law in Supreme Court that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. *James v. Hogan* 306
26. If the result of the trial in the district court is the only one that is permitted by the record, the judgment will not be reversed for errors of the trial court. *James v. Hogan* 306
27. An order of the Director of Banking will be reviewed by the Supreme Court to determine if such order is unreasonable and arbitrary. *Motors Acceptance Corp. v. McLain* 354
28. The right of appeal provided by section 77-510, R. R. S. 1943, is limited to proceedings for the equalization of assessments contemplated and regulated by sections 77-505 to 77-509, R. R. S. 1943. *Mid-Continent Airlines, Inc. v. State Board* 371
29. The right of appeal is purely statutory. Unless the statute provides for appeal in the specific instance under examination at any time, such right does not exist. *Mid-Continent Airlines, Inc. v. State Board* 371
30. Errors assigned but not argued will be considered as waived. *Daugherty v. State* 376
Turpit v. State 385
31. A verdict of guilty in a criminal case that is con-

trary to the evidence will not be sustained. *Jacox v. State* 416

32. Errors alleged to have been committed in a trial where the trial court grants a new trial will be considered and determined in the Supreme Court so far as necessary to the appeal, subject to the right to notice and consider plain errors not assigned. *Nelson v. Wiepen* 458

33. When a demurrer to a petition is sustained, the plaintiff's action dismissed, and a motion for a new trial is filed, the time for appeal begins to run from the date of the ruling on the motion for a new trial. *Harkness v. Central Nebraska Public Power & Irrigation Dist.* 463

34. During the pendency of a motion for a new trial timely filed, no appealable order is considered as having been rendered until the motion for a new trial is disposed of. *Harkness v. Central Nebraska Public Power & Irrigation Dist.* 463

35. Power is vested in the Supreme Court on appeal to review the action taken by the trial court in any action taken upon motion for judgment notwithstanding the verdict and to enter here the judgment in favor of the party who was entitled to the judgment in the trial court. *In re Estate of Fehrenkamp* 488

36. Upon review of an order overruling a motion for directed verdict, the duty rests upon the appellee to point out in Supreme Court the evidence upon which he relies to sustain the action taken by the trial court. *In re Estate of Fehrenkamp* 488

37. Where there is a reasonable dispute as to the physical facts, the conclusions to be drawn therefrom are for the jury. A verdict based thereon will not be disturbed unless clearly wrong. *Danner v. Walters* 506

38. Where evidence is objected to which is substantially identical with evidence admitted without objection, prejudicial error does not occur. *Danner v. Walters* 506

39. Instructions are to be considered together to the end that they may be properly understood. If as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. *Danner v. Walters* 506

40. A judgment will not be set aside because a more accurate statement of the law might have been made when from a consideration of the instructions

as a whole no prejudicial error appears. *Danner v. Walters* 506

41. Where erroneous evidence is admitted by a court but is withdrawn by the court from the jury's consideration, such withdrawal ordinarily cures the error committed in the admissions of the evidence. *Danner v. Walters* 506

42. Where evidence improperly received is later stricken out and withdrawn from the consideration of the jury, the error involved in its reception is ordinarily cured. *Danner v. Walters* 506

43. The inherent power of the Supreme Court to stay an order of the railway commission pending the determination of an appeal cannot be invoked except for cogent reasons requiring preservation of the status quo. *Safeway Cabs, Inc. v. Honer* 533

44. A party is not permitted, without objection, to take the chances of a favorable result and then, if disappointed, for the first time complain. *Sundahl v. State* 550

45. By statute, the Supreme Court has authority to reduce the sentence in a criminal case and to render such sentence as in its opinion is warranted by the evidence. *Sundahl v. State* 550

46. Reduction of sentence and rendering a new one warranted by the evidence is in no sense a commutation or the exercise of clemency. *Sundahl v. State* 550

47. In determining the question of reduction of sentence, the Supreme Court has no right to be deterred from discharging its duty through considerations of mercy or sympathy. *Sundahl v. State.* 550

48. A substantial reason or reasons warranted by the evidence must be found to cause either an affirmance or reduction of the sentence by the Supreme Court. *Sundahl v. State* 550

49. Whether or not a death sentence shall be reduced to life imprisonment rests upon the facts and circumstances of each case. *Sundahl v. State* 550

50. Where, after a fair trial, the jury has imposed the death penalty upon conviction of murder in the first degree, and the court has passed sentence in conformity with the verdict, the Supreme Court will not interfere with such sentence on the ground that it is excessive, in the absence of any mitigating circumstances. *Sundahl v. State* 550

51. Whatever repugnance the individual may feel to-

ward capital punishment must be put aside in obedience to law and in deference to the verdict of the jury. *Sundahl v. State* 550

52. In determining whether or not a sentence of death is to be reduced to life imprisonment, mental abnormality of the convicted person is to be considered but is not necessarily a controlling factor requiring reduction of the sentence. *Sundahl v. State* 550

53. A stipulation concerning matters in litigation may only be presented to and considered by the Supreme Court on appeal when identified, offered in evidence, and preserved in a bill of exceptions. *Todd v. Board of Educational Lands and Funds* 606

54. Unless an order of the railway commission is shown to be unreasonable or arbitrary, the Supreme Court is not authorized to interfere with the power of the commission to regulate common carriers. *In re Application of Resler* 624

55. The review by the district court of assessments made by the county assessor is limited to questions presented to the county board of equalization. *Archer-Daniels-Midland Co. v. Board of Equalization* 632

56. It is reversible error for the court to include, in its instructions to the jury, issues found in the pleadings but which have not been supported by any evidence. *Weisenmiller v. Nestor* 839

57. Where on appeal findings of fact are made which become the law of the case and there is a remand for a new trial, such findings are binding on the parties, the trial court and the Supreme Court, unless on a retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial. *Weisenmiller v. Nestor* 839

58. In the absence of a proper bill of exceptions, no question will be considered which necessarily involves an examination of the evidence adduced in the trial court. If the pleadings are sufficient to support the judgment, it will be affirmed. *Lawson v. State* 847

59. An order sustaining a general demurrer to a petition, not followed by a judgment of dismissal or other final disposition of the case, is not a final order or judgment and is not reviewable in the Supreme Court. *Shipley v. Shipley* 872

60. Under statute regulating appeals and Revised Rules

of the Supreme Court, consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned. *Okuda v. Hampton* 886

Assault and Battery.

Where one intentionally points a loaded gun at another, he is guilty of an unlawful assault, and if such gun is unintentionally discharged and the person assaulted is killed thereby, he is guilty of manslaughter. *Turpit v. State* 385

Attorney and Client.

1. A reasonable attorney's fee may be allowed for the services of a person's attorney in defending against a suit for annulment of marriage in the Supreme Court. *Nelson v. Robinson* 64
2. Before a litigant may claim the right to have an attorney's fee assessed in a case statutory authority or a uniform course of procedure must be found therefor. *Hawkeye Casualty Co. v. Stoker* 466
3. Allowance of attorney's fees is authorized by statute to parties designated who bring actions at law against the classes of insurers designated therein who are doing business in this state. *Hawkeye Casualty Co. v. Stoker* 466
4. A party not entitled at the time to maintain an action at law upon an insurance policy is not entitled to have an attorney's fee assessed. *Hawkeye Casualty Co. v. Stoker* 466

Automobiles.

1. The general rule is that an employee using an automobile in his employer's business has no implied or apparent authority to invite others to ride with him, and that, if a passenger who accepts the unauthorized invitation of the employee is injured, the employer is not liable, for the reason that the passenger is not a guest of his but merely a guest of his employee. *Gunn v. Coca-Cola Bottling Co.* 150
2. As used in the Iowa guest statute, "reckless operation" means proceeding without heed of or concern for consequences. It means more than negligent operation. It may but does not necessarily include willfulness or wantonness. It implies no care coupled with disregard for consequences. Speed alone does not amount to recklessness. Conduct arising from

mere inadvertence, thoughtlessness, or error of judgment is not reckless. *Yanney v. Nemer* 188

3. Under the Iowa guest statute the actions and conduct of the driver and not his mental attitude measure the degree of care and determine whether or not he is proceeding with a heedless disregard for consequences. *Yanney v. Nemer* 188

4. In order for a guest to establish reckless operation under the Iowa guest statute, it is necessary to show some act of the host that amounts to utter indifference to the safety of the guest. *Yanney v. Nemer* 188

5. To establish reckless operation under the Iowa guest statute, it is necessary to show that the danger was known to the driver, or was so obvious and apparent that the driver must be held to have known of it; or that there was a danger amounting to an almost certain probability and not a possibility; and that the driver, with conscious knowledge of such situation, did not exercise the slightest care to avoid injury to his guest. *Yanney v. Nemer* 188

6. The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing. *Stark v. Turner* 268
Johnson v. Schrepf 317

7. One having the right-of-way may not on that account proceed serenely unconscious of the surrounding circumstances. He has the right-of-way over traffic approaching on his left, but is not thereby relieved from the duty of exercising ordinary care to avoid accidents. *Stark v. Turner* 268

8. Where the driver of a motor vehicle upon a public highway, in attempting to pass another vehicle from the rear, operates his vehicle in such a manner as to strike the other vehicle in passing, he is ordinarily guilty of negligence when the driver of the vehicle being passed is without fault. *Johnson v. Schrepf* 317

9. The speed of a motor vehicle is not a matter of expert knowledge and skill exclusively. Any one with a knowledge of time and distance, and an opportunity to formulate the basis for an opinion, is a competent witness to give an estimate. *Kristufek v. Rapp* 343

10. Where it appears that a witness had no opportunity

to formulate a basis for an opinion as to the speed of a motor vehicle, it is error to permit him to estimate such speed. *Kristufek v. Rapp* 343

11. In an action between the operator of an automobile and a pedestrian crossing a street between intersections it is error for the trial court, when requested, to refuse to instruct the jury that such a pedestrian is required to keep a constant lookout for his own safety in all directions of anticipated danger. *Kristufek v. Rapp* 343

12. The rules of the road fixed by statute extend to all public highways however created. *Becks v. Schuster* 360

13. When a person enters an intersection of two streets or highways he is obligated to look for approaching cars. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence as a matter of law. If he fails to see an automobile not shown to be in a favored position, the question of his contributory negligence in proceeding to cross the intersection is a jury question. *Becks v. Schuster* 360

14. Where two motorists approach an intersection at or about the same time, the driver approaching from the right ordinarily has the right-of-way. But if the situation is such as to indicate that to proceed to cross would probably result in a collision, then he should exercise ordinary care to prevent an accident. *Becks v. Schuster* 360

15. It is the duty of an automobile driver to keep such a lookout ahead that he will see an obstruction or a vehicle as soon as it is illuminated by his lights, and to have his car under such control, under the driving conditions then existing, that he can stop it in time to avoid a collision with an object in the area lighted by his lights. *Mundy v. Davis* 423

16. Where the driver of an automobile claiming negligence against another enters an intersection without looking where looking would be effective to prevent an accident he is guilty of contributory negligence as a matter of law. *Dale v. Omaha & C. B. St. Ry. Co.* 434

17. If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence

sufficient to bar a recovery as a matter of law. *Dale v. Omaha & C. B. St. Ry. Co.* 434

18. A person traveling a favored street protected by a stop sign, of which he has knowledge, may properly assume that oncoming traffic will obey it. *Dale v. Omaha & C. B. St. Ry. Co.* 434

19. When one sees or could have seen the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle, and is struck, his own conduct constitutes contributory negligence more than slight in degree and precludes recovery. *Dale v. Omaha & C. B. St. Ry. Co.* 434
Gade v. Carlson 710

20. The duty of the driver of a vehicle to look for vehicles approaching on the highway implies the duty to see what is in plain sight. *Dale v. Omaha & C. B. St. Ry. Co.* 434

21. The duties and obligations which attend a motorist when he approaches a stop sign erected pursuant to city ordinance are the same as those which attend when he approaches one erected pursuant to statute or statutory rules of the road. *Dale v. Omaha & C. B. St. Ry. Co.* 434

22. Under the laws of Iowa, the registration certificate of an automobile is prima facie evidence of ownership of the automobile. It may be overcome by other evidence. *Hawkeye Casualty Co. v. Stoker* 466

23. Under the laws of Iowa, where an automobile is registered in the name of one person and an issuable claim is made that the true ownership is in another, the question of ownership is one of fact determinable by a jury. *Hawkeye Casualty Co. v. Stoker* 466

24. The negligence of a person driving an automobile may not ordinarily be imputable to his guest, but such guest may be responsible for the consequences of his own negligence. *Kuska v. Nichols Construction Co.* 580

25. A guest riding in an automobile is required to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances, but is not required to use the same degree of care as devolves upon the driver. If the guest perceives or should anticipate danger, he should warn the driver. Ordinarily, the guest need not

watch the road or advise the driver in the management of the car. *Kuska v. Nichols Construction Co.* 580

26. An invited guest in an automobile driven by another, with knowledge of approaching danger, should warn the driver of the danger, unless to a reasonably careful, cautious, and prudent person it appears that the warning would be of no avail or go unheeded, or that the driver observed or should have observed the danger. For failure to give such warning the guest would be chargeable with contributory negligence. *Kuska v. Nichols Construction Co.* 580

27. An invited guest, with knowledge of approaching danger, in the exercise of ordinary care should protest to the host if there is time and opportunity, unless it reasonably appears that such protest would go unheeded or would be of no avail. For failure so to do the guest may be chargeable with contributory negligence. *Kuska v. Nichols Construction Co.* 580

28. The statute requiring a driver to operate a motor vehicle on a highway at a reasonable rate of speed is the basic speed rule. Other provisions following in the statute are specific speed restrictions based on the existence of the fact situation or situations mentioned in the act. *Krepcik v. Interstate Transit Lines* 671

29. The definition of "business district" in prior statute applies to statute in effect amendatory thereof. *Krepcik v. Interstate Transit Lines* 671

30. In determining whether or not an accident happened within a business district, the occupied frontage on both sides of the highway for three hundred feet or more traveled immediately before the accident by the vehicle involved is to be considered. Land which is not occupied by buildings in use for business is not to be considered. *Krepcik v. Interstate Transit Lines* 671

31. The restrictions set out in the Motor Vehicle Operators' Act are speed limitations upon the prima facie lawful speeds fixed for various districts. They place a duty to decrease speed below those prima facie lawful speeds when the conditions described exist. They prescribe conditions under which the prima facie lawful speeds shall not be lawful. *Krepcik v. Interstate Transit Lines* 671

32. The "right half of the highway," as that term is

used in the Motor Vehicle Operators' Act, means the right half of the main traveled portion of the highway available for traffic. *Krepcik v. Interstate Transit Lines* 671

33. Under Certificate of Title Act, a chattel mortgage on a motor vehicle is void as to creditors of the mortgagor unless a notation thereof is made on the face of the certificate of title. *Alliance Loan & Investment Co. v. Morgan* 745

34. Statute relating to crossing a bridge with an overload weight creates a liability absolute in its terms when the facts set out therein are shown to have happened. *Central Neb. Public Power & Irrigation Dist. v. Boettcher* 815

35. A pedestrian has equal rights with the operator of a vehicle in the use of public highways. Each must use reasonable care for his own safety and the safety of others. *Heeney v. Churchill* 848

36. 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. *Heeney v. Churchill* 848

37. The exceptions to the general rule requiring a motorist at night to be able to stop within the area lighted by the lights on the automobile should embrace all situations wherein reasonable minds may differ on the question of whether or not the operator of the automobile exercised due care, caution, and prudence. *Heeney v. Churchill* 848

Bail.

1. The object of bail is to relieve the accused of imprisonment before his trial, to save the county the expense incident to his confinement before trial, and to insure attendance to answer the charge against him and that he will abide the judgment of the court. *State ex rel. Smith v. Western Surety Co.* 895

2. If the surety on a bail bond fails to deliver his principal into the custody of the proper officer of the law or to procure his attendance in court, as the bond requires, the liability of the surety for the penalty of the bond becomes absolute and the bond should be forfeited. *State ex rel. Smith v. Western Surety Co.* 895

3. After default in performance of the conditions

of a recognizance, the proper court may remit or reduce the penalty thereof according to the circumstances of the case and the situation of the accused upon such terms and conditions as are just and reasonable. *State ex rel. Smith v. Western Surety Co.* 895

4. The court in which a judgment has been rendered for the penalty of a forfeited bail bond has power to remit or reduce the amount of the judgment only when it is shown that after the rendition of the judgment the accused has been arrested and surrendered to the proper court for trial of the charge against him because of which the bond was furnished. *State ex rel. Smith v. Western Surety Co.* 895

Bridges.

Statute relating to crossing a bridge with an overload weight creates a liability absolute in its terms when the facts set out therein are shown to have happened. *Central Neb. Public Power & Irrigation Dist. v. Boettcher* 815

Brokers.

1. To entitle a broker or agent to exact a commission for the sale of lands, there must be an agreement evidenced by a writing or writings subscribed by the agent or broker and the owner wherein is set forth the compensation to be allowed. *VerMaas v. Culbertson, Roe & Bell, Inc.* 528
2. In the absence of agreement in writing subscribed by both parties a commission may not be exacted or retained by a broker or agent for the sale of land in the absence of voluntary consent or acquiescence of the owner of the land sold. *VerMaas v. Culbertson, Roe & Bell, Inc.* 528

Burglary.

1. The essential elements of the offense of possession of burglar's tools are the possession of instruments or tools suitable for breaking and entering with the intent to use them for a burglarious purpose. *Phillips v. State* 790
2. The material elements of the crime of possession, custody, or control of instruments or tools with intent to break and enter may be proved by direct or circumstantial evidence. *Phillips v. State* 790
3. In a prosecution for possession of burglar's tools

and implements, the ownership thereof is ordinarily immaterial. *Phillips v. State* 790

4. In a prosecution for possession of burglar's tools, the possession may be actual or constructive, and unless expressly provided by statute, possession upon one's person is not necessary. Two persons may have constructive possession, or one may have actual possession and the other constructive possession. *Phillips v. State* 790

5. The possession of burglarious implements or tools with a guilty intent may be joint as well as several. Where the guilty intent of several is manifested by their joint act, it becomes a joint offense. *Phillips v. State* 790

6. The words "possession, custody or control," as used in statute prohibiting possession of burglar's tools, express an alternative of terms, definitions, or explanations of the same thing in different words. *Phillips v. State* 790

Carriers.

1. In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest. *In re Application of Canada* 256

2. The guaranty of equal protection does not prevent the state or a city from adopting the simple expedient of prohibiting operations by additional carriers. *Council Bluffs Transit Co. v. City of Omaha* 717

3. Evidence that one interstate carrier is granted the right by a city to use certain streets is not a sufficient fact to establish the right of another interstate carrier, operating under a like interstate authority, to use the same streets. *Council Bluffs Transit Co. v. City of Omaha* 717

Charities.

1. It is a well-accepted rule of construction that a legislative act granting powers, privileges, or immunities to corporations must be held to apply only to corporations created under the authority of that

state over which such state has the power of visitation and control, unless a contrary intent is plainly expressed in the terms of such legislation. *In re Estate of Halstead* 31

2. A gift to an exclusively charitable corporation, organization, association, or foundation by name, without more, is a gift in trust for the objects and purposes of the institution and by its terms is a donation to charity. *In re Estate of Halstead* 31

3. A devise or bequest, although in form an outright gift, yet when made to an institution whose sole reason for existence and whose entire activity is charitable, is in purpose and practical effect a charitable trust. In such cases, the recipient takes not beneficially but as trustee to use the funds in furtherance of its charitable objects and purposes. *In re Estate of Halstead* 31

4. The fact that charitable bequests or devises are exempt from inheritance taxes does not modify the rule that such bequests or devises for charity should be construed liberally for the purpose of upholding them whenever possible. *In re Estate of Halstead*.... 31

5. Ordinarily a court of equity will not permit a gift, devise, or bequest for charitable uses or purposes, otherwise valid, to fail for want of a trustee competent to take charge of it, but will in appropriate proceedings appoint a competent trustee to administer it. *In re Estate of Halstead* 31

6. A gift, devise, or bequest in the nature of a trust to a corporation, organization, association, or foundation in this state for expenditure by it within the state for exclusively charitable purposes and uses, is exempt from payment of inheritance taxes. *In re Estate of Halstead* 31

Chattel Mortgages.

1. Where a mortgagor removes property from another state into this state, which has been encumbered by a mortgage duly recorded and valid under the laws of the former state, such removal does not invalidate the recording of such mortgage, nor necessitate the recording of it again in the county in this state to which the mortgagor has removed with the property. *Smith v. Brooks* 93

2. The constructive notice imparted by the recording of a chattel mortgage, by the law of comity between

the different states, is not confined to the county or state where the mortgage was executed and the property then was. *Smith v. Brooks* 93

3. A chattel mortgage duly executed in the state where the chattels were located at the time of its execution and recordation creates a lien that is not lost when the chattels are moved into this state and consigned to a commission company to be sold on the public market with the consent of the mortgagee conditioned on an agreement that the proceeds of the sale will be remitted to the mortgagee to apply on the mortgage debt. *Smith v. Brooks* 93

4. Under Certificate of Title Act, a chattel mortgage on a motor vehicle is void as to creditors of the mortgagor unless a notation thereof is made on the face of the certificate of title. *Alliance Loan & Investment Co. v. Morgan* 745

Colleges and Universities.

1. The statute making it the duty of the Board of Regents of the University of Nebraska to prescribe rules for the admission of indigent patients who may be sent to the University Hospital is not a delegation of legislative power to an administrative agency which is prohibited by the Constitution. *Board of Regents v. County of Lancaster* 398

2. A rule that no indigent patient shall be admitted to the University Hospital from any county except upon condition that the county shall pay the cost of new and expensive drugs and medicines used which are not paid for by the patient is not unreasonable or arbitrary. *Board of Regents v. County of Lancaster* 398

Commerce.

1. Property in transit in interstate commerce through this state only as an incident to its transfer to some other state acquires no situs for taxation and is not taxable in this state. *Archer-Daniels-Midland Co. v. Board of Equalization* 632

2. Property purchased in transit within this state which does not thereafter lose its character as property in transit in interstate commerce until it reaches its destination outside the state is not taxable under the Grain Broker's Tax Act. *Archer-Daniels-Midland Co. v. Board of Equalization* 632

Conspiracy.

1. A conspiracy, like other facts, may be proved by direct or circumstantial evidence. One means of proof is by showing overt acts or representations of the individuals charged with conspiracy. From the fact that different persons at different times by their acts or representations pursued the same object, the jury may, in connection with other facts, infer the existence of a conspiracy to effect that object. *Trebelhorn v. Bartlett* 113
2. In an action for damages based upon a conspiracy to defraud by wrongful acts or false representations, the damages and not the unlawful confederation is the gist of the action. If damages are shown to have resulted to plaintiff from such acts or representations of defendants or any of them, a judgment against such defendants may be sustained without establishing a conspiracy among them all. *Trebelhorn v. Bartlett* 113
3. Where damages are shown to have resulted from acts or representations of defendants, the proof of a conspiracy is of no consequence except as bearing upon rules of evidence or to bring within the ambit of liability someone who may have conspired but did not actively participate in the conduct itself. *Trebelhorn v. Bartlett* 113
4. Failure to prove an allegation of conspiracy does not affect the plaintiff's right to recover, there being sufficient independent grounds for recovery, although it limits those against whom recovery may be had to persons actively participating in the conduct complained of, and whose acts, as regards time, substance, and result, in fact united to produce the injury. *Trebelhorn v. Bartlett* 113

Constitutional Law.

1. The power of the Nebraska State Railway Commission to regulate common carriers is derived from Article IV, section 20, of the Constitution. Such powers are plenary and self-executing in the absence of specific legislation on the subject. *In re Application of Richling* 108
2. Where the Legislature enacts specific legislation implementing Article IV, section 20, of the Constitution, the Nebraska State Railway Commission is subject to and governed by the provisions of such enactment. *In re Application of Richling* 108

3. The public school lands of the state are held in trust for educational purposes by the terms of the Constitution. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244
4. Two sections of amendatory acts relating to leasing of educational lands are violative of the duties and functions of a fiduciary trustee and, as such, contravene the Constitution of Nebraska. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244
5. The statute making it the duty of the Board of Regents of the University of Nebraska to prescribe rules for the admission of indigent patients who may be sent to the University Hospital is not a delegation of legislative power to an administrative agency which is prohibited by the Constitution. *Board of Regents v. County of Lancaster* 398
6. A rule that no indigent patient shall be admitted to the University Hospital from any county except upon condition that the county shall pay the cost of new and expensive drugs and medicines used which are not paid for by the patient is not unreasonable or arbitrary. *Board of Regents v. County of Lancaster* 398
7. A constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *Truman v. Hann* 501
8. To meet constitutional requirements, a city ordinance must meet the tests required of statutory enactments. *Arrigo v. City of Lincoln* 537
9. To establish arbitrary discrimination inimical to constitutional equality, there must be more than an intentional and repeated failure to enforce legislation against others. *Arrigo v. City of Lincoln* 537
10. The Governor is vested with the supreme executive power. *State ex rel. Beck v. Young* 588
11. The Governor's power to remove an officer or employee of the executive branch of the government, appointed by him, is an executive function, limited only by the Constitution. *State ex rel. Beck v. Young* 588
12. The power of the Governor to remove a member of the Nebraska Liquor Control Commission is derived from the Constitution. The authority granted by statute is declaratory of the power granted by the Constitution and its provisions do not operate

as a limitation upon the supreme executive power. *State ex rel. Beck v. Young* 588

13. The power of the Governor to remove an officer of the executive branch of the government, appointed by him for a definite term, requires a sufficient specification of charges, notice, hearing, and adequate competent evidence to sustain the order made. The proceedings and order are subject to review by the courts to assure compliance with the Constitution. *State ex rel. Beck v. Young* 588

14. The violation of a statutory prohibition affords an adequate basis for a charge upon which an order of removal by the Governor can be based. *State ex. rel. Beck v. Young* 588

15. The power of the Governor to remove an officer of the executive department, appointed by him for a definite term, is derived from the Constitution and is self-executing. *State ex rel. Beck v. Young* 588

16. The acceptance of insurance commissions by a member of the liquor control commission on policies of insurance issued to persons subject to the regulation and control of the liquor control commission in violation of statute constitutes malfeasance in office within the meaning of the Constitution. *State ex rel. Beck v. Young* 588

17. The receipt of insurance commissions by a member of the liquor control commission involves a question of public morals in the administration of government of which the Governor could take cognizance in the performance of his constitutional duties. *State ex rel. Beck v. Young* 588

18. The right of an owner to dispose of property is substantial and valuable. It is incident to and inheres in the constitutional right to acquire and own title to every species of property recognized by law. It may not be impaired or defeated by legislation after the right is vested. *Todd v. Board of Educational Lands and Funds* 606

19. Two sections of amendatory act relating to leasing of school lands violate the Constitution and are invalid. *Todd v. Board of Educational Lands and Funds* 606

20. The provision of a city ordinance for shutting off water furnished by the city to the premises of the consumer failing to pay sewer service charges is not unconstitutional as depriving persons of property without due process of law where both water

and sewer services are interlocked. *Michelson v. City of Grand Island* 654

21. A regulation promulgated by municipal ordinance which provides that the water supply be shut off to residents delinquent in the payment of sewer charges is valid and not an unreasonable or arbitrary regulation. *Michelson v. City of Grand Island* 654

22. Classifications for legislative purposes, to be valid, must rest on some substantial difference of situation or circumstances that naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. *Council Bluffs Transit Co. v. City of Omaha* 717

23. A police regulation not operating unreasonably beyond the occasion of its enactment is not invalid simply because it may affect incidentally the exercise of some right guaranteed by the Constitution. *Council Bluffs Transit Co. v. City of Omaha* 717

24. The guaranty of equal protection does not prevent the state or a city from adopting the simple expedient of prohibiting operations by additional carriers. *Council Bluffs Transit Co. v. City of Omaha* 717

Continuances.

1. An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous unless an abuse of discretion is disclosed. *Sundahl v. State* 550

2. It is no abuse of discretion for the trial court to refuse a continuance unless it clearly appears that prejudice resulted. *Sundahl v. State* 550

Contracts.

1. Agreements made that are in violation of the orders and regulations of the Price Administrator in force at the time, which orders and regulations have been promulgated under the Emergency Price Control Act of 1942, are illegal and unenforcible. *Bohy v. Abbott* 139

2. An indivisible contract cannot be rescinded in part and a part remain executed. If rescinded at all, it must be the entire contract, and the parties thereto placed in the situation they were at the time it was made as nearly as the circumstances will permit. *James v. Hogan* 306

3. Where parties have clearly indicated by provision in a contract that the contract shall be void if it

is not performed within a prescribed time the courts will enforce the provision. *Einot, Inc. v. Einot Sales Co., Inc.* 760

4. Where a party to a contract, with full knowledge of the facts and with knowledge of a breach by the other party, receives money in the performance of the contract the breach will be deemed to have been waived. *Einot, Inc. v. Einot Sales Co., Inc.* 760
5. The assertion of the rescission of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been rescinded. *Einot, Inc. v. Einot Sales Co., Inc.* 760
6. The acceptance of the benefits of a contract after breach whether before or after action is commenced to enforce a forfeiture waives the forfeiture. *Einot, Inc. v. Einot Sales Co., Inc.* 760

Corporations.

1. The actual value of corporate stock which has no market value, that is, where it is all common stock, closely held and not listed or actively traded in on any stock exchange, is ordinarily determinable from the then net worth of the corporation divided by the number of bona fide shares issued and outstanding. *Trebelhorn v. Bartlett* 113
2. For the purpose of deciding net worth, evidence of the many related factors and elements, such as assets, liabilities, and all other matters pertinent to the value of the particular corporation involved, may be admitted and considered. *Trebelhorn v. Bartlett* 113
3. An action to enforce corporate rights or to redress injuries to a corporation cannot be maintained by a stockholder in his own name. Such a suit must be brought by the corporation or bv a stockholder on behalf of the corporation. *Ruplinger v. Ruplinger* 394

Costs.

An offer to confess judgment after suit commenced in district court to be effective to defeat subsequent costs must comply with the requirements of the statute relating thereto. *James v. Hogan* 306

Counties.

1. A mandatory duty is imposed upon a county board to set off and deduct from any account or claim presented to it for allowance the amount of delinquent

personal taxes assessed against the person, firm, or corporation in whose favor such account or claim has been presented and allowed. *State ex rel. Bates v. Morgan* 234

2. A county in this state has only such powers as are expressly conferred upon it by statute and such as are incidentally indispensable to carry into effect those expressly granted it. *State ex rel. Johnson v. County of Gage* 822
3. A grant of power to a county is strictly construed and any reasonable doubt of the existence of the power is resolved against the county. *State ex rel. Johnson v. County of Gage* 822
4. The powers of a county board in regard to the maintenance and repair of county roads and rural mail and star route roads are commensurate with the duty imposed, and the performance thereof in any reasonable manner by the county may not be interfered with or defeated. *State ex rel. Johnson v. County of Gage* 822
5. A county in this state is not a municipal corporation but is a quasi corporation, governmental in character, charged with objects of necessary local administration and in that capacity acts as an agent of the state. *State ex rel. Johnson v. County of Gage* 822
6. A county does not possess the double governmental and private character that cities do. *State ex rel. Johnson v. County of Gage* 822
7. The county board has exclusive original jurisdiction in the examination and allowance of claims against the county arising ex contractu. *Strawn v. County of Sarpy* 844
8. The jurisdiction of the district court as to claims against a county arising on contract is appellate only. *Strawn v. County of Sarpy* 844
9. A judgment of the district court entered in an original action in that court as to claims against a county for legal services rendered the county is void for want of jurisdiction. *Strawn v. County of Sarpy* 844

Courts.

1. Under both the Constitution and statute, the county court has exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons. *In re Estate of Bergren* 289
2. The county court in the settlement of an estate

has jurisdiction to determine the heirs of the decedent. In so doing, the court does not determine the title to real estate, although the determination may incidentally involve a question of title. *In re Estate of Bergren* 289

3. Courts of general jurisdiction have inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction. *Bize v. Bize* 520
Harrington v. Grieser 685

4. The Legislature has determined the public policy as to the penalty for murder in the first degree. It is the duty of the courts to enforce the law. *Sundahl v. State* 550

5. The jurisdiction of the district court as to claims against a county arising on contract is appellate only. *Strawn v. County of Sarpy* 844

Criminal Law.

1. Evidence of good character of the defendant in a criminal case should be considered by the jury not by itself but in connection with all the evidence in the case. *Fisher v. State* 166

2. It is proper to include in an instruction a statement that when, after giving evidence of good character due weight, the proof still shows the accused to be guilty beyond a reasonable doubt, such evidence of good character is unavailing. *Fisher v. State* 166

3. If the person committing a criminal act has capacity to know what he is doing and to understand that his act is wrong, he is sane in law even though his mental faculties are disordered or deranged. *Fisher v. State* 166

4. Admission of defendant of facts tending to establish a criminal charge against him is generally considered direct and not circumstantial evidence. *Fisher v. State* 166

5. Absence of any direct, incriminatory evidence is ordinarily made the test of the obligation of the trial court to instruct as to the probative value and manner of considering circumstantial evidence in a criminal case. If there is direct incriminatory evidence of the principal facts essential to guilt, the failure to instruct in this regard is not error. *Fisher v. State* 166

6. The credibility of witnesses and the weight of their testimony are for the jury to determine in a crim-

inal case, and the conclusion of the jury cannot be disturbed unless it is clearly wrong. *Fisher v. State* 166

7. Extrajudicial admissions or a voluntary confession is insufficient to prove that a crime has been committed, but either or both are competent evidence of the fact and may, with corroborative evidence or circumstances, establish the corpus delicti and guilty participation of the defendant. *Fisher v. State* 166

8. Evidence that accused has committed another crime independent of, and unconnected with, the one on trial, is inadmissible. It is not competent to prove one crime by proving another. *Turpit v. State* 385

9. Evidence of other similar acts or offenses committed at or about the time involved is admissible to be considered solely for such purposes where intent is or becomes material and such acts or offenses tend to establish the absence, or to rebut a defensive inference or claim, of mistake, accident, or inadvertence. *Turpit v. State* 385

10. Evidence to rebut or disprove statements as to material facts made on direct examination by the defendant may be offered and received in evidence. *Turpit v. State* 385

11. An information need not negative exceptions of a statute which are not descriptive of the offense. *Jacox v. State* 416

12. Statutes of limitation, as applied to criminal procedure, need not be specially pleaded and may be raised under a plea of not guilty. *Jacox v. State* 416

13. The applicable statutes of limitation should be liberally construed in favor of defendant in a criminal case. *Jacox v. State* 416

14. A verdict of guilty in a criminal case that is contrary to the evidence will not be sustained. *Jacox v. State* 416

15. In the trial of a criminal action, where counsel for defendant proceed with the trial, without objection and without request for a mistrial, they will not be heard to complain for the first time, on motion for a new trial, of applause by spectators. *Sundahl v. State* 550

16. Where voluntary intoxication is interposed as a defense in a criminal case involving deliberation, premeditation, and the formation of intent, the court

may instruct on the effect of intoxication on the ability to form an intent. *Tvrz v. State* 641

17. Where the trial court on its own motion instructs the jury as to the defense in a criminal case, it is not required to repeat in another form any such instruction or instructions at the request of the defendant. *Tvrz v. State* 641

18. Where purported statements of a defendant in a criminal case are testified to by witnesses that are not material proof of the crime charged, it is not error to refuse to give an instruction that such evidence should be received with caution because of unintentional alteration of words or expressions by the witness. *Tvrz v. State* 641

19. In a criminal case no presumption flows from the use of a deadly weapon where proof of guilt including the element of malice is dependent upon the evidence given by eyewitnesses. *Tvrz v. State* 641

20. A distinction exists between an offense and the unlawful act out of which it arises. The rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act. *Jeppesen v. State* 765

21. To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. *Jeppesen v. State* 765

22. In a case depending on circumstantial evidence, any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. *Jeppesen v. State* 765

23. A plea of abatement for variance is unavailing where the information which charges an offense is based upon the same transaction for which defendant had a preliminary hearing upon a complaint substantially charging the same offense as in the information. *Phillips v. State* 790

24. The same rule as to the information, conduct of the case, and punishment, applicable to a principal in fact now governs his aider, abettor, or procurer. No additional facts need to be alleged in an information against the latter than are required against his principal. *Phillips v. State* 790

25. The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt. *Phillips v. State* 790
26. It is the province of the jury to determine the sufficiency of circumstantial evidence. If the facts proved cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. *Phillips v. State* 790
27. 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, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. *Phillips v. State* 790
28. When complaint is made of the refusal to give an instruction, the burden is upon the party complaining to show not only that he was probably prejudiced by such refusal, but also that the entire instruction was correct as a proposition of law and applicable to the facts in evidence in the case. *Phillips v. State* 790
29. Under the code of criminal procedure, the law does not distinguish between principals in the first and second degrees, and whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender. *Phillips v. State* 790
30. The word "or" when used not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same result, states but a single ground, and not the alternative. *Phillips v. State* 790
31. The words "possession, custody or control," as used in statute prohibiting possession of burglar's tools, express an alternative of terms, definitions, or explanations of the same thing in different words. *Phillips v. State* 790

Damages.

1. The measure of damages recoverable by one who has been induced to sell corporate stock by fraud of the purchaser is the difference between the consideration received by the seller and the actual value of such

stock at the time of the transaction, if the latter exceeds the former. *Trebelhorn v. Bartlett* 113

2. The remedies of rescission and damages are inconsistent; the former proceeding upon disaffirmance, and the latter upon affirmance of the contract. *James v. Hogan* 306

3. In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury. The courts are reluctant to interfere with a verdict so rendered. *Johnson v. Schrepf* 317

4. A verdict may be set aside as excessive only where it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the jury disregarded the evidence or controlling rules of law. *Johnson v. Schrepf* 317

5. A court will not ordinarily hold a verdict to be excessive when the amount fixed by the jury is sustainable by factors of pain, suffering, mutilation, disability, wage losses, medical costs, or other pecuniary losses, including those resulting from existing economic conditions such as the low purchasing power of money. *Johnson v. Schrepf* 317

6. Where a substantial amount of water from another source or sources has been added to the water for which defendant is liable and the combined waters have caused the damage, it is incumbent upon the plaintiff to establish either that his damages would have occurred from the waters for which defendant is liable, or to establish the amount of his damage that had been caused by the waters for which defendant is liable. *McGill v. Card-Adams Co.* 332

7. Where the pleadings and evidence sufficiently raise the issue in a personal injury case concerning damages for loss of time or earnings, the trial court should properly instruct the jury concerning the same. *Nelson v. Wiepen* 458

8. Where the issue is duly raised, the trial court may and should advise the jury that it may award damages for impaired earning capacity by an instruction in proper form and clearly stating applicable rules. *Nelson v. Wiepen* 458

9. Measure of damage for breach by the landlord of a covenant to make repairs to leased premises generally and for a particular use is set forth. *Master Laboratories, Inc. v. Chesnut* 749

10. The measure of damages for breach of express

warranty of quality or condition is the difference between the value of the property at time of sale and the value it would have had if as warranted. *Long v. Carpenter* 862

11. All damages in contemplation of the parties to the contract or which directly and naturally result from a breach of warranty accrue in favor of the party injured by such breach. *Long v. Carpenter* 862

12. Special damages may also be recovered in an action for breach of warranty if they are such as may fairly be supposed to have entered into contemplation of the parties when they made the contract. *Long v. Carpenter* 862

Deeds.

1. The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence of delivery, and the burden of proof is on him who disputes this presumption. *Cerveny v. Cerveny* 1

2. A deed, delivered to grantee in grantor's lifetime, is operative, though enjoyment of estate conveyed is postponed until grantor's death, as present estate or interest is transferred by such delivery. *Cerveny v. Cerveny* 1

3. In suit to set aside deed to defendant for want of delivery plaintiffs have the burden of proving non-delivery of deed and producing evidence to overcome presumption of delivery due to defendant's possession of deed. *Cerveny v. Cerveny* 1

4. The presumption of delivery of a deed is not conclusive but it raises a strong implication which can only be overcome by clear and satisfactory proof. *Cerveny v. Cerveny* 1

5. The Supreme Court has consistently held that delivery is largely a question of intent to be determined from the facts and circumstances of the given case. *Cerveny v. Cerveny* 1

6. No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient. *Cerveny v. Cerveny* 1

Descent and Distribution.

1. Under both the Constitution and statute, the county court has exclusive original jurisdiction of all matters

relating to the settlement of the estates of deceased persons. *In re Estate of Bergren* 289

2. The county court in the settlement of an estate has jurisdiction to determine the heirs of decedent. In so doing, the court does not determine the title to real estate, although the determination may incidentally involve a question of title. *In re Estate of Bergren* 289

3. A surviving husband or wife may file in the county court, within one year after the issuance of letters testamentary, a refusal in writing to accept real estate devised or other provisions made in the will and his or her intention to take by inheritance, descent, and distribution as by law provided. *In re Estate of Bergren* 289

4. A person asserting that at the time a surviving spouse executed and filed an election to take under the statute of descent and distribution the spouse was subject to undue influence must establish by a preponderance of the evidence (1) that the spouse, at the time of executing such instrument, was subject to undue influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. *In re Estate of Bergren* 289

5. Where it is sought to invalidate and set aside an election to take under the statute of descent and distribution and renounce the provisions of a will for the want of mental capacity of the surviving spouse to execute the instrument, the burden of proof is on the one who alleges the mental incapacity. *In re Estate of Bergren* 289

6. In order to invalidate an election of a surviving spouse to take under the statute of descent and distribution on the ground of mental incapacity it is necessary to show such a degree of mental weakness as renders the person executing the instrument incapable of understanding and protecting such rights *In re Estate of Bergren* 289

Divorce.

1. In order to maintain an action to set aside a decree of divorce the court must have jurisdiction of the parties and of the subject matter to the same extent as when the original judgment was entered. *Haulman v. Bowman* 14

2. A petition to annul a marriage shall be filed, and proceedings shall be had thereon, as in the case of a petition for divorce. Upon due proof thereof it shall be declared void by a decree of nullity. *Nelson v. Robinson* 64
3. Where the evidence on material questions of fact in a divorce suit is in irreconcilable conflict, the Supreme Court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. *Hodges v. Hodges* 178
Lichtenberg v. Lichtenberg 278
4. In an action for divorce if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by the Supreme Court on review. *Hodges v. Hodges* 178
5. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances. *Hodges v. Hodges* 178
6. Where condonation or repetition of the wrong condoned is relied upon it should be pleaded, but the absence of a plea of condonation does not prevent the court from considering that question. *Hodges v. Hodges* 178
7. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct. The repetition of the offense revives the wrong condoned. *Hodges v. Hodges* 178
8. Condonation of extreme cruelty may be avoided by abusive language and the use of opprobrious epithets. *Hodges v. Hodges* 178
9. Conduct of a husband towards his wife which would not alone support a decree of divorce on the ground of extreme cruelty may, nevertheless, be sufficient to avoid a condonation extended to the husband by the wife for such cruelty. *Hodges v. Hodges* 178
10. One party to the marriage may condone the cruelty of the other but one claiming condonation must establish it by clear and satisfactory proof. *Hodges v. Hodges* 178
11. In a divorce case where the custody of minor

children is involved the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. *Hodges v. Hodges* 178
McNamee v. McNamee 212
Lichtenberg v. Lichtenberg 278

12. In awarding the custody of minor children, the court looks to the best interests of such children, and those of tender age are usually awarded to the mother. Other considerations being equal, it is usual to award the custody of children to the innocent spouse. *Hodges v. Hodges* 178
13. Custody of minor children awarded their mother in a divorce action will not be disturbed unless it is shown that the mother is an unfit person to have their custody, or that their best interests require such action. *Hodges v. Hodges* 178
14. An appeal from a decree rendered in a divorce action is triable de novo on the record made in the district court. *McNamee v. McNamee* 212
15. The state is constructively a party to a divorce action, and children involved in such action are wards of the court. *McNamee v. McNamee* 212
16. Rule in determining question of alimony stated. *McNamee v. McNamee* 212
Waugh v. Waugh 325
17. After a decree of divorce has been granted if the circumstances of the parties shall change or if it shall be to the best interests of their children the court may on its own motion revise or alter the decree so far as it concerns the care, custody, and maintenance of the children, or any of them. *McNamee v. McNamee* 212
18. A divorce may not be decreed on the uncorroborated declarations of a party seeking a divorce. *Kuta v. Kuta* 263
19. The care, custody, and control of a child of tender years is almost uniformly awarded to the mother if she is a fit and suitable person to have its custody. *Lichtenberg v. Lichtenberg* 278
20. In a divorce suit where the court has jurisdiction of the parties, it has power to adjust all their respective property interests. *Waugh v. Waugh* 325
21. Upon the granting of an absolute divorce the trial court has a legal right to assign the property, both real and personal, acquired during the marriage by

the joint efforts of the parties, between the parties as the equities require. *Waugh v. Waugh* 325

22. A father usually continues to be liable for the support of his minor children to the same extent after the divorce as before. Provisions in a divorce decree for their suitable maintenance and support are entirely distinct from the allowance of alimony to the wife or division of property between the parties. *Waugh v. Waugh* 325

23. The decree of a district court in a divorce action, insofar as a minor child is concerned, is subject to modification at any time in the light of changing circumstances. *Bize v. Bize* 520

24. The district court has a continuing power to review and revise the provisions of a decree for child support at its subsequent terms on petition of either of the parties. *Bize v. Bize* 520

25. An application to modify the terms of a decree of divorce is not an independent proceeding. It is not the commencement of an action. It is a proceeding supplementary or auxiliary to an action in which certain matters theretofore determined are by the terms of the statute subject to modification. *Bize v. Bize* 520

26. Jurisdiction of the court in matters relating to divorce and alimony is given by the statute. Every power exercised by the court with reference thereto must look for its source in the statute or it does not exist. *Harrington v. Grieser* 685

Drains.

1. It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty. *McGill v. Card-Adams Co.* 332

2. An owner of land may, without liability in damages, drain the same in the general course of natural drainage by constructing and maintaining in a reasonable and proper manner, and wholly on his own land, an open ditch or tile drain, discharging a reasonable quantity of water therefrom into a natural watercourse upon his own land or into a natural drainway thereon, whereby such water may be carried into some natural watercourse. *McGill v. Card-Adams Co.* 332

Easements.

One who purchases land burdened with an open and visible easement is ordinarily charged with notice that he is purchasing a servient estate. *Magnuson v. Coburn* 24

Eminent Domain.

1. 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. *Crawford v. Central Neb. Public Power & Irrigation Dist.* 832
2. Special benefits may go to reduce the damages to what remains of the land, but cannot be set off against the value of the part taken. *Crawford v. Central Neb. Public Power & Irrigation Dist.* 832
3. The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the peculiar relation of the land in question to the public improvement. *Crawford v. Central Neb. Public Power & Irrigation Dist.* 832
4. In eminent domain proceedings, everything which affects the market value is to be taken into consideration. The burden of additional fencing, and like matters, are to be included, not by being added together item by item, but to the extent that, taken as a whole, they detract from the market value of the property. *Crawford v. Central Neb. Public Power & Irrigation Dist.* 832

Equity.

1. Where the circumstances call for equitable relief, a decree may, upon petition in equity, be set aside by a court of equity having jurisdiction of the parties and of the subject matter of the suit, after expiration of the term at which it was rendered. *Haulman v. Bowman* 14
2. In order to maintain an action to set aside a decree of divorce the court must have jurisdiction of the parties and of the subject matter to the same extent as when the original judgment was entered. *Haulman v. Bowman* 14
3. A court of equity will not permit a gift, devise, or

bequest for charitable uses or purposes, otherwise valid, to fail for want of a trustee competent to take charge of it, but will in appropriate proceedings appoint a competent trustee to administer it. *In re Estate of Halstead* 31

4. In an action for declaratory judgment the entry of such judgment is one of practice and procedure rather than one of jurisdiction. The action is a special proceeding and is equitable in its nature, but it is not an exercise of general equity jurisdiction in which the court may grant consequential relief on a general prayer or upon general equitable considerations. *Graham v. Beauchamp* 889

Evidence.

1. Records, letters, or other documents not put in evidence at a hearing before the Department of Roads and Irrigation are no part of the record and may not be properly included in the bill of exceptions. *State v. Birdwood Irrigation District* 52
2. By the Uniform Judicial Notice of Foreign Law Act, the courts of this state are required to take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States. *Smith v. Brooks* 93
3. State courts will take judicial notice of general rules and regulations established and published by federal agencies under authority of law. *Bohy v. Abbott* 139
4. Evidence of good character of the defendant in a criminal case should be considered by the jury not by itself but in connection with all the evidence in the case. *Fisher v. State* 166
5. Admission of defendant of facts tending to establish a criminal charge against him is generally considered direct and not circumstantial evidence. *Fisher v. State* 166
6. Extrajudicial admissions or a voluntary confession is insufficient to prove that a crime has been committed, but either or both are competent evidence of the fact and may, with corroborative evidence or circumstances, establish the corpus delicti and guilty participation of the defendant. *Fisher v. State* 166
7. The speed of a motor vehicle is not a matter of expert knowledge and skill exclusively. Any one with a knowledge of time and distance, and an opportunity to formulate the basis for an opinion,

is a competent witness to give an estimate. *Kristufek v. Rapp* 343
8. Where it appears that a witness had no opportunity to formulate a basis for an opinion as to the speed of a motor vehicle, it is error to permit him to estimate such speed. *Kristufek v. Rapp* 343
9. Evidence that accused has committed another crime independent of, and unconnected with, the one on trial, is inadmissible. It is not competent to prove one crime by proving another. *Turpit v. State* 385
10. Evidence of other similar acts or offenses committed at or about the time involved is admissible to be considered solely for such purposes where intent is or becomes material and such acts or offenses tend to establish the absence, or to rebut a defensive inference or claim, of mistake, accident, or inadvertence. *Turpit v. State* 385
11. Evidence to rebut or disprove statements as to material facts made on direct examination by the defendant may be offered and received in evidence. *Turpit v. State* 385
12. A photograph proved to be a true representation of the person, place, or thing which it purports to represent, is competent evidence of anything of which it is competent and relevant for a witness to give a verbal description. *Turpit v. State* 385
Sundahl v. State 550
13. Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a gruesome spectacle. *Turpit v. State* 385
Sundahl v. State 550
14. Photographs of the person or body of a deceased, proper foundation having been laid, may ordinarily be received in evidence (1) for purposes of identification, (2) to show the condition of the body, or (3) to indicate the nature or extent of wounds or injuries thereon. *Turpit v. State* 385
Sundahl v. State 550
15. An objection that certain evidence offered is incompetent, irrelevant, and immaterial, is not necessarily sufficient to require its exclusion on the ground that there is not sufficient foundation for its introduction. *Turpit v. State* 385
16. Pleadings in another case or parts thereof which

amount to admissions against interest in a case on trial are admissible against the party who made the admissions. *Zimmerman v. Lindblad* 453

17. Physical facts are not sufficient for refusal to submit a case to a jury as against the testimony of witnesses unless they are demonstrable to a degree that reasonable minds cannot disagree as to their existence, and agree with the known and immutable laws of physics, mechanics, or mathematics. *Danner v. Walters* 506

18. Where evidence is objected to which is substantially identical with evidence admitted without objection, prejudicial error does not occur. *Danner v. Walters* 506

19. A witness may describe the marks that he observed near the place of an accident. The inference to be drawn from such testimony is solely the province of the jury. *Danner v. Walters* 506

20. Where erroneous evidence is admitted by a court but is withdrawn by the court from the jury's consideration, such withdrawal ordinarily cures the error committed in the admission of the evidence. *Danner v. Walters* 506

21. Where evidence improperly received is later stricken out and withdrawn from the consideration of the jury, the error involved in its reception is ordinarily cured. *Danner v. Walters* 506

22. When a letter is read in evidence, other letters on the same subject between the same parties may be admissible. When a detached writing is given in evidence, any other writing which is necessary to make it fully understood, or to explain the same, may also be admissible. *Cartney v. Olson* 546

23. The admission of incompetent evidence is not prejudicial where the same facts are established by the complaining party himself. This is true whether he established them before or subsequent to the admission of the incompetent evidence. *Tvrz v. State* 641

24. There is a presumption that articles transported by and delivered in the ordinary course of regular United States mail are delivered in substantially the same condition in which they were sent. Such presumption, however, is one which may be rebutted. *Schacht v. State* 858

25. In a prosecution for driving an automobile while under the influence of alcoholic liquor, a bottle

containing intoxicating liquor found in the car at the time of defendant's arrest is admissible as circumstantial evidence tending to support the charge. *Schacht v. State* 858

26. Where sufficient foundation has been laid, the evidence of a qualified chemist that blood samples taken from the defendant showed an alcoholic content sufficient to produce intoxication is admissible where the requirements of the blood test statute have been met. *Schacht v. State* 858

27. When on direct examination an objection to a question is interposed by the adverse party and sustained, there must be an offer of proof in order to present the ruling to the Supreme Court for review. *Huckfeldt v. Union Pacific R. R. Co.* 873

Executions.

A valid execution levied by a sheriff on nonexempt property of the judgment debtor creates in him a special interest in and the right to the possession of the property. *Alliance Loan & Investment Co. v. Morgan* 745

Executors and Administrators.

1. An administrator takes no title to the real estate of the decedent and is without authority to maintain an action to quiet title to such real estate. *Egan v. Niemann* 161

2. The true representative is bound by those acts of an executor de son tort which are lawful and such as the true representative would be bound in any event to perform in the due course of administration. *Gilbert v. First National Bank* 404

3. Although an executor de son tort cannot by his own wrongful act acquire any benefit, yet he is protected in all his acts not for his own benefit which a rightful representative might do. *Gilbert v. First National Bank* 404

4. An executor de son tort is liable to the lawful representative or a creditor for all the assets of the estate he received, except payments of just and lawful claims against the estate and payments for the use and benefit of distributees as would have been lawfully made in due course of administration. *Gilbert v. First National Bank* 404

5. One advancing money to an executor or an administrator which is applied to the payment of debts for

which the estate is bound may be subrogated to the place of the executor or administrator if it clearly appears by competent evidence that the estate has been benefited by the payment thereof. *Gilbert v. First National Bank* 404

6. Subrogation only arises in case money advanced has in fact been applied to the payment of debts for which the estate was justly and legally bound. *Gilbert v. First National Bank* 404
7. A subrogee can acquire no greater rights than those possessed by the party to whose rights he succeeded. *Gilbert v. First National Bank* 404
8. The rules of subrogation apply where money is advanced or paid to an executor de son tort or a creditor of the estate, and applied to payment of debts for which the estate was justly and legally bound, since in such a situation it was in fact paid to the estate. *Gilbert v. First National Bank* 404
9. While payments by third persons directly to a representative or creditors of an estate are not favored, reimbursement by way of subrogation will generally be allowed where it is clearly established that the payments were not made voluntarily but in good faith whereby the estate received the benefit thereof. *Gilbert v. First National Bank* 404

Fires.

1. An owner or occupant is not liable for injuries to a fireman or individual fighting a fire, who is a bare licensee, except those injuries proximately resulting from willful or wanton negligence, a designed injury, or a hidden danger or peril known to the owner or occupant but unknown to the fireman or individual. *Wax v. Co-Operative Refinery Assn.* 805
2. In an action by a fireman or person injured while fighting a fire, it is immaterial whether or not the fire was started by negligence of the occupant or owner of premises or that such was continuing negligence, since a fireman or individual undertakes to fight a fire knowing that it exists and as licensee ordinarily assumes the risk of the premises as he finds them. *Wax v. Co-Operative Refinery Assn.* 805

Forfeitures.

The acceptance of the benefits of a contract after breach whether before or after action is commenced

to enforce a forfeiture waives the forfeiture. *Einot, Inc. v. Einot Sales Co., Inc.* 760

Fraud.

1. Fraud may consist in words, acts, or the suppression of material facts with the intent to mislead or deceive. *Trebelhorn v. Bartlett* 113
2. Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed in the absence of facts showing the contrary that it was induced by the fraud or misrepresentation. *Trebelhorn v. Bartlett* 113
3. To maintain an action for damages for false representation, plaintiff must allege and prove what representation was made; that it was false and so known to be by the defendant charged with making it, or was made without knowledge as a positive statement of known fact; that plaintiff believed the representation to be true; that he relied and acted upon it; and was thereby injured. *Trebelhorn v. Bartlett* 113
4. A person is justified in relying upon a representation made to him where the representation is a positive statement of fact and where an investigation would be required to discover the truth. *Trebelhorn v. Bartlett* 113
5. The general rule that fraud is not presumed but must be proved by the party alleging it does not mean that it cannot be otherwise proved than by direct and positive evidence. Fraud in a transaction may be proved by inferences which may reasonably be drawn from intrinsic evidence respecting the transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction. *Trebelhorn v. Bartlett* 113
6. Actionable fraud may not be predicated upon mere expressions of opinion as to value honestly made under circumstances that do not give another the right to relv thereon, but representations of positive facts pertaining to the qualitv of the thing sold or purchased and relied upon by the purchaser or seller, which are calculated to mislead and deceive, if proved false, constitute actionable fraud. *Trebelhorn v. Bartlett* 113
7. The measure of damages recoverable bv one who has been induced to sell corporate stock by fraud

of the purchaser is the difference between the consideration received by the seller and the actual value of such stock at the time of the transaction if the latter exceeds the former. *Trebelhorn v. Bartlett* 113

Frauds, Statute of.

1. An oral lease for only one year is void, within the meaning of the statute of frauds, if made before the commencement of the term. *Prigge v. Olson* 131
2. A lease of land for a term in excess of one year signed by the lessor only is sufficient to satisfy the requirement of the statute of frauds. *Prigge v. Olson* 131
3. A signature on any appropriate writing made, authorized, or adopted by the party to be bound, with intent actual or apparent to give force and effect to the writing, satisfies the requirement of the statute of frauds. *Prigge v. Olson* 131
4. The statute of frauds may be complied with by the act of the parties adopting their signatures on an old contract to authenticate a new agreement made by them. *Prigge v. Olson* 131
5. A written lease, signed by the parties to it, delivered to lessor by the tenant to obtain an extension of the term of the tenancy, the insertion therein by the lessor of extension phraseology for such purpose, and the redelivery of the lease with the added provision to the tenant, is sufficient to satisfy the statute of frauds though no formal words expressing intent to recognize and republish the signatures were used. *Prigge v. Olson* 131
6. The adoption by the parties of their prior signatures on a lease of real estate after an alteration or change had been inserted in the lease with intent to be bound by the altered instrument is a compliance with the statute of frauds. *Prigge v. Olson* 131
7. To entitle a broker or agent to exact a commission for the sale of lands, there must be an agreement evidenced by a writing or writings subscribed by the agent or broker and the owner wherein is set forth the compensation to be allowed. *VerMaas v. Culbertson, Roe & Bell, Inc.* 528
8. In the absence of agreement in writing subscribed by both parties a commission may not be exacted or retained by a broker or agent for the sale of land in the absence of voluntary consent or ac-

quiescence of the owner of the land sold. *VerMaas v. Culbertson, Roe & Bell, Inc.* 528

Garnishment.

A garnishing creditor acquires no greater rights by garnishment than had his debtor. *Smith v. Brooks* 93

Gifts.

1. To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, a delivery by the donor, and an acceptance by the donee. *Dalton v. Florence Home for the Aged* 735
2. A transfer inter vivos should be sustained if all the facts and circumstances show the desire and the act completed, whatever may have been the method adopted. *Dalton v. Florence Home for the Aged* 735

Guardian and Ward.

1. By statute the duty is imposed upon a guardian to represent his ward in all legal suits and proceedings, except in those instances where a special guardian or next friend has been appointed for that purpose. *Kuta v. Kuta* 263
2. Where a party plaintiff under guardianship brings an action in his own name without representation by his guardian, or by a special guardian or next friend appointed for the purpose of representation, and the lack of capacity of the plaintiff to sue appears on the face of the petition, objection to such lack of capacity is waived unless it is raised by special demurrer. *Kuta v. Kuta* 263

Guardianship.

Where there is a present, actual, bona fide controversy, where justiciable issues are presented, and where all interested persons are made parties, the guardian of an incompetent person may have a declaration of the rights or legal relations to determine the title to certain personal property in order to file a proper inventory in the guardianship estate. *Graham v. Beauchamp* 889

Habeas Corpus.

1. In a petition for a writ of habeas corpus if relator sets forth facts which, if true, would entitle him to discharge then a hearing should be held

thereon to determine questions of fact presented; but if relator shows by the facts alleged in his petition that he is not entitled to relief then the writ should be denied. *Truman v. Hann* 501

2. Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant and cannot be used as a substitute for a writ of error. *Truman v. Hann* 501

3. Habeas corpus will not lie to discharge a person from a sentence of penal servitude when the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and if the sentence was within the power of the court to impose. *Truman v. Hann* 501

4. The regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for a writ of habeas corpus. If the court had jurisdiction of the defendant and the authority to try the charge against him, its action can be assailed only in a direct proceeding. *Truman v. Hann* 501

Highways.

1. The rules of the road fixed by statute extend to all public highways however created. *Becks v. Schuster* 360

2. Where the driver of an automobile claiming negligence against another enters an intersection without looking where looking would be effective to prevent an accident he is guilty of contributory negligence as a matter of law. *Dale v. Omaha & C. B. St. Ry. Co.* 434

3. If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. *Dale v. Omaha & C. B. St. Ry. Co.* 434

4. A person traveling a favored street protected by a stop sign, of which he has knowledge, may properly assume that oncoming traffic will obey it. *Dale v. Omaha & C. B. St. Ry. Co.* 434

5. Where the operator of an automobile about to enter an intersection sees an approaching car and tests an obvious danger by moving from a place of safety into the path of the oncoming vehicle and is struck, he is guilty of contributory negligence sufficient

to bar a recovery as a matter of law. *Dale v. Omaha & C. B. St. Ry. Co.* 434

6. The duty of the driver of a vehicle to look for vehicles approaching on the highway implies the duty to see what is in plain sight. *Dale v. Omaha & C. B. St. Ry. Co.* 434

7. The duties and obligations which attend a motorist when he approaches a stop sign erected pursuant to city ordinance are the same as those which attend when he approaches one erected pursuant to statute or statutory rules of the road. *Dale v. Omaha & C. B. St. Ry. Co.* 434

8. It is the continuing duty of a road contractor engaged in highway construction to adequately warn the traveling public of danger to travel or if obstructions are placed thereon. A failure to so warn the traveling public is continuing negligence as distinguished from a condition. If reasonable minds could conclude from the evidence that such negligence proximately caused an accident, the issue should be submitted to a jury for its determination. *Kuska v. Nichols Construction Co.* 580

9. A traveler may ordinarily occupy and use any part of a public highway when not needed by another whose rights thereto are superior to his own. *Kuska v. Nichols Construction Co.* 580

10. The presence of a well-traveled track connecting with a public highway open to travel, with no barricades thereto and no warning signs thereon, constitutes a continuing invitation to the traveling public to use the same, and justifies the assumption that it is reasonably safe for the accommodation of the public while using ordinary care. *Kuska v. Nichols Construction Co.* 580

11. The "right half of the highway," as that term is used in the Motor Vehicle Operators' Act, means the right half of the main traveled portion of the highway available for traffic. *Krepcik v. Interstate Transit Lines* 671

12. The duty of maintenance and repair of county roads and rural mail and star route roads is placed upon the county board by statute. *State ex rel. Johnson v. County of Gage* 822

13. The powers of a county board in regard to the maintenance and repair of county roads and rural mail and star route roads are commensurate with the duty imposed, and the performance thereof in

any reasonable manner by the county may not be interfered with or defeated. *State ex rel. Johnson v. County of Gage* 822

14. A pedestrian has equal rights with the operator of a vehicle in the use of public highways. Each must use reasonable care for his own safety and the safety of others. *Heeney v. Churchill* 848

15. 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. *Heeney v. Churchill* 848

Homicide.

1. An unintentional killing of a person without malice by an unlawful assault and battery that in itself is not of a character or intended to cause death may result in the assailant being guilty of manslaughter. *Fisher v. State* 166

2. Where one intentionally points a loaded gun at another, he is guilty of an unlawful assault, and if such gun is unintentionally discharged and the person assaulted is killed thereby, he is guilty of manslaughter. *Turpit v. State* 385

3. In a case involving murder in the first degree, it is the jury's duty to determine the question of guilt or innocence. If it finds a verdict of guilty, then it must fix the penalty. That decision should not rest upon whether parole is easy or difficult to secure. *Sundahl v. State* 550

4. The right of the jury to determine whether the penalty shall be death or imprisonment for life upon conviction of murder in the first degree is not limited by statute. The whole matter is committed to the judgment and conscience of the jury. *Sundahl v. State* 550

5. By statute, the jury has the primary duty to fix the penalty of first degree murder at either death or imprisonment for life. *Sundahl v. State* 550

6. By statute, the Supreme Court has authority to reduce the sentence in a criminal case and to render such sentence as in its opinion is warranted by the evidence. *Sundahl v. State* 550

7. Reduction of sentence and rendering a new one warranted by the evidence is in no sense a commutation or the exercise of clemency. *Sundahl v. State* 550

8. In determining the question of reduction of sentence, the Supreme Court has no right to be deterred from

discharging its duty through considerations of mercy or sympathy. *Sundahl v. State* 550

9. A substantial reason or reasons warranted by the evidence must be found to cause either an affirmance or reduction of the sentence by the Supreme Court. *Sundahl v. State* 550

10. Whether or not a death sentence shall be reduced to life imprisonment rests upon the facts and circumstances of each case. *Sundahl v. State* 550

11. Where, after a fair trial, the jury has imposed the death penalty upon conviction of murder in the first degree, and the court has passed sentence in conformity with the verdict, the Supreme Court will not interfere with such sentence on the ground that it is excessive, in the absence of any mitigating circumstances. *Sundahl v. State* 550

12. Whatever repugnance the individual may feel toward capital punishment must be put aside in obedience to law and in deference to the verdict of the jury. *Sundahl v. State* 550

13. In determining whether or not a sentence of death is to be reduced to life imprisonment, mental abnormality of the convicted person is to be considered but is not necessarily a controlling factor requiring reduction of the sentence. *Sundahl v. State* 550

14. The Legislature has determined the public policy as to the penalty for murder in the first degree. It is the duty of the courts to enforce the law. *Sundahl v. State* 550

15. Evidence justified death sentence and no substantial legal reason is found for reducing it to life imprisonment. *Sundahl v. State* 550

Husband and Wife.

1. A surviving husband or wife may file in the county court, within one year after the issuance of letters testamentary, a refusal in writing to accept real estate devised or other provisions made in the will and his or her intention to take by inheritance, descent, and distribution as by law provided. *In re Estate of Bergren* 289

2. A person asserting that at the time a surviving spouse executed and filed an election to take under the statute of descent and distribution the spouse was subject to undue influence, must establish by a preponderance of the evidence (1) that the spouse, at the time of executing such instrument, was sub-

ject to undue influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. *In re Estate of Bergren* 289

3. Where it is sought to invalidate and set aside an election to take under the statute of descent and distribution and renounce the provisions of a will for the want of mental capacity of the surviving spouse to execute the instrument, the burden of proof is on the one who alleges the mental incapacity. *In re Estate of Bergren* 289

4. In order to invalidate an election of a surviving spouse to take under the statute of descent and distribution on the ground of mental incapacity it is necessary to show such a degree of mental weakness as renders the person executing the instrument incapable of understanding and protecting such rights. *In re Estate of Bergren* 289

Indictments and Informations.

1. Where a statute makes either of two or more distinct acts connected with the same general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes when committed by different persons, or at different times, they may, when committed by the same person at the same time, be coupled in one count as constituting one offense. *Hughes v. State* 86

2. A defendant is entitled to the protection of the statutes of limitation when prosecuted by information to the same extent as he would have been if presented for the same offense by indictment. *Jacox v. State* 416

3. An information must be filed within the period designated by the statutes of limitation or a prosecution for an offense within its terms is barred. *Jacox v. State* 416

4. Violations of the Blue Sky Law constitute felonies. *Jacox v. State* 416

5. Offenses charging violation of the Blue Sky Law on three specific dates were not continuing crimes. *Jacox v. State* 416

6. A complaint or information is fatally defective only if its allegations can be true and still not charge a crime. *Phillips v. State* 790

7. The same rule as to the information, conduct of the

case, and punishment, applicable to a principal in fact now governs his aider, abettor, or procurer. No additional facts need to be alleged in an information against the latter than are required against his principal. *Phillips v. State* 790

Injunction.

Injunction is the proper remedy to prevent the arresting of flow of surface water. Equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief. *McGill v. Card-Adams Co.* 332

Insurance.

1. Before an insurer may make a defense of misrepresentation or breach of condition or warranty it must have seasonably tendered back the unearned premium and kept such tender good. *Hawkeye Casualty Co. v. Stoker* 466
2. An insurer has the right under a reservation of rights agreement to defend an insured without waiver of right or estoppel to defend against liability under a policy of insurance. *Hawkeye Casualty Co. v. Stoker* 466
3. Where an insurer disclaims liability under an insurance policy it may not of right exact of the insured a reservation of rights agreement and thus become entitled to defend an action without waiver of or estoppel to assert nonliability under the policy. *Hawkeye Casualty Co. v. Stoker* 466
4. An insurer does not have the right without consent of the insured to retain control of the defense of an action indemnifiable under the apparent terms of an insurance policy and at the same time reserve the right to disclaim liability on the policy. *Hawkeye Casualty Co. v. Stoker* 466
5. Where an insurer denies liability for indemnity under an insurance policy, the insured has the right to treat the denial as a breach of the contract by the insurer and to secure attorneys of his own choosing to defend an action. *Hawkeye Casualty Co. v. Stoker* 466
6. Where an insurer accepts the defense of an action under a reservation of rights agreement with the insured and thereafter institutes action in which

it unequivocally declares nonliability and invalidity of the policy and prays for judgment accordingly, the insured is freed from any obligation to allow the insurer to continue with the defense of the action. *Hawkeye Casualty Co. v. Stoker* 466

7. Where an insurer denies liability, it leaves the insured free to defend the action in actual trial to judgment or in good faith make such a settlement as ordinary and reasonable prudence and caution might dictate as advisable. *Hawkeye Casualty Co. v. Stoker* 466

Interest.

Interest is properly allowable in an action based on quantum meruit for labor and materials furnished from the date the judgment is rendered. *Umberger v. Sankey* 881

Intoxicating Liquors.

1. In a prosecution for driving an automobile while under the influence of alcoholic liquor, a bottle containing intoxicating liquor found in the car at the time of defendant's arrest is admissible as circumstantial evidence tending to support the charge. *Schacht v. State* 858

2. Where sufficient foundation has been laid, the evidence of a qualified chemist that blood samples taken from the defendant showed an alcoholic content sufficient to produce intoxication is admissible where the requirements of the blood test statute have been met. *Schacht v. State* 858

Irrigation.

An action to confirm proceedings for issuance of bonds of an irrigation district is a special proceeding in rem wherein, upon proper legal notice, jurisdiction is given the district court to render a valid judgment upon the issues appropriately involved in the particular case presented. *Frenchman-Cambridge Irrigation Dist. v. Ferguson* 20

Judgments.

1. Where the circumstances call for equitable relief, a decree may, upon petition in equity, be set aside by a court of equity having jurisdiction of the parties and of the subject matter of the suit,

after expiration of the term at which it was rendered. *Haulman v. Bowman* 14

2. An action to confirm proceedings for issuance of bonds of an irrigation district is a special proceeding in rem wherein, upon proper legal notice, jurisdiction is given the district court to render a valid judgment upon the issues appropriately involved in the particular case presented. *Frenchman-Cambridge Irrigation Dist. v. Ferguson* 20
3. A plea of tender is materially different in character and effect from an offer of confession of judgment after an action is begun. *James v. Hogan* 306
4. An offer to confess judgment after suit commenced in district court to be effective to defeat subsequent costs must comply with the requirements of the statute relating thereto. *James v. Hogan* 306
5. Under the Uniform Declaratory Judgments Act, an issue of fact may properly be submitted for determination by a jury. *Hawkeye Casualty Co. v. Stoker* 466
6. Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in the determination of an action before a court of competent jurisdiction in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein. *Watson Hay Co. v. Board of Educational Lands and Funds* 613
7. In an action wherein there has been a judgment or decree on the merits, matters settled by the judgment or decree must be regarded as conclusively settled by the Supreme Court unless such matters are reviewed by appeal or cross-appeal. *Watson Hay Co. v. Board of Educational Lands and Funds* 613
8. A judgment of the district court entered in an original action in that court as to claims against a county for legal services rendered the county is void for want of jurisdiction. *Strawn v. County of Sarpy* 844
9. Where there is a present, actual, bona fide controversy, where justiciable issues are presented, and where all interested persons are made parties the guardian of an incompetent person may have a declaration of the rights or legal relations to determine the title to certain personal property in

order to file a proper inventory in the guardianship estate. *Graham v. Beauchamp* 889

10. In an action for declaratory judgment the entry of such judgment is one of practice and procedure rather than one of jurisdiction. The action is a special proceeding and is equitable in its nature, but it is not an exercise of general equity jurisdiction in which the court may grant consequential relief on a general prayer or upon general considerations. *Graham v. Beauchamp* 889

Juries.

1. The extent to which examination of jurors may be pursued upon voir dire rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been an abuse of discretion to the prejudice of the complaining party. *Trebelhorn v. Bartlett* 113
2. Opportunity for prejudice or disqualification of jurors is not sufficient to raise a presumption that they exist. *Fisher v. State* 166
   Sundahl v. State 550
3. An admonition each time the jury is permitted to separate is not required. *Sundahl v. State* 550
4. Although it is better to admonish in the language of the statute substantial compliance therewith is sufficient. *Sundahl v. State* 550
5. Interrogation furnishes a defendant ample opportunity to establish whether or not prospective jurors have been prejudiced by reading newspaper accounts and statements. The reading of such matters by prospective jurors is not prejudicial per se. *Sundahl v. State* 550
6. Whether or not a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court. Its ruling on such motion will not be disturbed unless an abuse of discretion is shown. *Sundahl v. State* 550
7. The district court, in trying the issues presented by a motion for a new trial, has the right to indulge the presumption that the jurors were mindful of the oaths which they took, and found the verdict they did solely upon the evidence introduced on the trial of the case. The law supplies, by presumption, the evidence that the jurors obeyed their oaths. *Sundahl v. State* 550

Landlord and Tenant.

1. A provision of a written lease that any agreement modifying it must be in writing and signed by the lessee and lessor will be given effect. *Prigge v. Olson* 131
2. In the absence of statutory or contractual restrictions, a lease for a definite term may generally be assigned by the lessee without the consent of the lessor. *Todd v. Board of Educational Lands and Funds* 606
3. Measure of damage for breach by the landlord of a covenant to make repairs to leased premises generally and for a particular use is set forth. *Master Laboratories, Inc. v. Chesnut* 749

Larceny.

1. Larceny is the unlawful and felonious stealing, taking, and carrying away of the personal property of another, of some value, with a felonious intent on the part of the taker to permanently deprive the owner of his property. *Daugherty v. State* 376
2. Taking an article feloniously is accomplished by simply laying hold of, grasping, or seizing it animo furandi, with the hands or otherwise. The very least removal of it by the thief from the place where found is an asportation or carrying away. *Daugherty v. State* 376
3. The intent to commit larceny may be proved by circumstantial evidence. *Daugherty v. State* 376
4. Evidence examined and held sufficient to sustain a verdict of guilty of the crime of larceny. *Daugherty v. State* 376

Licenses.

It is an ancient and well-settled doctrine of the common law that a mere license, whether by deed or by parol, is revocable at pleasure. To this rule there is recognized an exception when, by reason of expenditures by the licensee on the strength of the license, it would be inequitable to permit the licensor to effect a revocation. *Magnuson v. Coburn* 24

Limitations of Actions.

1. Statutes of limitation, as applied to criminal procedure, need not be specially pleaded and may be raised under a plea of not guilty. *Jacox v. State* 416
2. The applicable statutes of limitation should be

liberally construed in favor of defendant in a criminal case. *Jacox v. State* 416

Mandamus.

1. Mandamus may issue against a public officer to compel him to act, when: (1) The duty is one imposed upon him by law; (2) the duty still exists at the time the writ is applied for; and (3) the duty to act is clear. *State ex rel. Bates v. Morgan* 234
2. Mandamus is not a preventive remedy but essentially a coercive writ, one that commands performance of a duty and not desistance therefrom. *State ex rel. Bates v. Morgan* 234
3. Mandamus should be denied where it appears that the acts sought to be coerced are unauthorized or forbidden by law, or where they tend to aid or promote an unlawful purpose. Such a writ will not issue when the act commanded would result in violation of a statute. *State ex rel. Bates v. Morgan* 234

Marriage.

1. When a marriage is supposed to be void, or the validity thereof is doubted, either party may file a petition in the district court of the county where the parties, or one of them, reside, for annulling the same. *Nelson v. Robinson* 64
2. A petition to annul a marriage shall be filed, and proceedings shall be had thereon, as in the case of a petition for divorce. Upon due proof thereof it shall be declared void by a decree of nullity. *Nelson v. Robinson* 64

Master and Servant.

1. For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the expressed or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible. *Gunn v. Coca-Cola Bottling Co.* 150
2. The general rule is that an employee using an automobile in his employer's business has no implied or apparent authority to invite others to ride with

him, and that, if a passenger who accepts the unauthorized invitation of the employee is injured, the employer is not liable, for the reason that the passenger is not a guest of his but merely a guest of his employee. *Gunn v. Coca-Cola Bottling Co.* 150

3. If the act causing the injury is within the class of service for the doing of which the servant was employed, the master is bound, even if the servant was forbidden to perform the particular act. But if the act forbidden was outside the class of service which the servant was employed to perform, the doing of the act is outside the scope of his employment. *Nelson v. Pennsylvania Fire Ins. Co.* 199

Money Lent.

1. A loan of money is the delivery by one party and the receipt by the other party of a given sum, upon an agreement, express or implied, to repay the sum loaned, with or without interest. *Cartney v. Olson* 546
2. A prima facie case is established in an action for money lent, by evidence that the money was delivered, that it was a loan, and has not been repaid. *Cartney v. Olson* 546

Mortgages.

The mortgagee's burden of proving that the mortgage was properly recorded, or the burden of proving, by one who asserts it, that the recordation was invalid, may be sustained by any competent evidence sufficient to establish the necessary facts. *Smith v. Brooks* 93

Motor Carriers.

1. A motor carrier must have a certificate of convenience and necessity issued by the Nebraska State Railway Commission. Conditions precedent to the issuance of a valid certificate are stated. *In re Application of Richling* 108
2. In the absence of specific legislation to the contrary, the Motor Carrier Act provides the exclusive method for obtaining a valid certificate of convenience and necessity. *In re Application of Richling* 108
3. A temporary certificate is subject to the same requirements as any other certificate of convenience and necessity. The Motor Carrier Act makes no dis-

tinction between classes or types of certificates. *In re Application of Richling* 108

4. Where the Nebraska State Railway Commission fails to give notice to all interested persons of the filing of an application for a certificate of convenience and necessity, it has no power to issue a valid certificate of convenience and necessity, temporary or otherwise. *In re Application of Richling* 108
5. Statute dealing with emergency rate orders has no relation to an application for a certificate of convenience and necessity by a common carrier in intrastate commerce by motor vehicle upon the public highways of the state. *In re Application of Richling* 108
6. The Nebraska State Railway Commission has jurisdiction and authority to suspend, change, or revoke a certificate of convenience and necessity in whole or in part, provided that in so doing it proceeds in conformity with statute. *In re Application of Resler* 624
7. The term "willful failure," is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of. *In re Application of Resler* 624

Municipal Corporations.

1. It is the general rule that the streets of a city, whether acquired by condemnation or dedication, are subject to the power of vacation. *Hanson v. City of Omaha* 72
2. Statutory provision for filing of objections to vacation of street or alley includes any owner or party interested in property who may suffer recoverable damage by the proposed vacation of a street or alley. *Hanson v. City of Omaha* 72
3. Compliance with statute is an essential act to the valid enactment of an ordinance vacating a street or alley. *Hanson v. City of Omaha* 72
4. Where it appears that lands sought to be removed from within the corporate limits of a village have no unity or community of interest with such village and receive few, if any, benefits by reason thereof, justice and equity require that they be disconnected from the village. *Runyan v. Village of Ong* 127
5. The power and authority to make public improvements does not of itself confer power and authority to levy and collect special taxes or assessments

to defray the cost of such improvements. *Besack v. City of Beatrice* 142

6. A city of the first class has no statutory jurisdiction or authority to levy special assessments upon real estate located within the boundaries of one lawfully created sewer district to defray the cost of any portion of a sewer constructed or reconstructed and situated outside the boundaries thereof and within the boundaries of another such created district. *Besack v. City of Beatrice* 142

7. The legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer. *Besack v. City of Beatrice* 142

8. The methods prescribed by statute for levying special assessments to defray the cost of sewer construction are mandatory and jurisdictional, and any such assessments otherwise imposed are void, in which case estoppel has no application. *Besack v. City of Beatrice* 142

9. Where special assessments for such improvements are made without compliance with jurisdictional requirements, they are void as distinguished from irregular, and may be assailed collaterally. *Besack v. City of Beatrice* 142

10. When sewers are constructed and any assessment to defray the cost thereof is declared void, the mayor and council of a city of the first class are authorized and empowered to make a reassessment of costs on real estate lying and being within the sewerage district in which such sewer may be situated, to the extent of the benefits to such property by reason of such improvement. *Besack v. City of Beatrice* 142

11. A railroad company's right-of-way and other real property specially benefited by a public improvement is liable for special assessments in the same manner and upon the same basis as other property owners in a public improvement district. *Chicago & N. W. Ry. Co. v. City of Omaha* 442

12. In making special assessments for benefits received, it is presumed that the authorities arrived at the amounts thereof with reference alone to the benefit accruing to the property assessed, and that the owners are required to contribute to the cost of the im-

provement only in proportion as their property is specially benefited thereby. *Chicago & N. W. Ry. Co. v. City of Omaha* 442

13. When a party attacks a paving assessment as void, the burden is upon him to prove the invalidity of such assessment. *Chicago & N. W. Ry. Co. v. City of Omaha* 442

14. A municipal corporation may legislate reasonably with respect to Sunday observance. *Arrigo v. City of Lincoln* 537

15. There is no distinction between an unreasonable and arbitrary statute and an ordinance containing these characteristics. *Arrigo v. City of Lincoln* 537

16. To meet constitutional requirements, a city ordinance must meet the tests required of statutory enactments. *Arrigo v. City of Lincoln* 537

17. Failure to consistently enforce or abuse in the enforcement of an ordinance does not affect its validity. *Arrigo v. City of Lincoln* 537

18. If a city ordinance contains valid and void provisions, the valid portion will be upheld if it is capable of enforcement and not dependent upon that which is invalid. *Arrigo v. City of Lincoln* 537

19. Under the Constitution, a home rule charter must be consistent with and subject to the Constitution and laws of this state. *Michelson v. City of Grand Island* 654

20. Whether or not an act of the Legislature pertains to a matter of state-wide or strictly local concern becomes a question for the courts when a conflict of authority arises. *Michelson v. City of Grand Island* 654

21. The sanitary condition existing in any one city of the state is of vast importance to all the people of the state because of the danger of spreading contagious and infectious diseases. The state has not delegated to the municipal authorities complete control over health and sanitation. *Michelson v. City of Grand Island* 654

22. When the Legislature has enacted a law affecting municipal affairs, which are also of state-wide concern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield. *Michelson v. City of Grand Island* 654

23. The Legislature has enacted legislation authorizing issuance of mortgage and revenue bonds for sew-

erage purposes which do not impose a general liability upon the municipality. *Michelson v. City of Grand Island* 654

24. The imposition of a rental charge for the use of a sewage disposal system is not an exercise of the taxing power, nor is it the levy of a special assessment. *Michelson v. City of Grand Island* 654

25. The provision of a city ordinance for shutting off water furnished by the city to the premises of the consumer failing to pay sewer service charges is not unconstitutional as depriving persons of property without due process of law where both water and sewer service are interlocked. *Michelson v. City of Grand Island* 654

26. A regulation promulgated by municipal ordinance which provides that the water supply be shut off to residents delinquent in the payment of sewer charges is valid and not an unreasonable or arbitrary regulation. *Michelson v. City of Grand Island* 654

27. The definition of "business district" in prior statute applies to statute in effect amendatory thereof. *Krepcik v. Interstate Transit Lines* 671

28. In determining whether or not an accident happened within a business district, the occupied frontage on both sides of the highway for three hundred feet or more traveled immediately before the accident by the vehicle involved is to be considered. Land which is not occupied by buildings in use for business is not to be considered. *Krepcik v. Interstate Transit Lines* 671

29. The restrictions set out in the Motor Vehicle Operators' Act are speed limitations upon the prima facie lawful speeds fixed for various districts. They place a duty to decrease speed below those prima facie lawful speeds when the conditions described exist. They prescribe conditions under which the prima facie lawful speeds shall not be lawful. *Krepcik v. Interstate Transit Lines* 671

30. Municipal corporations are prima facie the judges of the necessity and reasonableness of ordinances. A legal presumption exists in their favor unless the contrary appears on their face or unless unreasonableness is established by clear and unequivocal evidence. *Council Bluffs Transit Co. v. City of Omaha* 717

31. 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. *Council Bluffs Transit Co. v. City of Omaha* 717

32. In the exercise of police power delegated by the state legislature to a city, the city council, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised. *Council Bluffs Transit Co. v. City of Omaha* 717

33. The burden is upon a person attacking an ordinance as invalid to show that a regulation imposed by a municipality is so unreasonable and arbitrary as to amount to depriving such person of property without due process of law. *Council Bluffs Transit Co. v. City of Omaha* 717

34. A city has the right by ordinance to prescribe reasonable regulations for the control of traffic on its streets as a matter of public safety. *Council Bluffs Transit Co. v. City of Omaha* 717

35. In dealing with the problem of control of traffic on its streets, a city may adopt the expedient of prohibiting operations thereon by additional carriers. *Council Bluffs Transit Co. v. City of Omaha* 717

36. A municipal corporation may, when authorized to engage in the business of furnishing services to its inhabitants, dispose of by private sale a surplus necessarily acquired, when to do so does not interfere with any prior rights of its inhabitants thereto. *State ex rel. Johnson v. County of Gage* 822

Negligence.

1. Negligence to be the basis of an action for damages must have proximately caused or contributed to the injury for which recovery is sought. *Wax v. Co-Operative Refinery Assn.* 42

2. Where, in an action of tort, it is shown that, subsequent to the negligent act, a new and independent cause intervened, sufficient of itself to stand for the cause of injury, the former is too remote to be made the basis of recovery. *Wax v. Co-Operative Refinery Assn.* 42

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

the result of the original negligence. *Wax v. Co-Operative Refinery Assn.* 42
Kuska v. Nichols Construction Co. 580

4. A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause. *Wax v. Co-Operative Refinery Assn.* 42
5. In an action based on negligence the question of whether or not there was an intervening cause which removed the negligence of the defendant as the proximate cause is usually one for a jury. *Wax v. Co-Operative Refinery Assn.* 42
6. Where the evidence on the question of whether or not there was an intervening cause is not conflicting and is such that reasonable minds cannot differ as to the conclusion to be derived therefrom, the question is one to be decided as a matter of law by the court. *Wax v. Co-Operative Refinery Assn.* 42
7. As used in the Iowa guest statute, "reckless operation" means proceeding without heed of or concern for consequences. It means more than negligent operation. It may but does not necessarily include willfulness or wantonness. It implies no care coupled with disregard for consequences. Speed alone does not amount to recklessness. Conduct arising from mere inadvertence, thoughtlessness, or error of judgment is not reckless. *Yanney v. Nemer* 188
8. Under the Iowa guest statute the actions and conduct of the driver and not his mental attitude measure the degree of care and determine whether or not he is proceeding with a heedless disregard for consequences. *Yanney v. Nemer* 188
9. In order for a guest to establish reckless operation under the Iowa guest statute, it is necessary to show some act of the host that amounts to utter indifference to the safety of the guest. *Yanney v. Nemer* 188
10. To establish reckless operation under the Iowa guest statute, it is necessary to show that the danger was known to the driver, or was so obvious and apparent that the driver must be held to have known of it; or that there was a danger amounting

to an almost certain probability and not a possibility; and that the driver, with conscious knowledge of such situation, did not exercise the slightest care to avoid injury to his guest. *Yanney v. Nemer* 188

11. The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. *Stark v. Turner* 268
Mundy v. Davis 423

12. A violation of a statutory or municipal regulation is evidence of negligence, which the jury is entitled to consider upon the question whether actionable negligence existed. *Stark v. Turner* 268
Mundy v. Davis 423

13. The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing. *Stark v. Turner* 268

14. One having the right-of-way may not on that account proceed serenely unconscious of the surrounding circumstances. He has the right-of-way over traffic approaching on his left, but is not thereby relieved from the duty of exercising ordinary care to avoid accidents. *Stark v. Turner* 268

15. Where there is no evidence to support the pleaded defense of contributory negligence it should not be submitted to the jury, and to do so under such circumstances constitutes prejudicial error. *Johnson v. Schrepf* 317
Weisenmiller v. Nestor 839

16. An instruction, which places upon the defendant the burden of proving by a preponderance of the evidence "gross negligence or contributory negligence" on the part of the plaintiff in order to establish the defense of contributory negligence, is error. *Kristufek v. Rapp* 343

17. When a person enters an intersection of two streets or highways he is obligated to look for approaching cars. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence as a matter of law. If he fails to see an automobile not shown to be in a favored position, the question of his contributory

negligence in proceeding to cross the intersection is a jury question. *Becks v. Schuster* 360

18. Where two motorists approach an intersection at or about the same time, the driver approaching from the right ordinarily has the right-of-way. But if the situation is such as to indicate that to proceed to cross would probably result in a collision, then he should exercise ordinary care to prevent an accident. *Becks v. Schuster* 360

19. Where different minds may reasonably draw different conclusions or inferences from the evidence or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury. *Becks v. Schuster* 360

20. Negligence is a failure to do what reasonable and prudent persons would ordinarily have done or doing what reasonable and prudent persons would not have done. *Mundy v. Davis* 423

21. The burden is upon defendant to plead and prove the defense of contributory negligence and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect. *Mundy v. Davis* 423
Krepcik v. Interstate Transit Lines 671

22. Contributory negligence is conduct by plaintiff amounting to a breach of the duty which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause. *Mundy v. Davis* 423

23. The negligence of a person driving an automobile may not ordinarily be imputable to his guest, but such guest may be responsible for the consequences of his own negligence. *Kuska v. Nichols Construction Co.* 580

24. A guest riding in an automobile is required to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances, but is not required to use the same degree of care as devolves upon the driver. If the guest perceives or should anticipate danger, he should warn the driver. Ordinarily, the guest need not watch the road or advise the driver in the management of the car. *Kuska v. Nichols Construction Co.* 580

25. An invited guest in an automobile driven by another, with knowledge of approaching danger, should warn the driver of the danger, unless to a reasonably careful, cautious, and prudent person it appears that the warning would be of no avail or go unheeded, or that the driver observed or should have observed the danger. For failure to give such warning the guest would be chargeable with contributory negligence. *Kuska v. Nichols Construction Co.* 580

26. An invited guest, with knowledge of approaching danger, in the exercise of ordinary care should protest to the host if there is time and opportunity, unless it reasonably appears that such protest would go unheeded or would be of no avail. For failure so to do the guest may be chargeable with contributory negligence. *Kuska v. Nichols Construction Co.* 580

27. In a jury case, where different minds may draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury. Where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn, the question is one of law for the court. *Kuska v. Nichols Construction Co.* 580

28. Where separate independent acts of negligence combine to produce a single injury, each participant is liable for the resulting damages, although one of them alone might not have caused the injury. *Kuska v. Nichols Construction Co.* 580

29. It is the continuing duty of a road contractor engaged in highway construction to adequately warn the traveling public of danger to travel or if obstructions are placed thereon. A failure to so warn the traveling public is continuing negligence as distinguished from a condition. If reasonable minds could conclude from the evidence that such negligence proximately caused an accident, the issue should be submitted to a jury for its determination. *Kuska v. Nichols Construction Co.* 580

30. A traveler may ordinarily occupy and use any part of a public highway when not needed by another whose rights thereto are superior to his own. *Kuska v. Nichols Construction Co.* 580

31. The presence of a well-traveled track connecting with a public highway open to travel, with no barricades thereto and no warning signs thereon, constitutes a continuing invitation to the traveling public

to use the same, and justifies the assumption that it is reasonably safe for the accommodation of the public while using ordinary care. *Kuska v. Nichols Construction Co.* 580

32. It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. This rule applies to the affirmative defense of contributory negligence. *Krepcik v. Interstate Transit Lines* 671

33. Where specific charges of contributory negligence are pleaded and supported by proof, the instructions should submit those specific charges to the jury for its determination. To fail to do so, whether or not requested to do so, is error. *Krepcik v. Interstate Transit Lines* 671

34. A person who knowingly and of his own volition exposes himself to an obvious danger cannot recover damages for any injury which he might have avoided by the use of reasonable care. *Gade v. Carlson* 710

35. Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence. *Gade v. Carlson* 710

36. When one sees or could have seen the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle, and is struck, his own conduct constitutes contributory negligence more than slight in degree and precludes recovery. *Gade v. Carlson* 710

37. The cause which will afford the basis for an action for damages for negligence must be a proximate cause of the accident and the ensuing injuries or death. *Frerichs v. Eastern Neb. Public Power Dist.* 777

38. To be regarded as a proximate cause of an accident negligence must be of such a character that it may be said that the accident was the natural and probable result thereof. *Frerichs v. Eastern Neb. Public Power Dist.* 777

39. Where a negligent act creates a condition from which injury flows only by a subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not a proximate cause of the injury. *Frerichs v. Eastern Neb. Public Power Dist.* 777

40. An owner or occupant is not liable for injuries to a fireman or individual fighting a fire, who is a bare

licensee, except those injuries proximately resulting from willful or wanton negligence, a designed injury, or a hidden danger or peril known to the owner or occupant but unknown to the fireman or individual. *Wax v. Co-Operative Refinery Assn.* 805

41. In an action by a fireman or person injured while fighting a fire, it is immaterial whether or not the fire was started by negligence of the occupant or owner of premises or that such was continuing negligence, since a fireman or individual undertakes to fight a fire knowing that it exists and as licensee ordinarily assumes the risk of the premises as he finds them. *Wax v. Co-Operative Refinery Assn.* 805

42. The duty of an owner or occupant of premises owing to a licensee is not confined to real property, but applies as well to personal property. *Wax v. Co-Operative Refinery Assn.* 805

43. The exceptions to the general rule requiring a motorist at night to be able to stop within the area lighted by the lights on the automobile should embrace all situations wherein reasonable minds may differ on the question of whether or not the operator of the automobile exercised due care, caution, and prudence. *Heeney v. Churchill* 848

44. It is more than slight negligence as a matter of law under the comparative negligence statute for one to stop an automobile on a railroad track without looking or listening for approaching trains. This rule prevails even though the whistle was not blown, the bell not rung, or the speed of the train excessive. *Huckfeldt v. Union Pacific R. R. Co.* 873

New Trial.

1. An application for new trial must be made within ten days, either within or without the term, after the verdict, report, or decision is rendered, except (1) where unavoidably prevented, or (2) for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial. *Frenchman-Cambridge Irrigation Dist. v. Ferguson* 20

2. A motion for a new trial which is not filed within the time specified by statute is a nullity and of no force and effect. *Frenchman-Cambridge Irrigation Dist. v. Ferguson* 20

3. Where a verdict is returned against a plaintiff and in favor of several defendants, on different, dis-

tinct, and separate defenses pleaded separately by them, a single joint motion for a new trial against them all is insufficient, and it should be overruled if the verdict is good as to any one of the defendants. *Gunn v. Coca-Cola Bottling Co.* 150

4. The time for filing a motion for new trial begins to run from the time the decision was rendered, and not from the date it was filed or entered on the journal of the court. *Molczyk v. Molczyk* 163

5. The time limitation on filing motion for new trial is not directory merely but wholly mandatory, and only the date the decision was rendered is to be considered in determining the time within which a motion for new trial must be filed. *Molczyk v. Molczyk* 163

6. Errors occurring during the trial of a criminal case cannot be reviewed in the Supreme Court unless they have been assigned in and presented to the trial court by a motion for new trial. *Fisher v. State* 166

7. A new trial will not be granted upon the ground of newly discovered evidence, unless it is made to appear that such evidence, if offered and admitted on the trial, would probably have produced a different result. *Hodges v. Hodges* 178
In re Estate of Bergren 289

8. The application for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its action thereon will not be overruled unless a clear abuse of discretion is shown. *Hodges v. Hodges* 178
In re Estate of Bergren 289

9. Where a trial judge does not give a reason for granting a new trial, justification for so doing must be found in the record. *Nelson v. Wiepen* 458

10. Where a trial judge grants a new trial there is no burden in the sense of a burden of proof on either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented. *Nelson v. Wiepen* 458

11. Errors alleged to have been committed in a trial where the trial court grants a new trial will be considered and determined in the Supreme Court so far as necessary to the appeal, subject to the right to notice and consider plain errors not assigned. *Nelson v. Wiepen* 458

12. In the trial of a criminal action, where counsel for defendant proceed with the trial, without objection

and without request for a mistrial, they will not be heard to complain for the first time, on motion for a new trial, of applause by spectators. *Sundahl v. State* 550

13. Where a defendant elects not to interrogate prospective jurors as to whether or not they have read a newspaper article before trial, and it develops that one juror had read the article and others did so during the trial, the defendant waives the prejudice, if any, where objection is made for the first time on motion for new trial. *Sundahl v. State* 550

14. The district court, in trying the issues presented by a motion for a new trial, has the right to indulge the presumption that the jurors were mindful of the oaths which they took, and found the verdict they did solely upon the evidence introduced on the trial of the case. The law supplies, by presumption, the evidence that the jurors obeyed their oaths. *Sundahl v. State* 550

15. If an appellee desires to insist upon his right to a new trial in case the entry of a judgment notwithstanding the verdict is held to be erroneous, he must assign such error contained in his motion for a new trial upon which he intends to rely to obtain it. *Long v. Carpenter* 862

Pardons.

Pardon or parole relates to events after conviction and to action by the executive department. *Sundahl v. State* 550

Parent and Child.

1. A parent is not liable criminally for moderately or reasonably correcting a child, but it is otherwise if the correction is immoderate and unreasonable. *Fisher v. State* 166

2. A father usually continues to be liable for the support of his minor children to the same extent after the divorce as before. Provisions in a divorce decree for their suitable maintenance and support are entirely distinct from the allowance of alimony to the wife or division of property between the parties. *Waugh v. Waugh* 325

3. The custody of minor children is to be determined by their best interests with due regard for the superior rights of fit, proper, and suitable parents. *Bize v. Bize* 520

Parties.

1. A motion for judgment on the pleadings admits facts well pleaded or admitted, but does not admit conclusions of law. It is only where, upon statements in the pleadings, one party is entitled by law to judgment in his favor that judgment should be so rendered by the court. *Gilbert v. First National Bank* 404
2. One having an interest in the result of pending litigation may intervene as a matter of right. *Gilbert v. First National Bank* 404
3. An intervener must factually plead some interest in the subject matter of the litigation as distinguished from a mere denial of the rights of plaintiff or defendant. *Gilbert v. First National Bank* 404
4. The interest in a matter in litigation which will authorize a person to so intervene must be such a direct and immediate interest that the person or persons seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. *Gilbert v. First National Bank* 404
5. An interest authorizing intervention must be one arising from a claim to the subject matter of the action or some part thereof or a lien upon the money or property or some part thereof, as distinguished from an indirect, remote, or conjectural interest in the result of the suit. *Gilbert v. First National Bank* 404
6. An intervener who is not an indispensable party cannot change the position of the original parties or change the nature and form of the action or the issues presented. *Gilbert v. First National Bank* 404
7. An intervener is ordinarily entitled to present only issues, as distinguished from facts, which sustain or oppose the respective contentions of the plaintiff and defendant or either of them. *Gilbert v. First National Bank* 404

Partition.

In an action for partition it is the duty of the parties appearing, whether as plaintiff or defendant, to exhibit documentary proof of title, if any they have, and if they have no documentary evidence of title, to adduce other satisfactory and sufficient evidence in proof of their interest in the real estate in question. *Frankenberger v. Holm* 80

Partnership.

1. The existence of a partnership depends upon the agreement of the parties. Their intention is to be ascertained from all the evidence. *Byram v. Thompson* 756
2. Without recourse to court proceedings partners may state an account among themselves, either in full or as to some particular branch of the partnership transactions. *Byram v. Thompson* 756

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. *In re Estate of Halstead* 31
2. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. If the petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action. *In re Estate of Halstead* 31
3. Where a party relies upon a variance between the pleadings and the proof to defeat a recovery, that question should be raised at some time during the progress of the trial. Unless it is so raised and suggested to the trial court, it will not be considered on appeal to the Supreme Court. *Smith v. Brooks* 93
4. In order for a litigant to invoke the benefits of the Uniform Judicial Notice of Foreign Law Act it is required that he give reasonable notice in the pleadings or otherwise to the adverse party of his intention so to do. Such notice is a prerequisite to offering proof of such foreign law or asking the court to take judicial notice thereof. *Smith v. Brooks* 93
5. The correctness of the ruling of the district court sustaining a demurrer to a petition must be determined by consideration only of the facts well pleaded therein and any reasonable intendments implied from them. *Hester v. Young* 227
6. Pleadings in another case or parts thereof which amount to admissions against interest in a case on trial are admissible against the party who made the admissions. *Zimmerman v. Lindblad* 453

7. In deciding the correctness of a ruling on a demurrer to a pleading, only allegations of fact in the pleading to which it is directed may be considered. *Todd v. Board of Educational Lands and Funds* 606
8. A general denial is available to a defendant to challenge one or more of the elements essential to a recovery. The effect of the denial is to put the burden on plaintiff to establish by evidence the matters denied. *Master Laboratories, Inc. v. Chesnut* 749
9. Evidence in an action based on quantum meruit that defendant did not agree to pay the reasonable value of labor and materials furnished does not constitute a material variance with an allegation of the petition that defendant orally agreed to pay such reasonable value. *Umberger v. Sankey* 881
10. It is not necessary in a pleading to state facts which the law implies. When they are so pleaded they do not change the identity of the cause of action and they will ordinarily be treated as surplusage. *Umberger v. Sankey* 881

Principal and Agent.

The extent of the authority conferred upon an agent may be a question of fact but the question of whether there is any evidence to prove it is one of law. *Gunn v. Coca-Cola Bottling Co.* 150

Process.

1. Where a statute authorizes personal service on a nonresident then out of the state, and prescribes the manner in which the service shall be made, the service must be made by the person or officer designated. *Nelson v. Robinson* 64
2. Service outside of the state by a sheriff, deputy sheriff, or other person of a foreign jurisdiction, without appointment by the sheriff of the county in which the suit was brought, as required by statute, is insufficient and invalid. *Nelson v. Robinson* 64
3. Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued. *Nelson v. Robinson* 64

Public Lands.

1. The public school lands of the state are held in trust for educational purposes by the terms of the

Constitution. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244

2. As a trustee of the public school lands and the income derived therefrom, the state is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244
3. A breach of the duties and functions imposed upon the state as a trustee by virtue of its constitutional status as such is a violation of the Constitution itself. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244
4. The Legislature is authorized to provide by statute the terms upon which the public school lands of the state may be leased, but such terms must be consonant with the duties and functions of a trustee acting in a fiduciary capacity. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244
5. The state as trustee of the public school lands owes the beneficiaries of the trust its undivided loyalty and good faith, and its acts must be in the sole interest of such beneficiaries. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244
6. An act of the Legislature dealing with trust property of which the state is the trustee constitutes a breach of trust where it appears that it substantially benefits a special class of persons at the expense of the trust estate. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244
7. A legislative act which fixes the valuation of the public school lands of the state on an arbitrary basis without regard to its fair market value and requires the Board of Educational Lands and Funds to renew the leases of existing lessees on such basis is violative of the duties of the trustee in conferring special benefits on such lessees to the detriment of the beneficiaries of the trust. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244
8. It is the duty of a trustee to obtain a maximum return to the trust estate from the trust properties under its control, subject to the taking of necessary precautions for the preservation of the trust estate. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244
9. The loss of maximum income properly permitted by a trustee must bear a reasonable relation to the

risks sought to be avoided. A trustee may not permit an unreasonable loss of income in protecting the trust res where the loss is out of all proportion to the risk and where the protection of the trust res is, or can be, otherwise amply guarded against. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244

10. Two sections of amendatory acts relating to leasing of educational lands are violative of the duties and functions of a fiduciary trustee and, as such, contravene the Constitution of Nebraska. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244

11. An assignment of a school land lease was ineligible for record if at the time the assignment was tendered for record the assignor was in default of payment of some amount required by the lease to be paid. *Todd v. Board of Educational Lands & Funds* 606

12. If the assignor was not in default of any payment required by the lease when the assignment was tendered for record, it was entitled to be recorded. *Todd v. Board of Educational Lands & Funds* 606

13. The purpose of the statute requiring recording of assignments of school land leases was to furnish information and notice of the identity of the owner of the lease and was for the benefit and convenience of the state. *Todd v. Board of Educational Lands & Funds* 606

14. The rights of a lessee of school land are determined by the law as it was at the time the lease was made. The lessee may not be deprived of any substantial right resulting from the lease in his favor by subsequent legislation. *Todd v. Board of Educational Lands & Funds* 606

15. The holder of a school land lease desiring to assign it has the right to assign subject only to the conditions with reference to assignment to which the lease was subject at the time of issuance. *Watson Hay Co. v. Board of Educational Lands & Funds* 613

16. Assignee of school land lease was entitled to have recorded an assignment for the remainder of the term. *Hanna v. Board of Educational Lands & Funds* 619
Hanna v. Board of Educational Lands & Funds 623

17. Assignee of school land lease was not entitled to have a new lease issued directly to him for the

school lands described in that lease. *Hanna v. Board of Educational Lands & Funds* 619

Public Service Commissions.

1. A motor carrier must have a certificate of convenience and necessity issued by the Nebraska State Railway Commission. Conditions precedent to the issuance of a valid certificate are stated. *In re Application of Richling* 108
2. The power of the Nebraska State Railway Commission to regulate common carriers is derived from Article IV, section 20, of the Constitution. Such powers are plenary and self-executing in the absence of specific legislation on the subject. *In re Application of Richling* 108
3. Where the Legislature enacts specific legislation implementing Article IV, section 20, of the Constitution, the Nebraska State Railway Commission is subject to and governed by the provisions of such enactment. *In re Application of Richling* 108
4. The Motor Carrier Act provides the exclusive method for obtaining a valid certificate of convenience and necessity. *In re Application of Richling* 108
   In re Application of Canada 256
5. A temporary certificate is subject to the same requirements as to any other certificates of convenience and necessity. The Motor Carrier Act makes no distinction between classes or types of certificates. *In re Application of Richling* 108
6. Where the Nebraska State Railway Commission fails to give notice to all interested persons of the filing of an application for a certificate of convenience and necessity, it has no power to issue a valid certificate of convenience and necessity, temporary or otherwise. *In re Application of Richling* 108
7. Statute dealing with emergency rate orders has no relation to an application for a certificate of convenience and necessity by a common carrier in intrastate commerce by motor vehicle upon the public highways of the state. *In re Application of Richling* 108
8. The matter for decision in an appeal from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, is that the order is or is not unreasonable or arbitrary. *In re Application of Canada* 256
9. The Nebraska State Railway Commission may inter-

pret or clarify a certificate of convenience and necessity if it is indefinite, ambiguous, or uncertain in its terms or provisions. *In re Application of Canada* 256

10. In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest. *In re Application of Canada* 256

11. In the enactment of the statute regulating appeals from the Nebraska State Railway Commission, the Legislature left it optional whether or not a party dissatisfied with an order of the commission upon which there has been a hearing would file a motion for rehearing in order to institute proceedings in the Supreme Court to reverse, vacate, or modify such order. *In re Application of Chicago, B. & Q. R. R. Co.* 281

12. If a party timely files a motion for rehearing with the Nebraska State Railway Commission he may have one month from the ruling thereon within which to appeal, thereby presenting for consideration and review not only errors of law which allegedly occurred during the hearing but also whether or not the complete record discloses that the commission acted within the scope of its authority and whether or not its order was arbitrary and unreasonable. *In re Application of Chicago, B. & Q. R. R. Co.* 281

13. If a party does not file a motion for rehearing with the Nebraska State Railway Commission, or it is filed out of time but his appeal is timely perfected within one month from the date of the entry of the order to which complaint is made, the Supreme Court will not consider or review any assigned errors of law which allegedly occurred during the hearing, but will search the complete record to determine whether or not the commission acted within the scope of its authority and whether or not its order was arbitrary and unreasonable. *In re Application of Chicago, B. & Q. R. R. Co.* 281

14. If the appeal of a party from an order of the Nebraska State Railway Commission is not timely

perfected within one month from the date of entry of the order to which complaint is made, the Supreme Court has no jurisdiction. *In re Application of Chicago, B. & Q. R. R. Co.* 281

15. If an application filed with the Nebraska State Railway Commission involves the discontinuance and substitution of interrelated trains and presents over-all issues relating to public passenger transportation needs and services which are each component parts of the same problem, the commission has authority to hear such issues as one proceeding and dispose of them with one order. *In re Application of Chicago, B. & Q. R. R. Co.* 281

16. A final order of the Nebraska State Railway Commission granting a railroad company authority to discontinue specified passenger trains, operated within the state at a loss and for the operation of which no public need exists, is within the scope of its authority and not arbitrary and unreasonable. *In re Application of Chicago, B. & Q. R. R. Co.* 281

17. The abeyance provision contained in statutory provision authorizing appeals from orders where fixing of rates or discrimination in rates is involved has no application to an order made under the Motor Carrier Act. *Safeway Cabs, Inc. v. Honer* 533

18. The inherent power of the Supreme Court to stay an order of the railway commission pending the determination of an appeal cannot be invoked except for cogent reasons requiring preservation of the status quo. *Safeway Cabs, Inc. v. Honer* 533

19. The Nebraska State Railway Commission has jurisdiction and authority to suspend, change, or revoke a certificate of convenience and necessity in whole or in part, provided that in so doing it proceeds in conformity with statute. *In re Application of Resler* 624

20. The term "willful failure," is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of. *In re Application of Resler* 624

21. Where there is competent evidence sufficient to sustain the finding of the railway commission an order based on such finding is not unreasonable or arbitrary. *In re Application of Resler* 624

22. Unless an order of the railway commission is shown to be unreasonable or arbitrary, the Su-

preme Court is not authorized to interfere with the power of the commission to regulate common carriers. *In re Application of Resler* 624

23. A certificate of public convenience and necessity granted and issued by the Nebraska State Railway Commission is not property within the terms of the Motor Carrier Act, and the commission has no jurisdiction to transfer or assign it from the holder thereof to another. *In re Application of Petersen & Petersen, Inc.* 877

Railroads.

1. If an application filed with the Nebraska State Railway Commission involves the discontinuance and substitution of interrelated trains and presents overall issues relating to public passenger transportation needs and services which are each component parts of the same problem, the commission has authority to hear such issues as one proceeding and dispose of them with one order. *In re Application of Chicago, B. & Q. R. R. Co.* 281
2. A final order of the Nebraska State Railway Commission granting a railroad company authority to discontinue specified passenger trains, operated within the state at a loss and for the operation of which no public need exists, is within the scope of its authority and not arbitrary and unreasonable. *In re Application of Chicago, B. & Q. R. R. Co.* 281
3. A railroad company's right-of-way and other real property specially benefited by a public improvement is liable for special assessments in the same manner and upon the same basis as other property owners in a public improvement district. *Chicago & N. W. Ry. Co. v. City of Omaha* 442
4. It is more than slight negligence as a matter of law under the comparative negligence statute for one to stop an automobile on a railroad track without looking or listening for approaching trains. This rule prevails even though the whistle was not blown, the bell not rung, or the speed of the train excessive. *Huckfeldt v. Union Pacific R. R. Co.* 873

Rape.

1. No force on the part of the defendant, or resistance on the part of the female, is essential to constitute the crime of rape, or of an assault with intent to commit that offense, when it is alleged and proved

that the female is under the statutory age of consent and the defendant is at least 18 years old. *Hughes v. State* 86

2. In a prosecution for assault with intent to commit rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. *Hughes v. State* 86

Replevin.

1. To entitle a plaintiff in replevin to recover, the necessary facts must be shown to have existed at the time the action was commenced. *Alliance Loan & Investment Co. v. Morgan* 745
2. Any fact that transpires after the institution of a replevin case is immaterial in the consideration and determination of the merits of the case. *Alliance Loan & Investment Co. v. Morgan* 745
3. A plaintiff in a replevin case must recover on the strength of his right in or to the property and not upon any weakness of the interest of the defendant therein. *Alliance Loan & Investment Co. v. Morgan* 745
4. A judgment in a replevin action for a defendant holding a lien must be for a return of the property, or, in the alternative, for the value of the possession thereof if a return cannot be had, for damages for the withholding of the property, and costs of the suit. *Alliance Loan & Investment Co. v. Morgan* 745
5. If property taken under a writ of replevin cannot be returned, the measure of damage of the defendant is the amount of his lien with interest and costs, within the value of the property. *Alliance Loan & Investment Co. v. Morgan* 745
6. Damages for withholding property taken on a writ of replevin may be recovered only if the property is returned to the defendant. *Alliance Loan & Investment Co. v. Morgan* 745

Rescission.

1. An indivisible contract cannot be rescinded in part and a part remain executed. If rescinded at all, it must be the entire contract, and the parties thereto

placed in the situation they were at the time it was made as nearly as the circumstances will permit. *James v. Hogan* 306

2. The remedies of rescission and damages are inconsistent; the former proceeding upon disaffirmance, and the latter upon affirmance of the contract. *James v. Hogan* 306

3. Rescission extinguishes the contract and neither party can thereafter base any right of recovery on any part of it. *James v. Hogan* 306

Sales.

1. The letters "f. o. b." are an abbreviation of the words "free on board" and standing alone in a contract of sale they simply mean that the subject of the sale is to be loaded for shipment without expense to the buyer. *Storz Brewing Co. v. Brown* 204

2. In a contract of sale if delivery is made by carrier, the place of shipment is ordinarily deemed the place of delivery unless a contrary intent appears. *Storz Brewing Co. v. Brown* 204

3. Where delivery to a carrier is delivery to the buyer and passes title to him at the place of shipment, the risk of loss or injury after such delivery is on the buyer. *Storz Brewing Co. v. Brown* 204

4. The carrier is the bailee of the purchaser for the purpose of accepting delivery but not to determine that the goods are in quality and description such as the purchaser ordered. The latter has the right of inspection after delivery to him by the carrier and may take a reasonable time for that purpose. He is bound to accept only when the seller has tendered the thing contracted for. The right of inspection, however, does not change the rule that delivery will be held to have been made to the purchaser at the time of shipment and at his risk during transit. *Storz Brewing Co. v. Brown* 204

5. The positive statement of a dealer in livestock, or an assertion or affirmation of fact, as to quality or condition made in the course of exchange or purchase, indicating that he intended to bind himself to its truth, and which was so understood and relied upon by the other party, is an express warranty. *Long v. Carpenter* 862

6. An express warranty that an animal is sound implies the absence of any then-existing defect or disease which impairs or in its progress will impair the

animal's natural usefulness for the purpose for which it was purchased, and is breached by any defect or disease existent at time of sale which renders it less serviceable for such purpose. *Long v. Carpenter* 862

7. The measure of damages for breach of express warranty of quality or condition is the difference between the value of the property at time of sale and the value it would have had if as warranted. *Long v. Carpenter* 862

8. All damages in contemplation of the parties to the contract or which directly and naturally result from a breach of warranty accrue in favor of the party injured by such breach. *Long v. Carpenter* 862

9. Special damages may also be recovered in an action for breach of warranty if they are such as may fairly be supposed to have entered into contemplation of the parties when they made the contract. *Long v. Carpenter* 862

Schools and School Districts.

School district boards are empowered and required to make provision for transportation of pupils to schools of neighboring districts when authorized to do so by a majority of the votes cast at any annual or special meeting. In the absence thereof, the board is free to pay mileage. *Bender v. Palmer* 350

States.

The state by entering into a contract abandons its attributes of sovereignty and binds itself, to the extent of its power to contract, substantially as an individual does who becomes a party to a contract. *Todd v. Board of Educational Lands and Funds* 606

Statutes.

1. It is a well-accepted rule of construction that a legislative act granting powers, privileges, or immunities to corporations must be held to apply only to corporations created under the authority of that state over which such state has the power of visitation and control, unless a contrary intent is plainly expressed in the terms of such legislation. *In re Estate of Halstead* 31

2. In codifying or revising statutes, a mere rearrangement of the sections or parts of a statute, or the placing of portions of what was originally a single

section in separate sections, does not change the purpose, operation, and effect thereof. *Mid-Continent Airlines, Inc. v. State Board* 371

3. The Legislature may make a reasonable classification for purposes of legislation, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class. To be valid the law must operate uniformly and alike upon every member of the class so designated. *Arrigo v. City of Lincoln* 537

4. There is no distinction between an unreasonable and arbitrary statute and an ordinance containing these characteristics. *Arrigo v. City of Lincoln* 537

5. The power of the Governor to remove a member of the Nebraska Liquor Control Commission is derived from the Constitution. The authority granted by statute is declaratory of the power granted by the Constitution and its provisions do not operate as a limitation upon the supreme executive power. *State ex rel. Beck v. Young* 588

6. The violation of a statutory prohibition affords an adequate basis for a charge upon which an order of removal by the Governor can be based. *State ex rel. Beck v. Young* 588

7. The acceptance of insurance commissions by a member of the liquor control commission on policies of insurance issued to persons subject to the regulation and control of the liquor control commission in violation of statute constitutes malfeasance in office within the meaning of the Constitution. *State ex rel. Beck v. Young* 588

8. The receipt of insurance commissions by a member of the liquor control commission involves a question of public morals in the administration of government of which the Governor could take cognizance in the performance of his constitutional duties. *State ex rel. Beck v. Young* 588

9. Where grain has never entered the State of Nebraska, an investment therein is not taxable under the Grain Broker's Tax Act. *Archer-Daniels-Midland Co. v. Board of Equalization* 632

10. Neither tangible personal property nor the investment of a grain broker in grain which has not acquired a situs in this state is subject to an ad valorem tax under the Grain Broker's Tax Act. *Archer-Daniels-Midland Co. v. Board of Equalization* 632

11. The protection and preservation of public health

and sanitation are of state-wide concern with respect to which the Legislature has jurisdiction. *Michelson v. City of Grand Island* 654

12. Words defined in a prior statute will be understood in the same sense in subsequent statutes unless the contrary appears. *Krepcik v. Interstate Transit Lines* 671

13. It is a general principle of interpretation that the mention of one thing implies the exclusion of another. Under this principle the enumeration of certain powers implies the exclusion of all others not fairly incident to those enumerated. *Harrington v. Grieser* 685

Streets.

1. A city has the right by ordinance to prescribe reasonable regulations for the control of traffic on its streets as a matter of public safety. *Council Bluffs Transit Co. v. City of Omaha* 717

2. In dealing with the problem of control of traffic on its streets, a city may adopt the expedient of prohibiting operations thereon by additional carriers. *Council Bluffs Transit Co. v. City of Omaha* 717

Subrogation.

1. The doctrine of subrogation is not administered by courts of equity as a legal right, but is applied to subserve the ends of justice. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of each case. *Gilbert v. First National Bank* 404

2. One advancing money to an executor or an administrator which is applied to the payment of debts for which the estate is bound may be subrogated to the place of the executor or administrator if it clearly appears by competent evidence that the estate has been benefited by the payment thereof. *Gilbert v. First National Bank* 404

3. Subrogation only arises in case money advanced has in fact been applied to the payment of debts for which the estate was justly and legally bound. *Gilbert v. First National Bank* 404

4. A subrogee can acquire no greater rights than those possessed by the party to whose rights he succeeded. *Gilbert v. First National Bank* 404

5. The rules of subrogation apply where money is advanced or paid to an executor de son tort or a creditor of the estate, and applied to payment of debts for

which the estate was justly and legally bound, since in such a situation it was in fact paid to the estate. *Gilbert v. First National Bank* 404

6. While payments by third persons directly to a representative or creditors of an estate are not favored, reimbursement by way of subrogation will generally be allowed where it is clearly established that the payments were not made voluntarily but in good faith whereby the estate received the benefit thereof. *Gilbert v. First National Bank* 404

Sunday.

1. A municipal corporation may legislate reasonably with respect to Sunday observance. *Arrigo v. City of Lincoln* 537
2. A prohibition of activities on Sunday is for the promotion of health, peace, and good order of society by requiring a periodical day of rest. It is generally sustained as an exercise of police power. *Arrigo v. City of Lincoln* 537

Taxation.

1. Statutes exempting certain bequests, legacies, devises, or gifts from inheritance taxes should be strictly construed. To be exempt from inheritance taxes they must come within the strict letter of the statutory exemption. *In re Estate of Halstead* 31
2. The fact that charitable bequests or devises are exempt from inheritance taxes does not modify the rule that such bequests or devises for charity should be construed liberally for the purpose of upholding them whenever possible. *In re Estate of Halstead* 31
3. A gift, devise, or bequest in the nature of a trust to a corporation, organization, association, or foundation in this state for expenditure by it within the state for exclusively charitable purposes and uses, is exempt from payment of inheritance taxes. *In re Estate of Halstead* 31
4. Taxable property means property that may be legally taxed, or, stated otherwise, property which is not exempt from taxation. *Hanson v. City of Omaha* 72
5. A mandatory duty is imposed upon a county board to set off and deduct from any account or claim presented to it for allowance the amount of delinquent personal taxes assessed against the person, firm, or corporation in whose favor such account or

claim has been presented and allowed. *State ex rel. Bates v. Morgan* 234

6. The right of appeal provided by section 77-510, R. R. S. 1943, is limited to proceedings for the equalization of assessments contemplated and regulated by sections 77-505 to 77-509, R. R. S. 1943. *Mid-Continent Airlines, Inc. v. State Board* 371
7. The review by the district court of assessments made by the county assessor is limited to questions presented to the county board of equalization. *Archer-Daniels-Midland Co. v. Board of Equalization* 632
8. Where grain has never entered the State of Nebraska, an investment therein is not taxable under the Grain Broker's Tax Act. *Archer-Daniels-Midland Co. v. Board of Equalization* 632
9. Neither tangible personal property nor the investment of a grain broker in grain which has not acquired a situs in this state is subject to an ad valorem tax under the Grain Broker's Tax Act. *Archer-Daniels-Midland Co. v. Board of Equalization* 632
10. Property in transit in interstate commerce through this state only as an incident to its transfer to some other state acquires no situs for taxation and is not taxable in this state. *Archer-Daniels-Midland Co. v. Board of Equalization* 632
11. Property purchased in transit within this state which does not thereafter lose its character as property in transit in interstate commerce until it reaches its destination outside the state is not taxable under the Grain Broker's Tax Act. *Archer-Daniels-Midland Co. v. Board of Equalization* 632
12. The imposition of a rental charge for the use of a sewage disposal system is not an exercise of the taxing power, nor is it the levy of a special assessment. *Michelson v. City of Grand Island* 654

Tender.

1. A plea of tender in an answer is an admission that the amount offered is due the plaintiff. *James v. Hogan* 306
2. In order to make a tender effective and to relieve defendant from further interest and costs, he must, when sued, not only plead the tender but bring the amount into court so that it is available for the use of the plaintiff. *James v. Hogan* 306
3. An effective tender must be the amount to which the party is entitled at the time it is made. If he

has become entitled to costs by commencement of an action to recover the indebtedness, a tender which does not include all such costs is nugatory. *James v. Hogan* 306

4. A plea of tender is materially different in character and effect from an offer of confession of judgment after an action is begun. *James v. Hogan* 306

Torts.

Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held for the entire damage—not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury. *Stark v. Turner* 268

Trial.

1. In an action based on negligence the question of whether or not there was an intervening cause which removed the negligence of the defendant as the proximate cause is usually one for a jury. *Wax v. Co-Operative Refinery Assn.* 42
2. Where the evidence on the question of whether or not there was an intervening cause is not conflicting and is such that reasonable minds cannot differ as to the conclusion to be derived therefrom, the question is one to be decided as a matter of law by the court. *Wax v. Co-Operative Refinery Assn.* 42
3. Under Nebraska practice a motion of the defendant to dismiss at the close of plaintiff's evidence or at the close of all evidence on the ground that the evidence is insufficient to sustain a cause of action has the same purpose and is to be treated the same as a motion for directed verdict both in the district court and in the Supreme Court on appeal. *Wax v. Co-Operative Refinery Assn.* 42
4. A motion for directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and have the benefit of every inference that can reasonably be deduced from the facts in evidence. *Trebelhorn v. Bartlett* 113

Gunn v. Coca-Cola Bottling Co. 150

Yanney v. Nemer 188

Stark v. Turner 268
Kristufek v. Rapp 343
Kuska v. Nichols Construction Co. 580
Long v. Carpenter 862

5. In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him. *Gunn v. Coca-Cola Bottling Co.* 150
6. In a law action, it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for its determination. *Gunn v. Coca-Cola Bottling Co.* 150
7. In an action where the evidence produced by the plaintiff is not sufficient to support a verdict in his favor, it is the duty of the trial court to direct a verdict for the defendant. *Gunn v. Coca-Cola Bottling Co.* 150
8. Rule requiring cautionary instruction as to evidence given by detectives is generally not applicable to public officers who are witnesses. *Fisher v. State* 166
9. It is not obligatory upon the court, in the absence of a request, to give a cautionary instruction. *Fisher v. State* 166
10. It is not error to refuse a requested instruction when the substance of it is included by the court in its charge to the jury. *Fisher v. State* 166
11. It is proper to include in an instruction a statement that when, after giving evidence of good character due weight, the proof still shows the accused to be guilty beyond a reasonable doubt, such evidence of good character is unavailing. *Fisher v. State* 166
12. Absence of any direct, incriminatory evidence is ordinarily made the test of the obligation of the trial court to instruct as to the probative value and manner of considering circumstantial evidence in a criminal case. If there is direct incriminatory evidence of the principal facts essential to guilt, the failure to instruct in this regard is not error. *Fisher v. State* 166
13. The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury cannot be disturbed unless it is clearly wrong. *Fisher v. State* 166
14. Trial court must in all cases decide the preliminary question of whether there is any evidence upon which

a jury can properly proceed to find a verdict for the party upon whom the burden of proof is imposed. *Storz Brewing Co. v. Brown* 204

15. Where the evidence on the trial in the district court is not conflicting and reasonable minds cannot differ as to the conclusion to be derived therefrom it is the duty of the court, when requested, to direct a verdict in accordance with such conclusion. *Storz Brewing Co. v. Brown* 204

16. In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him. *Stark v. Turner* 268

17. When the defendant in a personal injury action moves for a directed verdict, such motion will be treated as an admission of the truth of all material and relevant evidence favorable to the plaintiff and of all reasonable inferences to be drawn therefrom. If it tends to support plaintiff's cause of action, the motion should be overruled and the case submitted to the jury. *Johnson v. Schrepf* 317

18. Where there is no evidence to support the defense of contributory negligence it should not be submitted to the jury, and to do so under such circumstances would constitute prejudicial error. *Johnson v. Schrepf* 317
Weisenmiller v. Nestor 839

19. A verdict may be set aside as excessive only where it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the jury disregarded the evidence or controlling rules of law. *Johnson v. Schrepf* 317

20. A court will not ordinarily hold a verdict to be excessive when the amount fixed by the jury is sustainable by factors of pain, suffering, mutilation, disability, wage losses, medical costs, or other pecuniary losses, including those resulting from existing economic conditions such as the low purchasing power of money. *Johnson v. Schrepf* 317

21. Where the evidence, viewed in the light most favorable to the party against whom the motion is directed, tends to sustain his cause of action, the motion should be overruled, even though conflicting evidence may appear in the record. *Kristufek v. Rapp* 343

22. An instruction, which places upon the defendant the burden of proving by a preponderance of the evidence "gross negligence or contributory negligence"

on the part of the plaintiff in order to establish the defense of contributory negligence, is error. *Kristufek v. Rapp* 343

23. An instruction, which correctly advises the jury that plaintiff must prove all the material elements of his case by a preponderance of the evidence and that if it fails to so establish any one of them the verdict should be for the defendant, is not erroneous in that it fails to inform the jury as to what their verdict should be if the evidence was evenly balanced. *Kristufek v. Rapp* 343
Danner v. Walters 506

24. The instructions of the trial court should be confined to the issues presented by the pleadings and the evidence. *Becks v. Schuster* 360

25. Where different minds may reasonably draw different conclusions or inferences from the evidence or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury. *Becks v. Schuster* 360

26. Instructions given by the trial court defining the expression "beyond a reasonable doubt," and on the presumption of innocence, were not prejudicially erroneous. *Daughterty v. State* 376

27. It is not error to refuse requested instructions when the substance of them is given by the court in its instructions to the jury. *Daugherty v. State* 376

28. Evidence examined and held sufficient to sustain a verdict of guilty of the crime of larceny. *Daugherty v. State* 376

29. A motion for judgment on the pleadings admits facts well pleaded or admitted, but does not admit conclusions of law. It is only where, upon statements in the pleadings, one party is entitled by law to judgment in his favor that judgment should be so rendered by the court. *Gilbert v. First National Bank* 404

30. One having an interest in the result of pending litigation may intervene as a matter of right. *Gilbert v. First National Bank* 404

31. An intervener must factually plead some interest in the subject matter of the litigation as distinguished from a mere denial of the rights of plaintiff or defendant. *Gilbert v. First National Bank* 404

32. The interest in a matter in litigation which will authorize a person to so intervene must be such a

direct and immediate interest that the person or persons seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. *Gilbert v. First National Bank* 404

33. An interest authorizing intervention must be one arising from a claim to the subject matter of the action or some part thereof or a lien upon the money or property or some part thereof, as distinguished from an indirect, remote, or conjectural interest in the result of the suit. *Gilbert v. First National Bank* 404

34. An intervener who is not an indispensable party cannot change the position of the original parties or change the nature and form of the action or the issues presented. *Gilbert v. First National Bank* 404

35. An intervener is ordinarily entitled to present only issues, as distinguished from facts, which sustain or oppose the respective contentions of the plaintiff and defendant or either of them. *Gilbert v. First National Bank* 404

36. It is improper to allow the cross-examination of a witness to be extended beyond the facts and circumstances connected with matters testified about on direct examination. *Zimmerman v. Lindblad* 453

37. Where testimony is given by a witness on direct examination, from which an inference of fact arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut that inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right. *Zimmerman v. Lindblad* 453

38. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and the evidence, whether requested to do so or not. *Nelson v. Wiepen* 458

39. Under the Uniform Declaratory Judgments Act, an issue of fact may properly be submitted for determination by a jury. *Hawkeye Casualty Co. v. Stoker* 466

40. If an instruction is reasonably sufficient and not incorrect as to law or fact, a party may not be heard to complain of its insufficiency or inadequacy in the absence of a request for a more specific instruction. *Hawkeye Casualty Co. v. Stoker* 466

41. Physical facts are not sufficient for refusal to submit a case to a jury as against the testimony of wit-

nesses unless they are demonstrable to a degree that reasonable minds cannot disagree as to their existence, and agree with the known and immutable laws of physics, mechanics, or mathematics. *Danner v. Walters* 506

42. Where there is a reasonable dispute as to the physical facts, the conclusions to be drawn therefrom are for the jury. A verdict based thereon will not be disturbed unless clearly wrong. *Danner v. Walters* 506

43. A witness may describe the marks that he observed near the place of an accident. The inference to be drawn from such testimony is solely the province of the jury. *Danner v. Walters* 506

44. Instructions are to be considered together to the end that they may be properly understood. If as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. *Danner v. Walters* 506

45. A judgment will not be set aside because a more accurate statement of the law might have been made when from a consideration of the instructions as a whole no prejudicial error appears. *Danner v. Walters* 506

46. Upon motion for directed verdict at the conclusion of plaintiff's evidence, the motion must be treated as an admission of the truth of all of the material and relevant evidence admitted and all proper inferences to be drawn therefrom. *Cartney v. Olson* 546

47. In an action for money lent, evidence was sufficient to make a prima facie case for the jury. *Cartney v. Olson* 546

48. An admonition each time the jury is permitted to separate is not required. *Sundahl v. State* 550

49. Although it is better to admonish in the language of the statute substantial compliance therewith is sufficient. *Sundahl v. State* 550

50. Where a defendant elects not to interrogate prospective jurors as to whether or not they have read a newspaper article before trial, and it develops that one juror had read the article and others did so during the trial, the defendant waives the prejudice, if any, where objection is made for the first time on motion for new trial. *Sundahl v. State* 550

51. A party is not permitted, without objection, to take the chances of a favorable result and then, if disappointed, for the first time complain. *Sundahl v. State* 550

52. In deciding the correctness of a ruling on a demurrer to a pleading, only allegations of fact in the pleading to which it is directed may be considered. *Todd v. Board of Educational Lands and Funds* 606
53. Where defendant does not adduce any proof, all facts which the evidence on behalf of plaintiff tends to prove will be treated as established for the purposes of a prima facie case in plaintiff's favor. *Archer-Daniels-Midland Co. v. Board of Equalization* 632
54. Where voluntary intoxication is interposed as a defense in a criminal case involving deliberation, premeditation, and the formation of intent, the court may instruct on the effect of intoxication on the ability to form an intent. *Tvrz v. State* 641
55. Where the trial court on its own motion instructs the jury as to the defense in a criminal case, it is not required to repeat in another form any such instruction or instructions at the request of the defendant. *Tvrz v. State* 641
56. Where purported statements of a defendant in a criminal case are testified to by witnesses that are not material proof of the crime charged, it is not error to refuse to give an instruction that such evidence should be received with caution because of unintentional alteration of words or expressions by the witness. *Tvrz v. State* 641
57. In a criminal case no presumption flows from the use of a deadly weapon where proof of guilt including the element of malice is dependent upon the evidence given by eyewitnesses. *Tvrz v. State* 641
58. It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. *Krepcik v. Interstate Transit Lines* 671
59. A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence, and a failure to do so is prejudicial error. *Krepcik v. Interstate Transit Lines* 671
60. It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. This rule applies to the affirmative defense of contributory negligence. *Krepcik v. Interstate Transit Lines* 671
61. Where specific charges of contributory negligence are pleaded and supported by proof, the instructions should submit those specific charges to the jury for

its determination. To fail to do so, whether or not requested to do so, is error. *Krepcik v. Interstate Transit Lines* 671

62. A motion for a directed verdict, although joined in by all parties to an action, raises only questions of law and does not constitute a waiver of a jury trial. *In re Estate of Coons* 690

63. Whether a judgment will be directed or a new trial granted under the act authorizing judgment notwithstanding the verdict involves a judicial discretion based upon the record. The purpose of the act is to serve the ends of justice and not to defeat them. *In re Estate of Coons* 690

64. In considering a motion for a directed verdict or to dismiss on the ground that a cause of action has not been proved, all competent evidence adduced by plaintiff together with all reasonable inferences to be drawn therefrom must be accepted as true. *Frerichs v. Eastern Neb. Public Power Dist.* 777

65. The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt. *Phillips v. State* 790

66. It is the province of the jury to determine the sufficiency of circumstantial evidence. If the facts proved cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. *Phillips v. State* 790

67. 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, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. *Phillips v. State* 790

68. When complaint is made of the refusal to give an instruction, the burden is upon the party complaining to show not only that he was probably prejudiced by such refusal, but also that the entire instruction was correct as a proposition of law and applicable to the facts in evidence in the case. *Phillips v. State* 790

69. An instruction will not be held to be prejudicially erroneous merely because of a harmless imperfection which cannot reasonably be said to have confused or

misled the jury to the prejudice of the party complaining. *Phillips v. State* 790

70. The word "or" when used not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same result, states but a single ground, and not the alternative. *Phillips v. State* 790

71. It is reversible error for the court to include, in its instructions to the jury, issues found in the pleadings but which have not been supported by any evidence. *Weisenmiller v. Nestor* 839

72. When on direct examination an objection to a question is interposed by the adverse party and sustained, there must be an offer of proof in order to present the ruling to the Supreme Court for review. *Huckfeldt v. Union Pacific R. R. Co.* 873

Trusts.

1. As a trustee of the public school lands and the income derived therefrom, the state is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244

2. A breach of the duties and functions imposed upon the state as a trustee by virtue of its constitutional status as such is a violation of the Constitution itself. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244

3. The Legislature is authorized to provide by statute the terms upon which the public school lands of the state may be leased, but such terms must be consonant with the duties and functions of a trustee acting in a fiduciary capacity. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244

4. The state as trustee of the public school lands owes the beneficiaries of the trust its undivided loyalty and good faith, and its acts must be in the sole interest of such beneficiaries. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244

5. An act of the Legislature dealing with trust property of which the state is the trustee constitutes a breach of trust where it appears that it substantially benefits a special class of persons at the expense of the trust estate. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244

6. A legislative act which fixes the valuation of the public school lands of the state on an arbitrary

basis without regard to its fair market value and requires the Board of Educational Lands and Funds to renew the leases of existing lessees on such basis is violative of the duties of the trustee in conferring special benefits on such lessees to the detriment of the beneficiaries of the trust. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244

7. It is the duty of a trustee to obtain a maximum return to the trust estate from the trust properties under its control, subject to the taking of necessary precautions for the preservation of the trust estate. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244

8. The loss of maximum income properly permitted by a trustee must bear a reasonable relation to the risks sought to be avoided. A trustee may not permit an unreasonable loss of income in protecting the trust res where the loss is out of all proportion to the risk and where the protection of the trust res is, or can be, otherwise amply guarded against. *State ex rel. Ebke v. Board of Educational Lands & Funds* 244

Usury.

1. To constitute usury it is essential that interest in excess of the legal maximum be exacted in consideration of the loan. *Loucks v. Smith* 597

2. To constitute usury, there must be an agreement by which the lender receives or reserves a greater rate of interest than the law allows. There must be an intent on the part of the borrower to give and of the lender to receive interest in excess of the legal limit. *Loucks v. Smith* 597

3. In order to constitute usury, there must be (1) a loan, express or implied; (2) an understanding between the parties that the money lent shall or may be returned; (3) a greater rate of interest than is allowed by law shall be paid or agreed to be paid; and (4) a corrupt intent to take more than the legal rate for the use of the money loaned. *Loucks v. Smith* 597

4. The intent which is necessary to constitute usury is not a specific intent to violate the statute but an intent to exact payments which exceed the amount of interest allowed by the statute. *Loucks v. Smith* 597

5. To determine whether all of the elements constituting usury are present the court will disregard the

form which the transaction may have taken and look only to its substance. If all the elements are present the transaction will be condemned as usurious but if any one of the elements is lacking the transaction is not usurious. *Loucks v. Smith* 597

Vendor and Purchaser.

1. Unless otherwise agreed, it is implied in a contract to convey real estate that a good or marketable title will be conveyed. *Master Laboratories, Inc. v. Chesnut* 749
2. Options are strictly construed and are not extended beyond the express provisions thereof. *Master Laboratories, Inc. v. Chesnut* 749
3. An offer to buy or sell real estate must be unconditionally accepted. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but is a counter proposition. *Master Laboratories, Inc. v. Chesnut* 749
4. Where nothing is said as to the character of the deed by which the property is to be conveyed under an option for the sale of real estate, a purchaser is entitled to a good or marketable title, but it is not necessary that the conveyance be by warranty deed. *Master Laboratories, Inc. v. Chesnut* 749
5. If an option and its acceptance are relied upon as a contract to convey real estate, the burden is upon the optionee to establish that his acceptance was unconditional. If the acceptance demands a warranty deed when the character of the conveyance to be made is not specified in the option, it is insufficient as an acceptance. *Master Laboratories, Inc. v. Chesnut* 749
6. Courts of equity will decree a strict foreclosure of land contracts only under peculiar and special circumstances. Applications of that character are addressed to the sound legal discretion of the court, and they will be granted in cases where it would be inequitable and unjust to refuse them. *Ruhl v. Johnson* 810

Venue.

A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless an abuse of discretion is disclosed. *Sundahl v. State* 550

Waters.

1. An adjudicated appropriation of the waters of a stream for irrigation purposes is a vested property right which is subject only to the law in existence at the time the right was acquired and to such reasonable regulations subsequently adopted by virtue of the police power of the state. *State v. Birdwood Irrigation District* 52
2. A use of water for irrigation purposes in this state under an appropriation made prior to 1895 is not limited in quantity except that it must be within the limits of the adjudicated appropriation, that it must be for some useful and beneficial purpose, and that it must not exceed the least amount of water that experience indicates is necessary in the exercise of good husbandry for the production of crops. *State v. Birdwood Irrigation District* 52
3. The state may regulate and control the use of its public waters for irrigation by virtue of its police power to prevent waste, to protect against unlawful diversions, and to enforce all adjudicated water rights in accordance with their terms. *State v. Birdwood Irrigation District* 52
4. One may not divert more water even under a valid appropriation than he can put to a beneficial use, and when the appropriator ceases to use it for such purpose the right ceases. The irrigation laws of this state, including the Raynor Act of 1889, are declaratory of this principle of the common law. *State v. Birdwood Irrigation District* 52
5. A statute providing for the forfeiture of a water right, after notice and hearing, where it appears that the water appropriation has not been used for some useful or beneficial purpose, or having been so used, has ceased to be used for such purpose for three years or more, constitutes a valid exercise of the police power of the state. As such it is valid as to past as well as to future appropriations. *State v. Birdwood Irrigation District* 52
6. The application of water to a beneficial use operates as a condition subsequent which in fact fixes the extent of the right originally acquired. *State v. Birdwood Irrigation District* 52
7. The power of the state to cancel the whole of an appropriation for irrigation purposes for nonuser carries with it the right to cancel a part thereof for nonuser. *State v. Birdwood Irrigation District* 52

8. Where an adjudicated appropriation describes the lands to which the water is to be applied, lands not included within such description have no rights thereunder. *State v. Birdwood Irrigation District* 52
9. Where an irrigation district acquires an appropriation for the purpose of serving particular lands, lands outside such district can gain no right to water under the appropriation except in the manner provided by statute. *State v. Birdwood Irrigation District* 52
10. The method provided by statute for bringing lands within an irrigation district is exclusive. *State v. Birdwood Irrigation District* 52
11. A change in locational use of appropriated waters for irrigation purposes can be made only in the manner provided by statute. *State v. Birdwood Irrigation District* 52
12. The purpose of an irrigation district is to furnish water for irrigation purposes to be usefully and beneficially applied to lands within the district. The appropriation of the district is dedicated to the lands within the district to which water has been beneficially applied and which have not come within the provisions of the nonuser statute. *State v. Birdwood Irrigation District* 52
13. An irrigation district may not deprive landowners in the district of the continuing benefit of its dedicated use without the consent of the landowner and the approval of the Department of Roads and Irrigation. *State v. Birdwood Irrigation District* 52
14. A landowner outside the district may not gain a right to use the irrigation waters of the district for irrigation purposes unless he be brought into the district in the manner provided by statute. *State v. Birdwood Irrigation District* 52
15. To constitute a watercourse the size of a stream is not material. It must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous. *McGill v. Card-Adams Co.* 332
16. The flood plane of a watercourse is regarded as a part of the channel and the water flowing within the flood plane is characteried as floodwater. *McGill v. Card-Adams Co.* 332
17. A stream which is accustomed to extend itself beyond its banks in times of high water and to flow

over the adjacent lands in its flood plane in a broader stream retains its character as a live stream, and the law relating to floodwaters applies. *McGill v. Card-Adams Co.* 332

18. The flood channel must be considered as a part of the channel of the stream and no structures or other obstructions can be placed in its bed which will have a tendency to dam the water back upon the property of upper riparian or adjacent owners. *McGill v. Card-Adams Co.* 332

19. The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another. *McGill v. Card-Adams Co.* 332

20. Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors. *McGill v. Card-Adams Co.* 332

21. Injunction is the proper remedy to prevent the arresting of flow of surface water. Equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief. *McGill v. Card-Adams Co.* 332

22. The upper owner of land has the right, without interference, to have the flow of surface water follow along a well-defined watercourse from his land. *McGill v. Card-Adams Co.* 332

23. An owner of land may, without liability in damages, drain the same in the general course of natural drainage by constructing and maintaining in a reasonable and proper manner, and wholly on his own land, an open ditch or tile drain, discharging a reasonable quantity of water therefrom into a natural watercourse upon his own land or into a natural drainway thereon, whereby such water may be carried into some natural watercourse. *McGill v. Card-Adams Co.* 332

24. Where a substantial amount of water from another source or sources has been added to the water for

which defendant is liable and the combined waters have caused the damage, it is incumbent upon the plaintiff to establish either that his damages would have occurred from the waters for which defendant is liable, or to establish the amount of his damage that had been caused by the waters for which defendant is liable. *McGill v. Card-Adams Co.* 332

Wills.

1. A person who understands the nature of his acts, the extent of his property, the proposed disposition of it, and the natural objects of his bounty, is competent to make a will. *In re Estate of Fehrenkamp* 488
2. A witness, in giving his or her opinion as to mental capacity of a testator, must have in mind whether or not the testator understood the nature of the acts, knew the extent of the property, understood the proposed disposition, and knew the objects of the bounty. *In re Estate of Fehrenkamp* 488
3. The question of testamentary capacity relates exclusively to the time when the will was made. Although competent evidence of the testator's condition of mind at other times is admissible, it is received only to assist in revealing his state of mind at that time. *In re Estate of Fehrenkamp* 488
4. Whether or not a testator was justified in making the provisions of a will is of no concern to the courts, provided the testator had the mental capacity to make a valid will. *In re Estate of Fehrenkamp* 488
5. In a will contest on the ground of undue influence the burden is on the contestant to prove by a preponderance of the evidence (1) that the testator was a person who would be subject to such influence, (2) that there was opportunity to exercise such influence, (3) that there was a disposition to exercise such influence, and (4) that the result was the effect of such influence. *In re Estate of Fehrenkamp* 488
6. Undue influence cannot be inferred alone from motive or opportunity. There must be evidence, direct or circumstantial, to show that undue influence not only existed, but that it was exercised at the very time the will was executed. *In re Estate of Fehrenkamp* 488
7. Mere suspicion, surmise, or conjecture is not enough to warrant a finding of undue influence. There must be a solid foundation of established facts upon

which to rest an inference of its existence. *In re Estate of Fehrenkamp* 488

8. There may be influences directing the testator's attention to proper obligations which it might be thought ought to be satisfied by testamentary provisions. Such influences may be persuasive and effective, but, so long as not coercive, they are not undue. Circumstances often arise where such conduct is wholly justifiable. *In re Estate of Fehrenkamp* 488

9. In order to invalidate a will, undue influence must be of such a character as to destroy the free agency of the testator and substitute another person's will for his own. *In re Estate of Fehrenkamp* 488

10. In evaluating the testimony and proper inferences tending to establish improper influence, it is permissible to view the entire evidence offered by the contestants as proof of whether or not the evidence is of such a substantial nature as to contain some proof of each of the four essential elements. *In re Estate of Fehrenkamp* 488

11. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict. *In re Estate of Fehrenkamp* 488

12. It is the duty of a proponent in a will contest, in the first instance, to prove the execution of the will and the mental capacity of the testator by evidence sufficient to make a prima facie case. *In re Estate of Coons* 690

13. The evidence of the attesting witnesses to a will, who are available, is indispensable to the proving of a will where such will is contested. *In re Estate of Coons* 690

14. Communications made to an attorney by his client, in the absence of a proper waiver, are inadmissible in a contested probate proceeding to establish the mental capacity of the client to make the will. *In re Estate of Coons* 690

15. An attorney who drafted a will, and was present at the time of its execution, is competent to testify to factual matters concerning its execution. *In re Estate of Coons* 690

16. The personal representative of a testator has no authority to waive for such testator the privilege

prohibiting an attorney from testifying to a confidential communication. *In re Estate of Coons* 690

Witnesses.

1. Rule requiring cautionary instruction as to evidence given by detectives is generally not applicable to public officers who are witnesses. *Fisher v. State* 166
2. A medical expert may properly give his opinion on the question of whether or not defendant in a criminal action knew the difference between right and wrong with reference to the act committed, with his examination and the results thereof as the foundation therefor. *Tvrz v. State* 641
3. The opinion of a medical expert may rest upon any one or more of three bases, namely (1) acquaintance with the party under investigation, (2) medical examination made by the expert, or (3) a hypothetical case stated to the expert in court. *Tvrz v. State* 641
4. Where a medical expert is called upon to render an opinion based upon a hypothetical case stated in court the question must require the expert to assume the truth of the case stated. *Tvrz v. State* 641
5. Where a medical expert is called upon to render an opinion based solely on the observation of a witness while testifying in open court, such witness is not required to assume the truth of the statements made by the witness while testifying. *Tvrz v. State* 641
6. Communications made to an attorney by his client, in the absence of a proper waiver, are inadmissible in a contested probate proceeding to establish the mental capacity of the client to make the will. *In re Estate of Coons* 690
7. An attorney who drafted a will, and was present at the time of its execution, is competent to testify to factual matters concerning its execution. *In re Estate of Coons* 690

Work and Labor.

1. An action based on quantum meruit for labor and materials furnished is grounded upon an implied promise to pay the reasonable value thereof. *Umberger v. Sankey* 881
2. Evidence in an action based on quantum meruit that defendant did not agree to pay the reasonable value of labor and materials furnished does not constitute a material variance with an allegation of the petition

that defendant orally agreed to pay such reasonable value. *Umberger v. Sankey* 881

3. An action based on quantum meruit for labor and materials furnished is not a suit upon an unsettled account within the meaning of statute allowing interest on accounts. *Umberger v. Sankey* 881

4. Interest is properly allowable in an action based on quantum meruit for labor and materials furnished from the date the judgment is rendered. *Umberger v. Sankey* 881

Workmen's Compensation.

1. 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. *Berry v. School District* 787

2. If an employee is injured while absent from the employment for lunch, the injury does not arise out of nor in the course of the employment. *Berry v. School District* 787