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STILLINGER & NAPIER, A PARTNERSHIP, APPELLEE, V. CENTRAL STATES GRAIN COMPANY, INC., A CORPORATION, APPELLANT.

82 N. W. 2d 637

Filed April 26, 1957. No. 34084.

1. **Contracts.** Preliminary negotiations leading to the execution of an integrated agreement of uncertain meaning are admissible for the purpose of determining the intentions of the parties, the conditions existing at the time, and the objects thereby to be accomplished, but not to vary plain terms of the instrument.
2. **Corporations: Trusts.** An officer or director of a corporation occupies a fiduciary relation to the corporation and is treated by a court of equity as a trustee.
3. **Corporations: Fraud.** An officer or director of a corporation, being a fiduciary, is denied business relationship with it without complete and truthful disclosure of all material facts known to him concerning the transaction and the subject matter of it. A material nondisclosure by a fiduciary constitutes a misrepresentation and a fraud.
4. **Conspiracy.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
5. ———. The principal element of conspiracy is an agreement or understanding between two or more persons to do a wrong to or inflict an injury upon another. It involves action and an intent to commit the act which results in the injury.
6. ———. A conspiracy, like other facts, may be proved by direct or circumstantial evidence, and one means of proof is by showing overt acts or representations of the individuals charged with conspiracy.
7. ———. A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must be, proved by a number of indefinite acts, conditions, and circumstances, which vary according to the purpose to be accomplished. If it be proved that defendants, by their acts, pursued the same object, although by different means, one performing one part and another another part, with a view to the attainment of the same object, the conclusion is justified that they were engaged in a conspiracy to effect that object.
8. ———. If a conspiracy between the parties is established, whatever was done in pursuance of it by one conspirator is considered as the act of all and all are liable irrespective of the fact of the extent to which they benefited thereby, since it is sufficient if the proof shows such concert of action in

commission of an unlawful act or such other facts from which a natural inference arises that the unlawful overt act was in furtherance of a common design of conspirators to commit the conspiracy.

9. **Contracts: Damages.** If a construction contract is substantially performed, the damage which the owner is caused by defective workmanship or unsuitable material used is measured by the fair and reasonable cost of remedying the defects.

APPEAL from the district court for Chase County: VICTOR WESTERMARK, JUDGE. *Reversed and remanded with directions.*

Neighbors & Danielson, James L. Macken, and *Beatty, Clarke, Murphy & Morgan,* for appellant.

Charles M. Bosley and *Robert C. Bosley,* for appellee.

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

BOSLAUGH, J.

The action of appellee was for the recovery of a judgment of $21,750 and interest against appellant; an adjudication that it was a lien upon its grain storage facilities at Imperial, Nebraska; and for a foreclosure of the lien. The lien claimed included work and material furnished in the construction of grain facilities at Atwood, Kansas.

It was stated in the cause of action of appellee that it, as a subcontractor, on November 16, 1951, made a contract with Western Construction Company, trade name of Jack E. Mack, because of which appellee performed construction work on the Imperial and Atwood facilities; that payments for the period to April 1, 1952, were made; that appellee had not been paid for work done and materials furnished from April 1, 1952, to April 21, 1952; and that the amount owing therefor was the sum of $21,750.

The pleading of appellant upon which the case was tried was the second amended answer and cross-petition. It answered the petition of appellee by an admission of the contract of November 16, 1951, called the subcontract,

between it and Jack E. Mack; by a denial of all other matters set forth therein; and by allegations that the lien claimed by appellee was false and fraudulent, that the claim of lien was filed with dishonest design for the purpose of defrauding appellant and casting a cloud on the title to its property, that the claim of lien included items not furnished to the Imperial construction, and that it failed to give appellant credit for payments made to or received by appellee.

The cross-petition asserted four causes of action:

The first was based on payments made by appellant to suppliers of materials to appellee incident to the construction contemplated by the subcontractor. The suppliers filed liens against the Imperial and Atwood grain facilities and appellant was compelled to pay and discharge them in the sum of $14,303.46 for which it sought judgment against appellee.

The second asserted that appellee contractually warranted its work and material; that it knowingly, in violation of its obligation, installed defective concrete and failed to tighten bolts and braces; and that the damage to appellant because of the former was $15,000 and the damage resulting to appellant because of the latter was $5,000, for the total of which it prayed judgment.

The third claimed that appellee and Jack E. Mack conspired to defraud appellant and as a consequence thereof it was damaged by misapplication by Jack E. Mack in the sum of $22,854.90 which appellant seeks to recover.

The fourth alleged that by overpayment made by appellant to appellee, accomplished by conspiracy and fraud of Jack E. Mack and appellee, it suffered damage in the sum of $16,962.50 for which judgment was asked against appellee.

The cause of action of appellee and the first cause of action of appellant were disposed of by stipulation of the parties and judgments in accordance with the stipulation. They are not involved in this appeal. The district court, after trial of the issues concerning the second,

third, and fourth causes of action, found generally for appellee and against appellant and that the proof failed to establish fraud or conspiracy by or between Jack E. Mack and appellee in any respect as charged by appellant or a proper measure of damages for any of the acts or wrongs alleged to have been committed by appellee. The trial court rendered a judgment dismissing the second, third, and fourth causes of action and denied the motion of appellant for a new trial. The appeal is from the denial of the motion for a new trial.

The numerous persons who participated in the circumstances of this litigation and who were witnesses for appellant may appropriately be identified as a contribution to economy of space and prevention of the necessity of repetition of their given names:

John Ellis, an investment broker associated with Eastman, Dillon & Co., a member of the New York Stock Exchange, and Robert Brady, an employee of that firm, met Jack E. Mack, hereafter referred to as Mack, the former in February and the latter in February or March of 1951. They assisted Mack in procuring financing for the grain storage venture and they presented the proposal of Mack for the venture to Henry Sears & Co. and Payson & Trask.

Henry Sears, a partner, and Stellan C. Wollmar, an associate, of Henry Sears & Co., a private investment company of New York City, each participated in the preliminary negotiations with Mack.

Charles E. Saltzman, a partner of Henry Sears & Co., was a director of appellant when the agreement with Mack was executed.

Frederick K. Trask, Jr., was a partner in Payson & Trask, New York City, a firm employing its own capital in the equity financing field. He participated in the preliminary negotiations with Mack.

James E. McMullen, a partner in Payson & Trask and secretary-treasurer of appellant, had part in the preliminary negotiations with Mack and represented his

firm, Henry Sears & Co., and appellant in their dealings with Mack after the agreement was made. He is a public accountant and has held important assignments with large industrial concerns.

Robert Hellendale and Edgar C. Morrison are each associated with the law firm of Carter, Ledyard & Milburn of New York City and they each participated in the preliminary negotiations, and the drafting of the agreement of appellant with Mack and the stock option agreement.

John D'Antonio, a graduate and practicing engineer, was employed by appellant as its technical representative during the construction of the Imperial and Atwood facilities to perform the duties of engineer specified in the agreement with Mack.

Arven D. Reynolds was employed by Mack from September 1949 to February 1952 as office manager.

Jack E. Mack was president and director of appellant, the contractor for the construction of the facilities, and he was sole owner of Western Construction Co.

The individuals named in the foregoing identification will each henceforth be referred to herein by his surname.

Robert Stillinger was a partner of appellee. He will be identified herein by his surname.

Mack was engaged in the construction of grain storage facilities. The Commodity Credit Corporation needed storage capacity of which there was a shortage and in order to interest persons in construction thereof offered to guarantee rentals therefor during a designated period of time. Mack had occupancy agreements for ten sites in Kansas and Nebraska and desired to build facilities thereon for himself but he had to secure large financial assistance to realize his desires in this respect. He went to New York City in the early part of 1951 seeking financial aid. He talked to Ellis and his associate Brady concerning his proposals and desires. They were engaged to assist Mack in procuring the financing he desired and for their services, if successful, they were to

have 5 percent of the equity stock in the company which would be organized.

The proof is that the words "equity stock" generally refer to the common stock of a corporation which is completely at the risk of the business and which obtains its reward only through the earnings of the business the corporation conducts; and that the term "senior financing" refers to forms of financing senior to the common stock and includes both preferred stock and loans made to the company. Ellis and Brady told Mack that equity investors would exact between 40 and 60 percent of the equity stock and probably some evidence of seniority for the money they contributed. Mack proposed to erect the facilities at cost without money profit but would get his compensation in the form of common stock. He would thus avoid high taxes on ordinary income and attain a position to realize a long-term capital gain.

Ellis prepared a memorandum designated "A Grain Storage Proposal." It stated Mack would take his profit in the form of common stock in the new corporation. It was examined and approved by Mack and was sent to several venture capital groups including Henry Sears & Co. and Payson & Trask. There were negotiations with the two firms last named beginning in May 1951. They were interested in contributing equity money but a firm commitment of senior financing had not been secured. The Equitable Life Assurance Society of New York City seemed to be a probable contributor of senior money. It was explained to it that the advantage of the proposal of Mack resulted from the fact that he was to do the construction work at cost and that the facilities would be completed at a very low competitive cost. A conference was held on June 6, 1951, attended by representatives of The Equitable Life Assurance Society, Henry Sears & Co., Payson & Trask, Ellis, Brady, Mack, and his counsel. The Equitable Life Assurance Society had approved a 2-million-dollar mortgage loan but there

was an unsolved problem. The Federal Reserve Board had in March 1951 adopted a regulation which limited the amount of a mortgage loan to 50 percent of the cost of the security. It was not known whether the Federal Reserve Board would construe the cost of security in this instance as the cost for which Mack offered to build the storage or the cost as it would be if normal profit in cash was taken by the contractor. It did not develop that this could be ascertained in advance. The Equitable Life Assurance Society shortly thereafter withdrew and the ten-site storage proposal was not realized.

The preliminary negotiations incident to the execution of an integrated agreement of uncertain meaning are admissible for the purpose of ascertaining the intentions of the parties, the conditions present when the writing was made, and the purposes intended to be accomplished. The contract between appellant and Mack does not expressly state that he was to build the facilities at cost but it consists of two writings, a construction contract and a stock option agreement, which must be interpreted together. The preliminary negotiations establish beyond doubt that the agreement was that Mack was to build the storage structures at cost and that appellant in consideration therefor was to issue to Mack up to 40 percent of its equity stock at a nominal cost without obligation on his part to contribute to senior money. This court has recognized and applied the doctrine of admissibility of preliminary negotiations subject to the limitation that plain terms of the writing resulting therefrom may not be varied. There is no variation of plain terms involved in this case. Nebraska Hardware Co. v. Humphrey Hardware Co., 81 Neb. 693, 116 N. W. 659; Wilderman v. Watters, 149 Neb. 102, 30 N. W. 2d 301; Sofio v. Glissmann, 156 Neb. 610, 57 N. W. 2d 176; Restatement, Contracts, § 242, p. 341.

A short time before August 24, 1951, Mack informed Ellis and Brady that he had a more limited proposal to make. The sole difference between his first proposal

and his second one was size. A construction-at-cost plan was inherent in and common to both. Substituted for ten facilities with a storage capacity of about 7 million bushels in the first were two in the second with about 2 million bushels of storage capacity. The second proposal contemplated a cost of about $400,000. Mack was asked to put the proposal in writing. Ellis and Brady interviewed Wollmar who said he was interested in exploring the new development. Mack went to New York later and had with him documentation to support his cost estimates. He had a telegraphic bid of appellee as a proposed subcontractor of much of the work which was used by Mack to obtain the execution of the prime contract. The circumstances point quite clearly to the participation of appellee very early in the fraudulent acts and pattern established by evidence of later additional facts.

The agreement between appellant and Mack was made and executed November 9, 1951. It consists of two instruments, the prime construction contract and a stock option agreement. These must be considered and interpreted as one. They were made at the same time, concerned the same subject matter and undertaking, and one was signed as a condition of the signing of the other. Nebraska Hardware Co. v. Humphrey Hardware Co., *supra;* Campbell v. Ohio National Life Ins. Co., 161 Neb. 653, 74 N. W. 2d 546. Appellant was organized to accomplish the business purposes of the parties. Mack was elected a director and president of the newly formed corporation. From the inception of the life of appellant he occupied a fiduciary relationship to it and he must be treated as a trustee. Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393; Beaumont v. Folsom, 136 Neb. 235, 285 N. W. 547; Duffy v. Omaha Merchants Express & Transfer Co., 127 Neb. 273, 255 N. W. 1; Pepper v. Litton, 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281. Mack, as a fiduciary, was prohibited from business relationships with the corporation of which he was a director and

chief officer without complete and truthful disclosure. Any nondisclosure by him was, in the circumstances of this case, a material misrepresentation and fraud. Rettinger v. Pierpont, *supra*. He was, as a fiduciary, obligated to conduct himself by the strict standards of rectitude that bind a trustee. Meinhard v. Salmon, 249 N. Y. 458, 164 N. E. 545, 62 A. L. R. 1. The representations of Mack that he would construct the storage structures at cost, that his obligations to appellee were a definite amount, and his subsequent clandestine profits and dealings with appellee constituted fraud as a matter of law. Keystone Surgical Supply Mfg. Co. v. Bate, 187 Pa. 460, 41 A. 299.

Appellant opened an account with The First State Bank of Scottsbluff December 7, 1951, and deposited $109,956. The deposit was to be used by Mack to pay obligations incurred by him in the construction of the grain storage facilities and this and other amounts that were later deposited in the account of appellant were placed therein upon the representation that Mack had incurred obligations on that account. Mack testified that to obtain additional funds he would certify to D'Antonio the expenditures he had incurred and based thereon D'Antonio would make a certificate, present it to the appellant, and it would then make funds available for the use of Mack by placing deposits in its bank account. Mack had authority to withdraw funds to pay the cost of construction of the facilities. On December 7, 1951, Mack had 2 cents in his bank account which appeared in the records of the bank as Western Construction Company, trade name for Mack. On that date he transferred $50,000 from the bank account of appellant to his own bank account. His account was on that date debited with the sum of $26,682.49. This entire amount, except the opening balance of 2 cents and a payment of $500 to Fairbanks Morse, was converted and misapplied by Mack. The payment of two personal loans in the sum of $25,000 was included in the amount debited to

his account that date. The result was that Mack misapplied $26,182.49 the day the account of appellant was opened.

The account of Mack was debited with a $28,462.50 payment to appellee December 12, 1951. Mack transferred another $50,000 December 10, 1951, to his account from the account of appellant. The deposits in the account of Mack from sources other than appellant were $1,164. It is certain that the $28,462.50 payment to appellee came from the funds of appellant and not from funds of Mack. Appellee has not accounted for the payment to it of the $28,462.50.

Mack sent D'Antonio a letter, dated February 5, 1952, to which were attached statements of his accounts with appellee and various suppliers. He stated therein that these accounts were "accurately established from records." He represented thereby that he had paid appellee, the subcontractor, on December 4, 1952 (1951), $34,426.25 and on January 15, 1952, $17,891.15, a total of $52,317.40. Mack, when he was asked the purpose of sending this letter to D'Antonio, stated it was to receive funds. The construction contract made it the duty of Mack to furnish D'Antonio all vouchers, invoices, and receipts required by him to perform his duties as engineer for appellant. The contract made it the duty of D'Antonio to determine the amounts expended or obligations incurred by Mack and to certify to appellant the findings he made in the exercise of his duties. Mack was bound to furnish complete and truthful information to D'Antonio and he was strictly obligated to make certificates based thereon. Each of them knew the obligation of the other because the contract clearly expressed it and conversations with Mack had discussed it. Mack knew that the account of appellee enclosed with the letter of February 5, 1952, was false. The letter was dictated by Mack and written by Reynolds, the office manager of Mack. He testified he knew the representation made by the letter concerning the account of ap-

pellee was false and that the amount paid appellee to that time was only about $28,000; and that Mack told Reynolds at the time the letter was written that the purpose of inflating the accounts was to enable Western Construction Company to make a profit on the Central States construction job. Mack had previously told Reynolds that he was putting up the facilities at cost for the figure he had submitted in New York.

D'Antonio would not make and execute a certificate on the statement of Mack of his payments to appellee. He refused to do so until written evidence from appellee was secured and submitted. Mack was advised after receipt of his letter of February 5, 1952, that it did not satisfy the requirements of the contract and no further advances could be made by appellant until a receipt from appellee was furnished. On the date of the letter Mack had paid appellee $29,462.50. The letter represented that he had paid appellee $52,317.40 as of that time. Concealment of a discrepancy of $22,854.90 was a pressing problem. The plan adopted by Mack was to knowingly and fraudulently misrepresent the facts. Reynolds testified that he heard Mack request suppliers and subcontractors to furnish him receipts showing they had been paid more money than they had actually received. Appellee was one to whom the request was made. It complied and furnished Mack with a confirmatory statement addressed to appellant in which payment of $52,317.40 is shown to have been made by Mack to appellee. The significance and importance of this writing justifies setting it out, with omission of the letterhead:

"Central States Grain Co. 12 Feb., 1952
Scottsbluff, Neb.

Att'n Mr J. H. Mack, President

Gentlemen:

Anent our contract for construction of grain storage units at Atwood and Imperial, our records show the following current position:

Total Contract $137,705.00

1st Payment	$34,426.25	
2nd "	17,891.15	52,317.40
Balance Due		$ 85,387.60

Yours truly
STILLINGER-NAPIER
T. D. Napier"

Mack wrote a letter to D'Antonio dated February 13, 1952, in which he said he had talked with Tom Napier that morning by telephone and he was sending his statement which would be forwarded as soon as it was received by Mack. He said: "I think that this will once and for all clarify the issue of money disbursements. * * * Without a doubt Jim (McMullen) was absolutely right in his insistence for this documented data * * *."

When Mack had paid appellee but $29,462.50 but represented he had paid $52,317.40 and thereafter secured from appellee a written formal statement directed to appellant that Mack had paid appellee the larger amount, consisting of two items, it should be considered as established that appellee and Mack acted in fraudulent concert to defraud appellant. It may not be considered a mere coincidence that such a fraudulent figure could have been severally adopted. Such a situation convincingly speaks of a willful design and a mutual understanding of conspirators.

A conspiracy is defined in Rettinger v. Pierpont, *supra*, in this manner: "A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. * * * The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury."

In Trebelhorn v. Bartlett, 154 Neb. 113, 47 N. W. 2d 374, the court said: "A conspiracy, like other facts,

may be proved by direct or circumstantial evidence, and 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. * * * 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, so that if damages are shown to have resulted to plaintiff from such acts or representations of defendants or any of them, then a judgment against such defendants may be sustained without establishing a conspiracy among them all."

The court said in Marsh-Burke Co. v. Yost, 98 Neb. 523, 153 N. W. 573: "A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must be, proved by a number of indefinite acts, conditions and circumstances, which vary according to the purpose to be accomplished. If it be proved that defendants, by their acts, pursued the same object, although by different means, one performing one part and another another part, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object."

Mack, by his manner of testifying, confirmed the conclusion that he had acted deceitfully. When he was asked if he had paid appellee before February 5, 1952, the sum of $52,317.40, he answered: "That I don't know either." He was then asked if that sum was accurately established from his records as disbursements to Stillinger & Napier. His answer was not a model of forthrightness or clarity. Here it is: "I don't know out of that designated payment right there what our profit motive was at that time."

The subcontract with appellee required a total pay-

ment for the construction provided by its terms of $137,705. While Mack was testifying concerning the claimed payment of $52,317.40 to appellee he said he certainly had a profit motive. He was asked to tell how he would accomplish the making of a profit on the subcontract with appellee and he said one way of doing it would be for him to pay appellee less than the total contract price for the work appellee was to accomplish and another way of doing it would be "by refund." He was then pressed for an explanation of how he was going to make a profit out of that subcontract and he then stated: "Well, in the form of refund, which would be the logical way to handle the contract." It seems certain that Mack was determined to get money from appellant by some dishonest method and appellee showed effective willingness to cooperate with him to that end. Mack finally testified that the claim made by him that he had paid appelleee in two payments a total of $52,317.40 before his letter of February 5, 1952, was false. Stillinger also denied payment to appellee of this amount. However, because of the signed statement of appellee of February 12, 1952, which was procured and furnished by Mack to D'Antonio, he executed a certificate relying thereon and Mack was given credit for $52,317.40. Thereby Mack, by the cooperation and misrepresentation of appellee, misapplied and converted the difference between that amount and $29,462.50 which Mack had in fact paid appellee, or the sum of $22,854.90, and appellant sustained damage in that amount. That is the amount of the third cause of action. The recovery appellant seeks in that regard is for the conversion of its own funds by an unfaithful fiduciary who was bound to conduct himself in regard to appellant in the most impeccable manner. He was assisted by appellee and they both participated and cooperated to produce that result. A conspirator is liable for the consequences of a conspiracy without regard to whether or not he is rewarded by benefit from it.

The doctrine is well stated in Warsop v. Cole, 292 Mich. 628, 291 N. W. 33: "There is no question but that the conspiracy between the parties having been once established, whatever was done in pursuance of it by one of the conspirators is to be considered as the act of all, and all are liable irrespective of the fact they did not actively participate therein or the extent to which they benefited thereby. It is sufficient if the proof shows such a concert of action in the commission of the unlawful act or such other facts and circumstances from which the natural inference arises that the unlawful overt act was in furtherance of a common design, intention and purpose of the alleged conspirators to commit the same." See, also, Hutson v. Imperial Royalties Co., 135 Kan. 718, 13 P. 2d 298; Anderson v. Thacher, 76 Cal. App. 2d 50, 172 P. 2d 533. The conclusion is that appellee is liable to appellant for $22,854.90 which Mack misapplied. However, as is developed by later discussion of the case, it was the intention of Mack and appellee to participate jointly and dishonestly in $52,317.40 of the funds of appellant.

Mack was required by the construction contract to furnish D'Antonio with vouchers, invoices, and receipts showing the expenditures and incurred obligations and the engineer was required by that instrument to certify his findings to appellant. It was implicit in these provisions that truthful evidences of expenditures and incurred obligations were contemplated and required.

Appellee, after it commenced construction work as the construction contract intended, submitted progress estimates to Mack for the purpose of obtaining payment for work done by appellee. In his letter of February 5, 1952, Mack referred to the fact that he then had before him a copy of progress estimate No. 1 for concrete and that the amount of it was $11,000. It was dated February 2, 1952. This figure represented all the work which appellee had done on the storage facilities at Imperial and Atwood. No credit was given

for the actual down payment made by Mack to appellee of $29,462.50 or for the purported payment of $52,317.40. The progress estimate No. 1 was paid by Mack in two payments of $5,000 on February 9, 1952, and $6,000 on February 16, 1952. D'Antonio certified these expenditures February 25, 1952.

Thereafter on February 18, 1952, progress estimates Nos. 2 and 3 were submitted in the amount of $10,000 and $5,000, respectively, and they were paid by Mack on March 1 and March 14, 1952.

The progress report No. 4, dated March 3, 1952, detailed the work done at a cost of $34,250, recited the payments made in the amount of the progress estimates Nos. 1, 2, and 3 in the total sum of $26,000, and showed a balance due of $8,250. Mack paid this to appellee.

The progress estimate No. 5, dated March 17, 1952, detailed the payments made on the four previous estimates and claimed a balance due of $5,300 which was paid to appellee by check of appellant signed by McMullen, the treasurer of the corporation.

The progress estimate No. 6, dated April 1, 1952, detailed all work done on the storage facilities at Atwood and Imperial and stated the value thereof as $51,325. It listed each of the five payments made in the respective amounts of the five previous progress estimates constituting total payments of $39,550 and stated a balance of $11,775. This was paid to appellee April 18, 1952, by check of appellant signed by McMullen. The check was endorsed by appellee and it was paid. There was on the back of the check above the signature of appellee the following: "Payee acknowledges full payment of all indebtedness for services, labor and supplies to April 1, 1952, performed or furnished for grain storage facilities at Imperial, Nebraska, and Atwood, Kansas."

Appellee gave what is called estimate No. 7, bearing date of April 18, 1952, to D'Antonio on the morning of April 19, 1952. It included all work done to the latter

date. It set forth in detail the work done by appellee and the cost thereof as $63,825. The deductions therefrom were stated as "Less estimates 1 through 6" $51,325 and it claimed as unpaid for work done from April 1, 1952, through April 18, 1952, $12,500. However, it was stipulated at the trial that the value of the work done by appellee on construction of the storage facilities from April 1, 1952, through April 18, 1952, was the sum of $14,825 and judgment therefor was rendered in this cause in favor of appellee.

The value of the work done by appellee to April 1, 1952, as shown by progress estimate No. 7 prepared by appellee and by other evidence, was $51,325 and appellee was fully compensated therefor by payment to it of the amounts claimed to be due by the first six progress estimates. There should be added thereto the value of the work done after April 1, 1952, which was, as stipulated and adjudicated, the sum of $14,825. Hence the total value of the work done by appellee by virtue of its subcontract was the sum of $66,150. Appellee received $29,462.50 and $51,325, or a total of $80,787.50. Appellee was overpaid in this respect $14,637.50. This is the subject matter of the fourth cause of action.

There is no material dispute in the proof. The facts are convincing that Mack and appellee conspired together to defraud appellant of $52,317.40. It seems beyond doubt that they acted in concert to this end for the gain of each. Mack had the benefit of $22,854.90 by virtue of the admittedly dishonest statement of February 12, 1952, made by appellee. That was an overt act of appellee in accordance with the design of the parties to the conspiracy. Mack showed his appreciation by refraining from requiring appellee to account for the down payment and it intended thereby to obtain an overpayment of $29,462.50. The fact that appellee did not intend to give terminal credit for the down payment is established beyond the area of argument or dispute. If this was not true, why did appellee file a lien against

the storage facilities when the amount it was secreting exceeded the amount of the asserted lien.

There is no conflict in the evidence that appellee installed defective concrete in the storage facilities of such character and under such conditions that it was unsuitable for the purpose intended and required; that it was necessary to remove and replace it with proper and suitable concrete; and that the fair and reasonable cost thereof was the sum of $4,009.81 which appellant paid and because thereof it was damaged in that amount. There were many bolts used in the construction of the facilities for fastening braces, putting on aluminum siding, and for other purposes. Appellee inserted the bolts but did not tighten the burrs on them. They were required to be made what is spoken of in the record as "wrench tight." This required going over the entire structures. It was a very considerable undertaking. There were twelve to fifteen men employed to accomplish the necessary result. The fair and reasonable cost was $4,205.46 which was paid by appellant and it was thereby damaged in that amount.

If a construction contract is substantially performed, as was the situation in this case, the damage which the owner suffers because of defective workmanship is measured by the fair and reasonable cost of remedying the defects. Cartwright & Wilson Construction Co. v. Smith, 155 Neb. 431, 52 N. W. 2d 274.

Appellant should have judgment against appellee as follows: On the second cause of action for the sum of $8,215.27 with interest thereon at 6 percent per annum from the date it is rendered; on the third cause of action for the sum of $22,854.90 with interest thereon at 6 percent per annum from February 12, 1952; and on the fourth cause of action for the sum of $14,637.50 with interest thereon at 6 percent per annum from the date the judgment is rendered.

The judgment of the district court as to the second, third, and fourth causes of action of appellant should be

and it is reversed and the cause is remanded with directions to the district court for Chase County to render a judgment herein in favor of appellant and against appellee in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ADOLPH HOHENSEE, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. DONALD SMITH, APPELLANT.

82 N. W. 2d 554

Filed April 26, 1957. Nos. 34086 and 34087.

1. **Municipal Corporations: Evidence.** A municipal court will take judicial notice of the ordinances of the city, and on appeal to the district court from a conviction under a city ordinance the latter court will on a trial de novo take notice of whatever facts the municipal court was required to notice judicially.
2. **Municipal Corporations: Appeal and Error.** On an appeal to the Supreme Court from a judgment of the district court convicting a defendant of a violation of a city ordinance, the same being a review of the proceedings and not a trial de novo, the existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record.
3. ———: ———. The judgment of the district court in such a case will on appeal to this court be accorded the usual presumption of regularity, and it will be presumed, nothing appearing to the contrary, that facts before that court established that the facts set out in the complaint constituted a violation of the ordinance of the city.
4. **Municipal Corporations: Penalties.** A prosecution for the violation of a city ordinance, which does not embrace any offense made criminal by the laws of the state, while in form a criminal proceeding, is, in fact, a civil one to recover a penalty, and a preponderance of the evidence is all that is required to sustain a conviction.
5. **Appeal and Error.** The verdict of a jury based upon conflicting evidence will not be disturbed on appeal unless it is clearly wrong.

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

Louis T. Carnazzo and *C. H. Morris,* for appellants.

Edward F. Fogarty, Bernard E. Vinardi, Neal H. Hilmes, Irving B. Epstein, and *Charles A. Fryzek,* for appellee.

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

CARTER, J.

The defendants were charged in separate complaints with a violation of a city ordinance of the city of Omaha which prohibited the solicitation or collection of money or contributions without first filing a written statement with the superintendent of the board of public welfare stating the purposes for which money or contributions are to be solicited or collected. The jury returned a verdict of guilty on each complaint. The trial court imposed a fine of $200 on the defendant Hohensee and of $100 on the defendant Smith. Each defendant has filed a separate appeal.

These two cases were tried together in the district court by agreement of the parties. They were also consolidated on appeal by stipulation of the parties.

The State called as witnesses two members of the police department and a deputy license inspector. Two were present on June 27 and all were present at the Rome Hotel in Omaha on June 28, 1955, when the defendant Hohensee delivered lectures on nutritional science. Their evidence shows that during the course of these lectures the defendant Hohensee with the assistance of the defendant Smith caused small envelopes to be passed out to those in attendance with the explanation that all persons who placed one dollar or more in the envelope would receive a subscription to Life Span, a magazine written and prepared by Hohensee. The evidence of these witnesses further shows that Hohensee stated that any amounts less than one dollar placed in the envelopes would be used to further the

cause but would not entitle the donor to the magazine. The evidence shows further that a written statement was not filed with the board of public welfare, a fact not disputed by the defendants.

The evidence of the defendants is that the money collected was solely for subscriptions to the Life Span magazine and that no funds were solicited or received for any other purpose. The defendants deny that any statement was made regarding any amount less than one dollar.

The evidence clearly raises an issue of fact for determination by a jury. Since it was sufficient to sustain the verdict at which the jury arrived, the assignment of error that the evidence was insufficient to sustain the verdict is without merit.

It is contended by the defendants that the complaints filed against them do not state an offense in that they do not negative an exception contained in the ordinance under which the complaints were drawn. The ordinance was not offered in evidence and it does not otherwise appear in the record. The action, though criminal in form, is a civil one for the collection of a penalty. For this court to consider the sufficiency of a complaint filed pursuant to a city ordinance, the ordinance must be admitted by the pleadings or offered in evidence. This court does not take judicial notice of municipal ordinances and a failure to properly present an ordinance when the sufficiency of the complaint is questioned precludes our consideration of the sufficiency of the complaint. Steiner v. State, 78 Neb. 147, 110 N. W. 723; Maxwell v. Steen, 93 Neb. 29, 139 N. W. 683; State v. Novak, 153 Neb. 596, 45 N. W. 2d 625. Under the foregoing holdings the district court for Douglas County could properly take judicial notice of the applicable ordinance in a trial of the case de novo. This court, in reviewing the case on appeal, when the ordinance is not properly before us, will not presume error on the part of the district court. It must be shown from the record.

In such a situation the presumption of regularity must prevail. Wells v. State, 152 Neb. 668, 42 N. W. 2d 363; State v. Novak, *supra*. It is the rule also that a complaint based on the violation of a city ordinance will be deemed sufficient on appeal, except in case of a complete failure to state a cause of action. State v. Neimer, 147 Neb. 284, 23 N. W. 2d 81. The facts stated in the complaint are presumed to charge an offense under the ordinance when the ordinance is not properly presented in the record. We fail to find any reason to say that there was a complete failure to state a cause of action. We conclude that the sufficiency of the complaint is not subject to attack.

A prosecution for the violation of a city ordinance, which does not embrace any offense made criminal by the laws of the state, while in form a criminal proceeding, is, in fact, a civil proceeding to recover a penalty, and a preponderance of the evidence is all that is required to sustain a conviction. State v. Neimer, *supra*. The evidence, though conflicting, is sufficient to sustain the verdict of the jury. As to the defendant Smith, the evidence shows that he was a paid assistant of the defendant Hohensee. The jury could properly find that he aided and abetted the defendant Hohensee, and consequently be held to have violated the ordinance as charged. An affirmance of each conviction is therefore required.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. COUNTY OF KIMBALL ET AL., APPELLEES.
82 N. W. 2d 479

Filed April 26, 1957. No. 34093.

1. **Process.** Where the return of an officer recites that he served the summons on which the return is endorsed, the presumption is that he performed his duty in making the service.

2. ———. The rule is well established in this state that an officer's return on a summons is prima facie proof of the service therein indicated.
3. **Judgments.** When a judgment is attacked collaterally, or when a long time after the judgment is entered the correctness of an officer's return is assailed, great faith and credit must be given to the formal return of the officer.
4. **Process.** The return of an officer cannot be impeached except by clear and convincing evidence.

APPEAL from the district court for Kimball County: ISAAC J. NISLEY, JUDGE. *Reversed and remanded with directions.*

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

Heaton & Heaton, for appellees Scott.

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

MESSMORE, J.

The State of Nebraska filed an application on May 5, 1955, in the district court for Kimball County, the purpose of which was to acquire possession of Section 16, Township 16 North, Range 55 West of the 6th P.M., in Kimball County as that section is established by a survey made in accordance with the order of the district court for Kimball County entered in 1933. The resurvey revealed that a portion of land previously thought to lie in the north half section of Section 21 was actually a part of Section 16.

The defendants, Robert E. Scott and Anna R. Scott, by their answer filed in the present action in opposition to the State's application, insofar as pertinent to this appeal, alleged that the order of the court entered on December 7, 1933, was null and void for the reason that the service of process alleged to have been made upon these defendants in the city and county of Denver, Colorado, on the 12th day of June 1933, was in truth and fact never made; that the return of the deputy sheriff on said

service of summons was false; that these defendants were never notified of the pendency of said action filed in 1933 in Kimball County; and that the plaintiff, State, was not entitled to relief prayed for in its application. Defendants prayed that the State's application be dismissed.

The State filed a general denial in reply to the defendants' answer.

On May 2, 1956, trial was had to the court on the State's application, and evidence was presented by the parties. After the trial had concluded, the trial court found and decreed that there had not been due and proper service of process upon the necessary parties defendant at the time of the original hearing in 1933; that the order entered by the court at that time was null and void; and that the present application of the plaintiff should be dismissed. The court did dismiss the State's application.

The State filed a motion for new trial. The trial court overruled the motion for new trial, and from the order overruling the motion for new trial, the State appeals.

On June 7, 1933, the State filed its petition in the district court for Kimball County against certain named defendants. In its petition the State alleged that it was the owner in fee simple of Section 16, Township 16 North, Range 55 West of the 6th P.M., in Kimball County; and that the correct corners and boundary lines of said land had been in dispute for a number of years and the plaintiff desired to have them established and made certain. The State further alleged that the correct corners and boundaries were as established by a survey made in 1928 by H. B. Lawson, deputy state surveyor, pursuant to statutory procedure. The petition further alleged that R. Elmer Scott was the record owner of, and Anna R. Scott his wife was interested in, the northeast quarter of Section 21 in said township and range which adjoined Section 16 on the south.

While the petition sets forth interests of other persons

in connection with the subject matter involved in this action, any interest said persons so named in the petition may have had is not for determination in this appeal. We are concerned in this appeal only with the service had upon the defendants Scott.

The prayer of the petition was that the corners and boundaries of Section 16, Township 16 North, Range 55 West of the 6th P.M., in Kimball County be established by the court.

On June 7, 1933, affidavit was filed for service of summons out of state, showing R. Elmer Scott and his wife to be residents of Colorado and that summons could not be served upon them in the State of Nebraska.

We make reference to exhibit No. 1 which is as follows:

"Summons - Outside of State - District Court - Original

STATE OF NEBRASKA,) The State of Nebraska
) ss. Kimball County.
Kimball County) TO THE SHERIFF OF
County SAID COUNTY, GREETING:

You are hereby commanded to notify R. Elmer Scott and Anna R. Scott, his wife Defendants that they have been sued by The State of Nebraska Plaintiff, in the District Court of the 13th Judicial District in and for the County of Kimball and that unless they answer on or before the 10th day of July A. D., 1933, the petition of said Plaintiff filed against them in the Clerk's Office of said Court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on or before Monday, the 19th day of June, A. D., 1933.

SEAL WITNESS MY HAND and seal of said Court at Kimball Nebraska, this 7th day of June A. D., 1933."

This summons was signed by the clerk of the district court.

"STATE OF NEBRASKA,)
) ss.
Kimball County) I, C. A. Forsling sheriff
County
in and for said County, and State of Nebraska, do hereby appoint the Sheriff or any Deputy Sheriff of Denver County, State of Colorado, to serve this writ." Signed by C. A. Forsling.

We make reference to the return on the reverse side of the summons which reads as follows:
"STATE OF Colorado,)
) ss.
Denver County) R. I. Shores being first duly
County
sworn, deposes and says that he is the identical person who was appointed by the sheriff of Kimball County, State of Nebraska, to serve the within summons, that he served the within summons on the within named R. Elmer Scott and Anna R. Scott, his wife, on the 12th day of June, 1933, by handing to and leaving with each of them in Denver County, State of Colorado, a true and certified copy thereof with all the endorsements thereon." Signed by R. I. Shores and subscribed and sworn to in the presence of a notary public on the 12th day of June, 1933. The fees for the service appear as follows: Service and return $2; mileage $1.05; and notary fees 50 cents.

On December 7, 1933, the trial court found that the plaintiff, the State, was the owner of all of Section 16, Township 16 North, Range 55 West of the 6th P.M., in Kimball County; and that the defendants owned the property adjoining thereto as alleged in the plaintiff's petition. The court further found that the corners recognized by Lawson as original government corners in the northeast corner, the southeast corner, and the southwest corner of Section 16 were not original government corners. The court further found that there were no government corners on Section 16, that the corners and boundary lines of Section 16 were those found by assum-

ing the northwest corner of Section 16 as located in said dependent resurvey to be an established corner and by assuming the original government corners as above mentioned to be the only original government corners within said township and establishing the corners and boundaries of said Section 16 under such assumed state of facts according to the rules of government surveys in effect on that date. The court adjudged and decreed that the boundary line of Section 16 be fixed and adjudicated according to its findings; and that if the plaintiff should locate upon the ground the boundary lines as adjudicated, it might, upon such notice to the defendants, or any of them, as the court might direct, be placed in possession of any part of Section 16 as defined, which was occupied by the defendants.

The result of the resurvey of 1954 was to locate Section 16 so that the boundary lines included approximately 40 acres of land that under the 1928 survey had been a part of Scotts' quarter section. As between the 1928 and 1954 surveys, the Scotts would be deprived of approximately 40 acres of the area of their quarter section of land.

The record discloses that it was stipulated by the parties that the survey made by Hugh Dillon, the State Surveyor, filed and made a part of the State's application in this case, was in direct accord with the findings of the district court for Kimball County and the judgment entered therein December 7, 1933.

It was stipulated that exhibit No. 1, which purports to be the original summons, outside of state, issued for service upon R. Elmer Scott and Anna R. Scott, his wife, in this action under date of June 7, 1933, and the return to such summons on the reverse side of exhibit No. 1 may be admitted and considered without objection in the action.

It was further stipulated that it was the contention of the plaintiff that the defendant Scott was in possession of 39½ acres of land claimed by the plaintiff as being a

part of Section 16; that this action was for the purpose of obtaining possession thereof; and that the defendants denied that the State was the owner of the said 39½ acres, or that said acreage belonged to Section 16.

At this point the State rested its case.

Paul Wilger testified for the defendants that he had lived in Kimball County since 1919, and was familiar with the north half of Section 21, Township 16 North, Range 55, Kimball County. He farmed the north half of Section 21 for Robert Scott whose land was the northeast quarter of Section 21, and farmed John Kelly's quarter section of land located in the northwest part of Section 21, at the same time he was farming a quarter section of land of his own. He further testified that Section 21 is just south of Section 16. He farmed this land from 1919 until 1937. In 1928, this witness personally submitted a petition to cause an election to have the township surveyed. The election was held, and as a result Lawson, a deputy state surveyor, made a survey. This survey located the boundary line and made no change in the boundary line which he had known since 1919.

Anna R. Scott, the wife of R. Elmer Scott and one of the defendants, testified that she had lived in Denver since 1921, and had never lived in Kimball County; that she was married to Mr. Scott in 1926; and that in 1933 she was employed by Doctors Hillkowitz and Freshman, and was also employed as registrar of the National Board of the Registry of Medical Technologists. She further testified that in June 1933, she and Mr. Scott were living in an apartment house located at 1801 Grant Street in Denver, and that she did not receive the summons, exhibit No. 1, at 1:40 p.m., June 12, 1933, which was on a Monday. She further testified that Mr. Scott was an auditor and worked at a different place than she did; that they prepared their breakfast in the apartment, did not go home for lunch, and generally had their evening meal together down town in Denver; and that she and her husband could not have been at the apartment at

1:40 on Monday, June 12, 1933. She testified further that she first heard about this case when the present tenant on their land in Kimball County came to Denver and called her husband, and her husband in turn called her. This was in 1955. She further testified that she worked in the doctors' office from 8:30 a.m. until 5 p.m., and many times after that hour did her other work. She could not account for the particular day of June 12, 1933, but testified that in all probability she and her husband ate dinner down town, the same as any other day. After finishing the evening meal, Mr. Scott would go back to his work and she would return to her work. In 1933, Mr. Scott was working independently as an auditor. She further testified that no deputy sheriff ever handed her a summons notifying her of an action pending in Kimball County; and that she was positive about this fact.

Robert E. Scott testified that he went to Denver in the latter part of 1922, and had resided there since that time; that he had been referred to as R. Elmer Scott; that he and Mrs. Scott own the quarter section of land here involved, that is, the northeast quarter of Section 21, which he acquired in 1918 or 1919; that in 1933, he was doing accounting work for various companies and had several accounts; and that at that time he lived at 1801 Grant Street in Denver. He testified as to the positions his wife held. In June 1933, he was carrying a heavy schedule, working on a supplemental audit for an insurance company in the Central Savings Bank Building. He and Mrs. Scott would leave their apartment around 8:30 a.m. They would only cook their breakfast in the apartment. He could not recall the details of what happened on any specific day as far back as June 1933, but it would be very improbable that he and Mrs. Scott would be at the apartment at 1801 Grant Street in Denver at 1:30 or 1:40 p.m., June 12, 1933. He further testified that no sheriff of Denver County handed him personally a summons with reference to an action pending in Kim-

ball County; and that he never received a summons of any kind. In 1955, he was called by a representative of an oil company who asked him to check with reference to an abstract concerning his land, and regarding the boundaries of the land involved in the law suit in 1933. This witness replied to such representative that there had never been any question about the boundary line as far as he knew, and that he believed there was an error in the abstract. The next time he heard about this matter, the tenant farming his land came to Denver, stopped at his office, and inquired of him why the surveyors were on his property in Kimball County. On May 20, 1955, Mr. Scott made a trip to Kimball to endeavor to find out what the trouble was. He testified that by coincidence that day the town paper had a notice of a hearing to be had in court. That was when he heard about the present action. He further testified that had he received a summons, he and Mrs. Scott would have gone to Kimball, as it is only 175 miles from Denver; and that the boundary line used by his tenant on his quarter section of land is the same as it was when he acquired it in 1918.

A. W. Freshman, a physician, testified by deposition admitted in evidence that his office is in the Metropolitan Building in Denver; that he is very well acquainted with Anna R. Scott and has known her since 1923, before he was a physician and afterwards; that she was employed by his senior partner who has since died, and this employment was at the same office he occupied; that she was his secretary and bookkeeper, and had been at this same office address since 1923 and worked every day except Sunday; that she is employed from 9 a.m., or before, until 5 p.m.; that he had no specific or particular recollection of the date of June 12, 1933; and that the reputations of Anna R. Scott and her husband for telling the truth and being reliable were excellent.

The deposition of John W. Blodgett, chief clerk in the

office of undersheriff of Denver County, Colorado, was admitted into evidence. This witness testified in regard to a certain document on file in his office described as a "jacket" containing the record of service upon the Scotts, which constitutes no part of the summons but is separate and distinct therefrom; that one of the documents in the jacket revealed that on June 12, 1933, at 1:40 p.m., service was made by deputy sheriff R. I. Shores on both R. Elmer Scott and Anna R. Scott; that from observation of the contents of the jacket, under the word "trips" this witness stated that it disclosed that in an effort to make the service three trips were made by a deputy sheriff to 1801 Grant Street, and one trip was made to 1255 South Pearl Street, both in Denver; that there is a tag, which is an exhibit, containing instructions to the deputy sheriff with reference to papers to be served; and that along with the papers to be served, as shown in this exhibit, information was given with reference to where R. Elmer Scott might be found. One such place was 1255 South Pearl Street where it was indicated he was employed as a bookkeeper for the Miracle Products Company, another was the address of his apartment, 1801 Grant Street or 333 East Sixteenth Avenue, and addresses where Anna R. Scott might be found. It required, in this instance, that service of the process must be personal. There were no other records directly concerning the service of process. On cross-examination Blodgett testified that the notation of trips written in pencil was intended as a memorandum to be completed by a deputy sheriff to enable him to make a record of the mileage he had traveled in attempting to make service, for the purpose of determining the fee to be charged; and that such memorandum is valuable to the office for computing the mileage to be charged for making the service. Another document within the jacket was a receipt for $3.55 from the clerk of the district court for Kimball County for payment of fees in connection with the service on the defendants

Scott. Another document in the jacket was a statement sent to the clerk of the district court for Kimball County requesting the payment of such fees. Blodgett further testified that no benefit for fees charged for making service inures to any person working in the sheriff's office, such fees are transmitted to the city and county treasurer.

The State makes the following assignment of error: The district court abused its discretion and erred in holding that there was sufficient proof, or proof of a clear and convincing nature, of a type to justify impeachment of the sworn return of the deputy sheriff of Denver County, Colorado.

The question involved in this appeal is whether or not the evidence is sufficient to impeach the return made on the summons.

In Westman v. Carlson, 86 Neb. 847, 126 N. W. 515, appears language that is applicable to the instant case and recognized in several cases in this jurisdiction, as follows: "The return of the officer is part of the judicial record of the case. It appears to be regular on its face. It shows in addition to the return that the sheriff charged mileage and fees for copies of the summons. He performed his duties under an oath of office and the penalties of an official bond. As to serving the writ and making the return, the presumption is that the officer performed his duty. Parker v. Starr, 21 Neb. 680. The return of a sheriff that he served a summons on defendant can only be impeached by clear and convincing proof. Connell v. Galligher, 36 Neb. 749; Unangst v. Southwick, 80 Neb. 119. This doctrine is essential to the integrity and permanency of judicial records." The court held: "Where the return of a sheriff recites that he served the summons, on which the return is indorsed, the presumption is that he performed his duty in making the service. * * * The return of a sheriff that he served a summons on defendant can only be impeached by clear and convincing proof."

As stated in Unangst v. Southwick, on rehearing, 80 Neb. 119, 116 N. W. 864: "We fear that it would be a dangerous precedent to adhere to a rule which would permit an officer's return to be superseded by such evidence as this. It would offer an opportunity for the practice of fraud and perjury, and the due administration of justice might be considerably hampered by dishonest litigants, who, after making no response to the process of the court, would appear collaterally and defeat the officer's return." However, we do not charge such motives to the defendants in the instant case. We do believe the circumstances in the instant case strongly corroborate the sheriff's return.

As stated in Janous v. Columbus State Bank, 101 Neb. 393, 163 N. W. 327: "When a judgment is attacked collaterally, or when a long time after the judgment is entered the correctness of the sheriff's return is assailed, great faith and credit must be given to the formal return of the officer."

In the case of De Lair v. De Lair, 146 Neb. 771, 21 N. W. 2d 498, this court said: "The rule is well established in this state that a sheriff's return on a summons is prima facie proof of the service therein indicated. * * * The return of an officer cannot be impeached except by clear and convincing evidence."

A review of cases above cited appeared in the De Lair case, together with other cases to which we make reference.

We stated in Connell v. Galligher, 36 Neb. 749, 55 N. W. 229: " 'Upon grounds of public policy, the return of the officer, even though not regarded as conclusive, should be deemed strong evidence of the facts as to which the law requires him to certify, and should ordinarily be upheld, unless opposed by clear and satisfactory proof.' " See, also, Wyland v. Frost, 75 Iowa 209, 39 N. W. 241; Campbell v. Harvard State Bank, 103 Neb. 562, 173 N. W. 587; Ault v. Stewart, 113 Neb. 47, 201 N. W. 639.

The defendants seek to impeach the service in the instant case on the grounds that the service of summons at the place and time shown on the record jacket in the office of the Denver County undersheriff could not have been had upon them on Monday, June 12, 1933, at 1:40 p.m., the reason being that each of the defendants was employed at a different place in Denver; that they were required to leave home early in the morning and return to their home late in the evening; and that neither the defendants nor any other witness could recall the events happening on June 12, 1933, some 23 years ago. The record jacket relating to service on the defendants at 1:40 p.m., June 12, 1933, is not conclusive, it is not sworn to with certainty that the defendants were so served. In any event, this record constitutes no part of the summons or the return thereon. The return of the summons itself does not give the alleged time of service. That testimony was taken from the record jacket. The clerk in the sheriff's office testified that the space referred to in the record jacket with reference to service of summons where the time was written in, was the place for the deputy to make memorandum for his convenience and the convenience of the office in computing mileage, and was not information that was part of the sworn statement of the return. In fact, the service of this summons, insofar as the return thereon is concerned, could have been had on the defendants at any place in Denver County, Colorado.

We conclude that the type of evidence submitted by the defendants is not that of clear, convincing proof necessary to impeach the sworn statement of an officer made in the course of his duty. The trial court had jurisdiction over the defendants and the subject matter of the action at the time the judgment was rendered on December 7, 1933. The trial court erred, as contended for by the State.

The State assigns as error and contends that a judgment which recites that the parties were present in

court, and where the record shows a service and return of summons sworn to by a deputy sheriff, under such circumstances the judgment is not subject to collateral attack to show that the court never had jurisdiction over the defendants. While there may be merit to this assignment of error, in view of our holding we deem it unnecessary to discuss it.

For the reasons given herein, we reverse the judgment of the district court and remand the cause with directions to enter judgment for the plaintiff, awarding to it all of Section 16, Township 16 North, Range 55 West of the 6th P.M., in Kimball County, Nebraska, as established by the resurvey which is a part of the record in this case.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., dissenting.

My disagreement with the court in this case relates not to the rules of law stated but to their applicability here, and if applicable, to the conclusion reached under them. Ultimately the question of the effect of undenied facts is involved.

The rules stated by the court all relate to the service of process by "an officer," the return made, and the presumptions that attach thereto.

The service here involved purports to have been made by a deputy sheriff of Denver County, Colorado. He was authorized to make service under an appointment of the sheriff of Kimball County which was directed to the sheriff or any deputy of Denver County. His authority was limited to the service of that writ. As such he was an agent of the sheriff of Kimball County and not an officer as the term is used in the rules upon which the court relies.

We had such an appointment in Nelson v. Robinson, 154 Neb. 64, 46 N. W. 2d 892. Without discussion we there treated the "private person" making the return as an "agent" of the sheriff of Scotts Bluff County.

This distinction runs through our decisions. For in-

stance in Forbes v. Bringe, 32 Neb. 757, 49 N. W. 720, there was an appointment of a special deputy to serve a writ. We referred to the return sworn to "by the person" who made the service.

The distinction has statutory recognition. Section 25-507, R. R. S. 1943, provides: "The summons shall be served *by the officer* to whom it is directed, who shall endorse on the original writ the time and manner of service. It may also be served *by any person* not a party to the action, appointed by the officer to whom it is directed. The authority of such *person* shall be endorsed on the writ. When the writ is served by a *person* appointed by the *officer* to whom it is directed, or when the service is made out of this state, the return shall be verified by oath or affirmation." (Emphasis supplied.)

Here the Legislature refers to the officer to whom the writ was directed. In this instance that officer was the sheriff of Kimball County. It refers to the "person" appointed by the "officer" to serve the writ. In this instance that "person" was the sheriff, or his deputy, of Denver County. Obviously the sheriff of Kimball County, as an officer, would have no authority to serve the writ in Colorado. Just as obviously his agent would have no authority as an officer to serve the writ.

The distinction does not rest upon the use of alternate words. A "person" serving the writ is required to verify his return on oath or affirmation. Why?

The reason appears in First Nat. Bank v. Anderson, 106 Neb. 204, 182 N. W. 1021, wherein we held: "In performing his official duty the sheriff acted under an oath of office and under the penalties of an official bond. There is a presumption that he performed his duty." The converse of the holding is that the "person" serving the writ is not an officer and not under oath and hence is required to verify under oath or affirmation. The converse of the holding is also that the presumption of the

performance of duty attaches to the "officer" and not to the "person."

Consistent with our statute and decisions other courts have held that the presumption in favor of the return of an officer does not exist where the return is made by a private person specially appointed to serve a writ. See, Simms v. Simms, 88 Ky. 642, 11 S. W. 665; Gardner v. Lincoln Bank & Trust Co., 251 Ky. 109, 64 S. W. 2d 497; Lynch v. West, 63 W. Va. 571, 60 S. E. 606.

Accordingly, it is my view that the court has decided this case on rules of law that are not applicable to the fact situation presented.

Now I go to the court's decision based on the rules it follows.

This action was originally brought in 1933. The Scotts were 2 of 12 individual defendants and there were also a corporate defendant and Kimball County—14 defendants in all. Two defendants, a husband and wife, answered.

The matter went to trial and judgment in 1933. In 1955 the State took its first action to enforce the judgment. The Scotts then answered, presenting the issue that the return of service by the sheriff's agent was false; that they had never been served; and that they had no knowledge of this action until 1955.

The parties made an investigation of the service at Denver. The person making the service was not found and was reported to be deceased. They did find the record in the office of the undersheriff of Denver which the majority recites. That record suggests the time of day of the purported service and either one of two places where the purported service was had. It suggests also that the person making the service did not know the Scotts and that he made three trips to the residence of the Scotts and one trip to the place of business where he had been advised Mrs. Scott was employed. It showed also that there was a charge of $2 for service, $1.05 for mileage, and 50 cents for a notary, or a total of $3.55.

The Scotts appeared at the trial, and submitted to examination and cross-examination. They established without contradiction, and with corroboration, that the service could not have been made at the time and place appearing in the records of the undersheriff's office.

The court brushes this evidence aside as not a part of the summons and return and anyway "the service of this summons * * * could have been had on the defendants at any place in Denver County, Colorado," insofar as the return is concerned. This holding rests on no fact suggested by the record. No one contended at the trial that service was had other than at one of the two named addresses.

The court overlooks the fact that there is a bridge between the records in the undersheriff's office and the return. On the return the charge for service, mileage, and notary is exactly the same as in the undersheriff's records. To that extent the court impeaches the veracity of the person making the return which the court accepts.

But I pass that.

Putting aside the undersheriff's records and the testimony of the Scotts relating thereto, there remains in this record evidence which cannot be brushed aside.

The Scotts also testified that they were not served with summons and had no knowledge otherwise of this litigation. That testimony was given in court, under oath, and subject to cross-examination. It stands unchallenged, uncontradicted, and unimpeached. It goes to service not only at "any place" in Denver County, but "any place" anywhere else.

So the court's decision then rests upon a consideration of the evidence of the Scotts which is found to be of no moment when weighed against the return of the person making the service.

The court recognizes that a return can be impeached "by clear and convincing evidence."

Wherein is the evidence of the Scotts lacking in clar-

ity? The court points out no lack of clarity but by a recital of the evidence shows the full, complete, unequivocal, and unambiguous denial of the Scotts.

Wherein is their evidence not convincing? It can only be on the basis of its rejection as false. Yet the court points out neither falsity nor basis of lack of credibility. The evidence was convincing to the trial court who heard the testimony and observed the witnesses. It is as clear and convincing as was the evidence in De Lair v. De Lair, 146 Neb. 771, 21 N. W. 2d 498, where this court set aside a sheriff's return made as an officer. I shall return to that decision later herein.

It seems that the only basis of rejection is the presumption that the court attaches to the return. The net of the decision, as I see it, is that the court in effect now returns to the old and generally rejected common-law rule that a return cannot be impeached. It would seem futile to try to impeach a return after this decision.

Now I apply another test to the instant decision, and that is the test of equality of litigants. It is a test suggested by the balanced scales cast in bronze in the doors of our courtroom.

How have other cases involving similar fact situations been decided?

I restate the basic fact situation here. The sworn, uncontradicted, unimpeached testimony of the Scotts is held to be outweighed by the return of the officer making the service. The return is challenged as false. The testimony of the Scotts is not.

In Graves v. MacFarland, 58 Neb. 802, 79 N. W. 707, a foreclosure decree, and later a deficiency judgment, were involved. The action was brought in Lancaster County. The sheriff of Antelope County was appointed to serve process on defendant Graves and wife. The return of the sheriff showed personal service upon Mrs. Graves and service upon Graves by leaving a copy at his usual place of residence. The Graves defaulted.

Judgment of foreclosure, and later a deficiency judgment, were entered against Graves. Graves brought an action to enjoin enforcing the judgments on the ground that he had not been served with summons. The agent of the Lancaster County sheriff (sheriff of Antelope County) testified that he served the summons as recited in his return. (There is no such testimony in the instant case.) Three witnesses, one disinterested, testified that the service was not made as returned at the Graves' residence. There this court weighed the evidence as to service at a particular time and place. Here the court puts that evidence aside. There we found on sharply conflicting evidence and contrary to the judgment of the trial court that the defendant had not been served, although the return was supported by the testimony of the person making the service. In the course of the opinion Judge Sullivan wrote: "* * * if service had really been made, it seems quite remarkable that Graves should give no attention whatever to the suit." And so here it seems quite remarkable that the Scotts "if service had really been made" paid no attention to this suit which involved their entire real estate holdings at the time.

I cannot reconcile the instant decision with the decision in Graves v. MacFarland, *supra*.

St. Paul Harvester Co. v. Mahs, 82 Neb. 336, 117 N. W. 702, involved a return made by a deputy sheriff (an officer) of Lancaster County. Default judgment was taken in 1890. Fourteen years later an effort was made to enforce the judgment. The issue of no service was raised. There the deputy sheriff testified that he must have made the service or he would not have so stated in his return. Here there was no such evidence. There the court weighed the evidence contrary to the return and found the return to be false, and sustained the defense. I mention this case because the court here holds that where the service is assailed "a long time after the judgment is entered * * * great faith and credit must

be given to the formal return of the officer." Parenthetically I suggest that a false return does not ripen into a true return by lapse of time.

I now return to the case of First Nat. Bank v. Anderson, *supra*. There the sheriff (an officer) returned the summons showing service at the usual place of residence. It was a foreclosure action. Default judgment was rendered and the property was sold. The defaulting defendants contended that they were not served with summons and had no notice of the suit. The trial court held for the purchaser at the sheriff's sale. We reversed the judgment, holding that the service had not been made. The sheriff testified to sustain his return. The proof tending to impeach his return was contradicted "in some minor particulars." Here the evidence of the Scotts is not impeached in any particular. In the course of the opinion Judge Rose wrote: "It is not likely that owners of land of such value would knowingly and willingly permit it to be sacrificed for the satisfaction of so small an indebtedness." So here it is unlikely that the Scotts would have knowingly and willingly permitted a suit to go by default that involved the title to one-fourth of their landholdings.

I now go to De Lair v. De Lair, *supra*. Six of the present seven members of this court participated in that unanimous decision. The action was one in divorce. The sheriff (an officer) recited in the return of the summons that he made service by leaving a copy at the usual place of residence. The divorce decree was rendered in 1934. Both parties remarried. Ten years later (a long time after the judgment was rendered) plaintiff sought to amend the return by showing service upon the defendant in person. The defendant joined in the motion. The cause was heard on affidavits and depositions. The interested parties testified that the service was made in person. They were supported by friends and relatives. The sheriff testified that his return was in all respects true and correct. We ordered the return

amended, although it was sustained by the testimony of the sheriff. Here the return stands alone—and we hold it must be accepted as true.

I cannot reconcile our decision in the De Lair case with the court's decision here. Interesting also is the fact that in the instant case the court cites the De Lair case for a rule of law and "a review of cases," but does not point out the diametrically opposite results in the De Lair case and the instant case.

I now review the decisions relied on by the court in their chronological order. I point out that in every instance the return was made by an "officer" as distinguished from "a person." I point out also that although we are confronted here with the question of the sufficiency of the evidence as a fact matter, the court does not see fit to mention any of the facts in the decisions upon which it relies.

Parker v. Starr, 21 Neb. 680, 33 N. W. 424, was a foreclosure action which required service upon minors and a guardian or father, and if not found, then upon the mother or person with whom the minors were living. The return showed service upon the minors and the mother. We held the service sufficient on the presumption that "the officer did his duty." The facts recited in the return were not challenged. The case has no factual resemblance to the case at bar.

Connell v. Galligher, 36 Neb. 749, 55 N. W. 229, involved a judgment rendered in 1859. Thirty years later one of the defendants offered evidence attacking the judgment on two grounds. The return showed personal service. The defendant offered evidence that he was not in Douglas County at the time of the purported service. George B. Lake appeared for the defendants "for the purpose of delay, there being no meritorious defense." The defendant contended that Mr. Lake was without authority to appear for him. The defendants were copartners. Mr. Lake testified that he was employed by a member of the firm. During the intervening

30-year period Mr. Lake was for many years a member of this court. We held that the burden of proof was upon the defendant to prove both propositions, and that he had proven neither one. We did not undertake to decide what the result would have been had he proven one and not the other. We held that the "proceedings" sustained the judgment.

Unangst v. Southwick, on rehearing, 80 Neb. 119, 116 N. W. 864, was a foreclosure action. The sheriff's return showed personal service of summons upon the defendant wife. She challenged that service as plaintiff in this action. The court's opinion quotes from this case to the effect that an officer's return cannot be "superseded by such evidence as this." So let's examine the evidence in that case.

There the sheriff's (officer's) testimony supported his return. Here there is no such supporting testimony. But let's go on.

Plaintiff testified that at the time of the purported service she was served with notice of an application for the appointment of a receiver in the same action but was not served with summons. All witnesses agreed that both notice and summons were served on the husband in the action where she was named as a party. It was held: "It seems improbable that he (sheriff) would serve upon the plaintiff only the notice of the application for receiver and make his return showing the service of the summons upon her. He had the opportunity to serve it. In the summons, both the husband and wife were named as defendants. We fear that it would be a dangerous precedent to adhere to a rule which would permit an officer's return to be superseded by such evidence as this."

It is upon that fact situation in the Unangst case that the rule relied on by the court in the instant case was announced applicable to "such evidence" as was there offered. That case is not this case factually.

We finally held in the Unangst case that plaintiff had

received "from the process of the court, actual notice of the pendency of the suit." The evidence other than the return showed the actual notice. In the instant case it does not. In the instant case the court cites no evidence, other than the return of the person serving, to sustain its holding. In the Unangst case the circumstances corroborated the sheriff's return. Here there are no such circumstances.

Westman v. Carlson, 86 Neb. 847, 126 N. W. 515, involved not personal service but service at the usual place of residence. There was no claim of personal service as in the instant case, and accordingly no denial of personal service as in the instant case. Of the three people who could have received the service at the usual place of residence, two were dead when an attempt was made to enforce the judgment 10 years after it was rendered by default. The remaining witness denied knowledge of the service but admitted that the summons could have been handed to either of the others. The decision rests upon the presumption that the officer performed his duty. That is not this case.

The court quotes from Janous v. Columbus State Bank, 101 Neb. 393, 163 N. W. 327. The quote is correct. However, in the next sentence we stated that it had no application to the facts of the case. Of course, that does not alter the rule. There the officer testified not "a long time after the judgment," but "soon after" the purported service was made. He handed the summons to an elderly lady who spoke English very little but did speak German. He told her "as near as I could" that it was a summons. She returned it to him and told him to give it to Joe—apparently a son-in-law, and a principal defendant. We held that what happened did not amount to service without proof that Mrs. Janous received the summons with knowledge that it was the service of a summons. After weighing the "officer's" testimony we held that the summons had not been served and set aside the judgment based thereon. Just where this

case, fact-wise, supports the court's fact conclusion is not at all clear to me.

The court cites but does not quote from Campbell v. Harvard State Bank, 103 Neb. 562, 173 N. W. 587. In this action the officer testified that he made personal service upon the wife who was sued with her husband and identified in the courtroom as the person served. There is no such identification here. The parties appeared by attorneys whose authority was not challenged. We concluded from the evidence that the defendants knew of the action and paid no attention to it because they thought they had no property subject to execution. We did not decide the case on the premise that the service of summons was good. The decision rests upon "a general rule that a court of equity will not set aside a judgment rendered in a case where the party complaining had full notice and knowledge of the pendency of the suit and took no steps to protect his interest at that time."

Ault v. Stewart, 113 Neb. 47, 201 N. W. 639, is cited by the court. This case states a rule of law about which there is no dispute. That the summons was served was not disputed. The question was whether service was had in Scotts Bluff or Sioux Counties. It was good if served in Scotts Bluff County and void if served in Sioux County. It was a fact matter not in anywise comparable to the problem here.

Finally we come to the crux of this case.

The testimony of the Scotts that they were not served would be accepted in any proceeding where that was the fact to be ultimately determined. The court does not refuse to accept the fact here. The court rejects the Scott testimony not because it is not true but because it is not the "type of evidence" necessary to overcome the return. Parenthetically it is the same "type of evidence" that appears in the cases where we have rejected the return showing service. This conclusion of the court relates back to the holding in Unangst v. South-

wick, *supra,* and to the case of Westman v. Carlson, *supra,* wherein we stated that it was "essential to the integrity and permanency of judicial records."

The facts in the two cases have been summarized above. But in those two cases the facts outside the return did not establish its falsity. Here the court holds that the return controls and is superior to the undisputed, unimpeached testimony of the Scotts.

The records of a court should be protected when they speak the truth and should be reformed to speak the truth when they do not. The integrity of the judicial process and the confidence of people in the courts require it. The rules which the court quotes admit the right and duty of a court to make the records speak the truth. But in the application here the truth is denied because it is in conflict with the record.

There is not involved here alone the theory of the integrity of judicial records. Constitutional rights of people to life, liberty, and property, and due process of law are involved.

To sustain a record as superior to those rights is a shocking thing.

DuBois v. Clark, 12 Colo. App. 220, 55 P. 750, is a case where an officer made a return showing personal service. One of the defendants purportedly served moved to vacate a judgment on the ground that service of summons was not made upon him. The trial court denied the motion. On appeal the question was whether if the return was false its falsity could be shown. The court discussed the old common-law rule that the return was conclusive and rejected that rule. It discussed presumptions that attached to a return. It discussed attempted service and the unreliability of a return where the officer did not know the parties to be served or where they could be found (a situation which exists in the instant case). The court then held: "But, aside from all this, section 25 of the bill of rights provides that no person shall be deprived of life, liberty or property,

without due process of law. The legislature has prescribed the process necessary where life or liberty is involved, and it has also prescribed the process necessary to the rendition of judgments in civil actions, by means of which parties may be deprived of their property. The process prescribed is actual process, to be actually served, in some one of the methods specified. *A person cannot be deprived of his life or liberty on a presumption, unless the presumption and the fact accord,* and as, in respect to process, the constitution places life, liberty and property upon an equality, *a party cannot be deprived of his property, without service of process in the manner provided by law.* A presumption of service may or may not be true, and, if it is false, a judgment entered upon it, if it is enforced by execution, results in depriving the person who is the subject of the presumption, of his property without due process of law." In effect we approved this rule in First Nat. Bank v. Anderson, *supra,* where we held that courts cannot strip landowners of title without notice to them.

Here a presumption not in accord with the proven facts is allowed to deprive the Scotts of the right to protect a valuable property right.

In the recent case of Iwerks v. People, 130 Colo. 86, 273 P. 2d 133, the court determined a question which involved a sheriff's return showing service. The court found that what papers, if any, were served was "a matter of grave doubt." It held: "In matters of this kind where grave doubt arises concerning what was actually done, that doubt must be resolved in favor of the person alleging that no service was made."

At best, from the view of the State, whether the summons was served here is a matter of grave doubt. I would follow the rule of simple justice, set aside this judgment, and allow the Scotts to defend. No rights of other parties have arisen during the intervening 22 years while the State stood by and did nothing. The

issue then was and now would be: What are the proper boundaries of the land involved?

The judgment of the trial court did not determine the issue of the land boundaries. It merely gave them the right to defend if the State elected to proceed with its action against them. I would affirm the judgment of the trial court.

One other matter in the opinion of the court requires mention.

I pointed out earlier herein that 2 of the 14 defendants answered. The transcript shows that trial was had. The judgment recites: "The parties being present in court" trial began on one day and continued the next day. The State contends that the above recital shows a voluntary appearance of the Scotts, equivalent to the service of process. The court holds that there "may be merit" to the contention but does not decide it. As I view it the contention is utterly void of any merit.

To sustain the State's contention would be equivalent to finding that all of the defendants, including the county and a corporation, not pleading, were present in court and thereby conclusively bound by the judgment.

The answering defendants in 1933 were the parties who owned the land to the north of Section 16. They were the ones who stood to lose a substantial acreage of their land if the 1928 survey was adjudged to be correct. It would be an assumption contrary to experience to hold that the Scotts sat in court for 2 days while the 1928 survey which sustained their holdings was under attack and did and said nothing then or thereafter when the court held that survey to be in error.

I mention the contention here only because it illustrates the extent to which the State is willing to go to sustain a judgment depriving the Scotts of one-fourth of their landholdings.

DONALD L. SPECK, APPELLEE, V. BETTY L. SPECK, APPELLANT.
82 N. W. 2d 540

Filed April 26, 1957. No. 34142.

1. **Divorce.** In a divorce case where the custody of minor children is involved, the custody of the children is to be determined by the best interests of the children, with due regard for the superior rights of fit, proper, and suitable parents.
2. ———. In awarding the custody of minor children the court looks to the best interests of the children and those of tender age are usually awarded to the mother if she is a fit and proper person to have their custody.
3. ———. Custody of minor children awarded to the mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree unless it is shown that the mother is an unfit person to have their custody, or that their best interests under all the circumstances require such action.
4. ———. Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Motion to dismiss overruled. Judgment affirmed in part, and in part reversed and remanded.*

Sam S. Diedrichs, for appellant.

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, and *Frank E. Piccolo, Jr.,* for appellee.

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

CARTER, J.

This is an appeal from a judgment of the district court for Lincoln County modifying a decree of divorce by taking care, custody, and control of five minor children of the parties from the defendant and awarding their care, custody, and control to the plaintiff. The trial court also set aside the order for the support of the

children by the plaintiff. The cross-petition of the defendant praying for an increase in the amount of support money was dismissed. From the judgment so modifying the original decree of divorce the defendant appeals.

The evidence shows that on October 28, 1953, plaintiff, Donald L. Speck, commenced a suit for an absolute divorce from the defendant, Betty L. Speck. On January 18, 1954, the court granted an absolute divorce to the defendant and awarded her the care, custody, and control of the five minor children, to wit: Michael A. Speck, born February 16, 1946; Sandra Sue Speck, born June 26, 1947; Jo Ann J. Speck, born July 29, 1949; Sheila L. Speck, born July 7, 1950; and Daniel C. Speck, born September 21, 1951. Defendant retained the care, custody, and control of the children for approximately 2 years. On December 20, 1955, plaintiff filed an application for the modification of the decree of divorce as it related to the custody of the children. Defendant filed an answer denying the allegations of the petition for the modification of the decree and a cross-petition for an increase in the amount of support money for the children. There were several subsequent pleadings filed, including a supplemental petition, which do not appear important in determining the issues raised by this appeal. The case was tried and a judgment modifying the decree entered on June 20, 1956, transferring the care, custody, and control of the children to the plaintiff, Donald L. Speck. The appeal is from this judgment.

The record shows that plaintiff remarried on October 31, 1954. He has established a good home in Kearney, Nebraska, and he has the apparent means of properly caring for the children. His present wife desires to have the children in the home. The evidence sustains a finding that plaintiff and his wife are suitable persons to have the care and custody of the children. The real issue, however, is whether or not the evidence sustains the action of the trial court in taking the children from the care and custody of the natural mother.

The evidence shows that defendant lived in a residence property in North Platte which she rented from her father. It consisted of a living room, kitchen, utility room, and two bedrooms. The five children slept in two bunk beds in one bedroom. The defendant slept in a double bed in the other bedroom. In the spring of 1954, defendant became enamored with one Clarence Watkins, a married man. At the beginning of their relationship he was delivering milk at the home of the defendant. He began taking meals at the defendant's home. His automobile was seen parked at her residence late at night and as early as 6:30 a.m. on numerous occasions. The defendant admits that Watkins stayed all night on three occasions, but insists that he slept on the davenport in the living room with his clothes on. They went to church together a few times. Defendant admits that Watkins took her to shows and sometimes took her automobile riding. She denies that she had any improper relations with him. She admits that she had agreed to marry Watkins when his divorce was obtained. The evidence is clear that Watkins corrected and disciplined the children and assumed more than a casual interest in the defendant at all times during the day and night. The record shows that he moved some of his furniture into defendant's garage, and set up a vegetable juicer in the utility room and sold vegetable juices as a means of livelihood. He used defendant's automobile in making his deliveries. Irrespective of all these evidences of a clandestine relationship, defendant denies having intimate relations with Watkins.

This court had a similar situation before it in Yost v. Yost, 161 Neb. 164, 72 N. W. 2d 689. We there said: "The record is replete with admissions by the defendant and Fanning which show the whole plan. Each admitted being married at the time they carried on their clandestine relations. They deny any sexual relations until after their purported marriage on May 1, 1954, but the acceptance of such evidence at its face value

would tax the credulity of a self-respecting court." The foregoing has particular application to the present case. It is contended that the evidence does not establish illicit relations by these parties. Direct evidence, of course, is not ordinarily procurable to establish such improper conduct. But where the evidence and circumstances show, as they do here, that every element is present except direct proof of the act itself, the court is not required to close its eyes to the obvious. It may properly determine even as against the protestations of one or both of the parties that the result followed which usually grows out of such a relationship. In any event, a proper regard for the welfare of her children required the defendant to refrain from conduct which would reflect upon her and produce harmful effects upon these small children. The evidence sustains a finding that the children were being cared for in improper and unfit surroundings and that the defendant was an unfit person to have their care and custody.

The law governing such cases is well settled. In Gorsuch v. Gorsuch, on rehearing, 143 Neb. 578, 11 N. W. 2d 456, it was stated in the following language: "The proper rule in a divorce case, where the custody of minor children is involved, is that 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."

In awarding the custody of minor children of tender years under the foregoing rule, the best interests of the children usually require that they be given into the care and custody of the mother if she is a suitable and fit person. When the care and custody of minor children have been awarded to the mother in a divorce action, such custody will not ordinarily be disturbed in a subsequent proceeding to modify the original decree unless it is shown that the mother is an unfit person to have their custody. Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509; Lichtenberg v. Lichtenberg, 154 Neb. 278, 47 N. W.

2d 575; Cowan v. Cowan, 160 Neb. 74, 69 N. W. 2d 300. The evidence sustains a finding that the mother is an unfit and unsuitable person to have the care and custody of these minor children. Since the trial court came to the same conclusion, its finding to that effect must be sustained.

The defendant asserts that the trial court erred in placing the care and custody of the children in the plaintiff and his present wife, Eleanor. One of the objections is that Eleanor had three children by a previous marriage and that their care and custody had been awarded to their father. The record shows that Eleanor and her former husband, together with their children, had moved to Nebraska from New York. The father took the children and returned to New York where divorce proceedings were instituted. Eleanor testifies that she had no funds to contest the divorce and that the children were awarded to the father by default. We do not think this in itself makes her unfit and unsuitable in assisting the plaintiff in rearing his children.

We conclude from the evidence that the trial court properly found that defendant was an unfit and unsuitable person to have the care and custody of these minor children. We think the evidence shows that plaintiff is a fit and proper person to have their care and custody. The judgment of the trial court so finding is therefore correct.

The defendant complains of the dismissal of her cross-petition for additional support money for the children. In view of our findings hereinbefore made, the cross-petition was properly dismissed.

It appears also that plaintiff was cited for contempt for failure to pay delinquent child-support money. While the trial court did not directly rule on the merits of the citation for contempt, it is apparent that it held for the plaintiff when it set aside its previous award of support money and relieved the plaintiff of all past due pay-

ments. The effect of this finding is to hold the plaintiff not guilty of contempt.

That part of the court's order purporting to release the accrued payments for the support of the children is erroneous. The trial court has no such authority. The rule is: Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments. Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340; Clark v. Clark, 139 Neb. 446, 297 N. W. 661; Ruehle v. Ruehle, 161 Neb. 691, 74 N. W. 2d 689. That part of the order vacating the accrued payments for child support is reversed.

Plaintiff filed a motion to dismiss the appeal for the reason that defendant and Watkins have married and moved to Denver, Colorado, subsequent to the trial of this case. This affords no basis for a dismissal of the appeal. The motion to dismiss is overruled.

MOTION TO DISMISS OVERRULED. JUDGMENT AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

LORETTO MCLAUGHLIN, INDIVIDUALLY, AND LORETTO MCLAUGHLIN AS EXECUTRIX OF THE ESTATE OF EDWARD P. MCLAUGHLIN, DECEASED, APPELLEE, V. HELEN MCLAUGHLIN HEATH ET AL., APPELLANTS.

82 N. W. 2d 533

Filed April 26, 1957. No. 34152.

1. Wills. In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law.
2. ———. Parol evidence is inadmissible to determine the intent

of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intent obscure or uncertain.

3. ———. Where in a will there is a patent ambiguity resulting from the use of words, and nothing appears within its four corners to resolve or clarify the ambiguity, the words must be given their generally accepted literal and grammatical meaning.

4. ———. A will speaks as of the date of the death of the testator.

5. ———. Evidence to support a contention that a will is enforceable by reason of a contractual obligation must be clear, satisfactory, and unequivocal.

APPEAL from the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Affirmed.*

Lester L. Dunn, for appellants.

Richard W. Smith and *Woods, Aitken & Aitken,* for appellee.

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

YEAGER, J.

This is an action by Loretto McLaughlin, individually, and as executrix of the estate of Edward P. McLaughlin, deceased, plaintiff and appellee, against Helen McLaughlin Heath, Ann McLaughlin Hauptman, and Jane McLaughlin Hudson, defendants and appellants, the object and purpose of which is to have construed the last will and testament of Edward P. McLaughlin and procure a decree quieting title to all of the real estate of which Edward P. McLaughlin died seized in the plaintiff individually.

After joinder of issue the case was tried and a decree was rendered granting all of the relief prayed by plaintiff. Motion for new trial was filed and in due course overruled. From the decree and the order overruling the motion for new trial the defendants have appealed. They assign as ground for reversal that the trial court erred in determining that the plaintiff became the sole devisee of all of the estate of Edward P. McLaughlin,

deceased, and that the defendants have no interest whatsoever in any of the estate.

It is pointed out here that the plaintiff is the widow of Edward P. McLaughlin and that the defendants are his daughters and daughters of the plaintiff.

The facts relating to this controversy are not in dispute in any material respect. The facts as they appear are that on or about January 16, 1951, the plaintiff and Edward P. McLaughlin executed a will containing, among other provisions not necessary to be repeated herein, the following:

"We, Edward P. McLaughlin and Loretto McLaughlin, husband and wife, of Lancaster County, Nebraska, both being of sound mind and disposing memory, do hereby make our joint and mutual Will in manner and form following, that is to say:

"1. The first to die directs that his or her funeral expenses, just debts and the costs and expenses of administration of his or her estate be first paid.

"2. The first to die hereby gives, devises and bequeaths to the survivor absolutely and forever the remainder of his or her estate, both real and personal, after the payment of the obligations referred to in Paragraph 1 hereof.

"3. On the death of both of the joint makers of this Will, we give, devise and bequeath to our three daughters, Mrs. Arthur H. Hudson, of Lincoln, Nebraska, Helen McLaughlin of Lincoln, Nebraska, and Mrs. Charles M. Hauptman of Lincoln, Nebraska, all our real and personal property of every description and wherever situated, absolutely and in fee simple and to their heirs and assigns forever."

This is on its face a joint will. Nothing appears in it to indicate that it depended upon any contractual understanding or consideration. There is no contention in the presentation of the parties that it in any wise so depends.

The plaintiff contends that by the paragraph num-

bered 2 she as the survivor of Edward P. McLaughlin took his estate absolutely and in fee simple free from any claim of the defendants.

The defendants contend that by the paragraph numbered 3 the estate which plaintiff took under the will was limited to a life estate with remainder to the defendants.

The plaintiff contends that paragraph 3 is not a limitation upon paragraph 2 but is a provision for the disposition of the estate of plaintiff and of Edward P. McLaughlin in case of death of the two at one and the same time.

The district court by its decree sustained the contentions of the plaintiff and rejected those of the defendants. A proper resolution of the controversy must be made agreeable to certain well-established rules for the construction of wills.

One rule is the following: "In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law." Martens v. Sachs, 138 Neb. 678, 294 N. W. 426, 134 A. L. R. 356. See, also, In re Estate of Pfost, 139 Neb. 784, 298 N. W. 739; Lacy v. Murdock, 147 Neb. 242, 22 N. W. 2d 713; Olson v. Lisco, 149 Neb. 314, 30 N. W. 2d 910; Brandeis v. Brandeis, 150 Neb. 222, 34 N. W. 2d 159.

Another rule is: "Parol evidence is inadmissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intent obscure or uncertain." Lincoln Nat. Bank & Trust Co. v. Grainger, 129 Neb. 451, 262 N. W. 11. See, also, Martens v. Sachs, *supra;* In re Estate of Pfost, *supra;* Brandeis v. Brandeis, *supra;* Scriven v. Scriven, 153 Neb. 655, 45 N. W. 2d 760.

Another is: "Where in a will there is a patent ambiguity resulting from the use of words, and nothing appears within its four corners to resolve or clarify the

ambiguity, the words must be given their generally accepted literal and grammatical meaning." In re Estate of Pfost, *supra*. See, also, Brandeis v. Brandeis, *supra*.

Another is: "A will speaks as of the date of the death of the testator." Brandeis v. Brandeis, *supra*. See, also, Lacy v. Murdock, *supra*.

Another is: "Extrinsic evidence is admissible to prove that a will contains a latent ambiguity and to explain the ambiguity for the purpose of arriving at the true intent of the testator." Borah v. Lincoln Hospital Assn., 153 Neb. 846, 46 N. W. 2d 166.

In an approach to the determination of this case it is pointed out that the plaintiff in her presentation here does not contend that the testator could not have by appropriate provision limited the estate to be taken by plaintiff under the language of the will to less than a fee, but only that he did not do so. On the other hand it is not contended that in the absence of limitation in the will fee simple title would not have passed to plaintiff by paragraph 2. The substantial contention of the defendants is that paragraph 3 is a limitation and that by it the plaintiff took a life estate in the lands of Edward P. McLaughlin rather than a fee simple title thereto.

On the face of the will there is uncertainty as to the intended application of paragraph 3. On its face the declaration is joint as to disposition of property. The plaintiff urges that by its terms it contemplates that joint application would become effective only on the simultaneous death of plaintiff and Edward P. McLaughlin.

If that is the proper interpretation, of course in the event of separate death of one or the other of the two, the defendants would never take anything by the terms of the will. After the death of one the survivor would have and possess all of the property of both free from any present or future claims of the defendants. Taken by itself it cannot well be said that the paragraph is

incapable of this interpretation. It does not however exclude other interpretations.

On the other hand the defendants contend substantially that by the terms of paragraph 3 the two parties in the execution of the will expressed the intention that the property of the first to die should pass to the other for life and that at the death of the survivor it should pass to the defendants. We cannot say that the paragraph is incapable of this interpretation, but it does not exclude other interpretations.

By the terms of paragraph 3 it is provided that the property of both would pass to the defendants, but we are directly concerned here only with what, if any, of the estate of Edward P. McLaughlin would pass to the defendants. We are concerned only academically with the question of whether or not, if paragraph 3 is a limitation upon the estate contemplated by paragraph 2, the estate which plaintiff had in her own right at the time of her husband's death would be in anywise affected by the paragraph. We are not unmindful however of the possibility that what is said herein may have the ultimate effect of declaring the intent of the plaintiff with regard to her own property by what was said in the will.

In Brandeis v. Brandeis, *supra*, it was said: "Where on the basis of the language employed by a testator a will is capable of more than one interpretation the ambiguity is patent and not latent and extrinsic evidence is inadmissible to aid in its interpretation."

Since, as pointed out, the provisions of this will are capable of more than one interpretation it becomes necessary to say that it contains a patent ambiguity. It therefore becomes necessary, agreeable to authority cited herein, to ascertain the true intent of the testator from what is contained within the four corners of the will and in so doing to give the words employed their generally accepted literal and grammatical meaning.

From this will it is clear that by the terms of paragraph 2 the only thing attempted was that the survivor

should have and possess the property of the other. There is nothing in the will anywhere to indicate that this was based upon any kind of mutual promise, agreement, or consideration. No such contention is made by the defendants. It is only in instances where it is contended and the contention is supported by proof which is clear, satisfactory, and unequivocal that a decision may rest on the proposition that the terms and effect of a will depend upon a contract. This is the rule as applied to actions for specific performance and obviously it is applicable in other instances where contractual obligations sought to be enforced are brought into question. Petersen v. Hitchcock, 128 Neb. 381, 258 N. W. 669; Rogers v. Casady, 134 Neb. 227, 278 N. W. 267.

There is nothing in paragraph 3 which in anywise purported to burden the separate estate of the survivor in case one of the parties predeceased the other. There is nothing in it which purported to burden the devised estate in the hands of the survivor. On the face of paragraph 2 the conclusion is inescapable that within legal contemplation the action of the two parties had several as distinguished from joint application.

It is not until paragraph 3 is examined that any phase of joint intention or action becomes apparent. As pointed out the defendants contend that the intent and purpose of this paragraph was to limit the devise of paragraph 2 to a life estate. If this is true, in legal contemplation, in view of the absence of anything to disclose any contractual or mutual action based on consideration in the making of the will, it would not effect a disposition of the estates of both parties at the death of the survivor. Under such circumstances the survivor would of course have full control of the disposition of his or her estate after the death of the first to die.

It may not be presumed that the parties intended anything less by the will than a full and complete disposition of their separate estates under a condition where, consistent with law, there could be such a full and com-

plete disposition.

The language of paragraph 3 permits without inconsistency and without putting any strain upon it, an interpretative intent the effect of which would be to accept the declared intent and purpose of paragraph 2 and at the same time give effect to paragraph 3 as a full and complete disposiiton of the estates of both of the parties.

This interpretation would have the effect of saying that when the parties used the words "On the death of both of the joint makers of this Will," they intended to say that if they died at the same time paragraph 3 should provide the mode and method for the disposition of their respective estates. Significantly, it is believed, in this quoted statement the parties speak of one death but of two parties. Of course words may be employed in different senses, but in the interpretation of a patent ambiguity in a will, as pointed out, the courts must base decisions upon the literal and grammatical meaning of words and phrases as they appear in the will itself.

To accept this interpretation of paragraph 3 does not destroy or burden any of the other provisions of the will. It allows full effectiveness to all of the provisions.

Accordingly the conclusion is reached that the construction contended for by plaintiff has been sustained. In consequence of this the judgment of the district court is affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

Plaintiff pleaded for a construction of the will and for a decree quieting title in her. Defendants pleaded that plaintiff acquired only a life estate and that the fee was in them. They prayed only for a dismissal of the petition.

I disagree with the court's construction of the will.

The plaintiff testified in this case in the trial court. Without objection, and in patent violation of many basic rules of evidence, plaintiff by leading and suggestive questions testified as to conclusions of not only her in-

tent in making the will but as to the intent of her deceased husband. By that process she was led down the pathway of a theory of simultaneous death, as in the minds of both the makers of the will, which nullifies many of its provisions.

The court properly holds that that evidence was inadmissible, but it was admitted without objection. The court rejects the evidence and construes the will in accord with it. The suggestion of simultaneous death intentions is not found in the will. It is in the testimony of the plaintiff.

The defendants offered no evidence.

On appeal here defendants cite section 76-205, R. R. S. 1943, as to the construction of instruments. They then cite Annable v. Ricedorff, 140 Neb. 93, 299 N. W. 373, point out its differences and similarities with the instant case, and conclude that it "would appear" that the defendants receive the fee under the will and the plaintiff the life estate.

The court states that it becomes necessary to ascertain the true intent of the testator (singular) from what is contained within the "four corners of the will" and give the words employed their "generally accepted literal and grammatical meaning."

The court construes the will to be the will only of the first testator to die, except in the case of simultaneous deaths of both testators. It reaches that conclusion although stating that it will not be presumed that the parties intended anything less than "a full and complete disposition of their separate estates." The survivor is without a will, although she is the maker of a "joint and mutual" will. It is now a nullity. No such intent can be gathered from this "joint and mutual" will.

We have held that simultaneous means taking place at the same time. Securities Credit Corp. v. Pindell, 153 Neb. 298, 44 N. W. 2d 501.

I readily agree that a will could provide for the dis-

position of property in the event of simultaneous deaths. There is always the possibility of simultaneous deaths of a husband and wife who live and often travel together. Common knowledge, however, is that such deaths happen rarely.

Had the makers of the will contemplated such a situation and revealed that intent to the scrivener, a few simple words would have sufficed to state it. But they were not used.

The will does not suggest the intent to devise to meet that contingency. It is only by starting with that premise dehors the will that the conclusion is reached which the court sustains.

The court states the necessity of examining what is contained within the four corners of the will and yet it sets out only the opening paragraph and the first three numbered paragraphs of the will. It states that the others are not necessary to be stated.

The court omits two paragraphs which comprise over 40 percent of the body of the will. Both bear number 5. I state them as 5(a) and 5(b):

5(a). "At his request, *we* have made no provision for our son William McLaughlin of Atchison, Kansas, and for reasons best known to him and to us; however, *we* rely upon our said daughters to see to it that he is well provided for during the term of his natural life. *We* have full confidence in our said daughters to carry out this request." (Emphasis supplied.)

5(b). "The one dying first hereby appoints the other executor or executrix hereof, and upon the death of both of us, the joint makers of this Will, we appoint our daughters, Mrs. Arthur H. Hudson, Helen McLaughlin, and Mrs. Charles M. Hauptman, as executrices hereof, and we further empower Edward P. McLaughlin or Loretto McLaughlin, if appointed as executor or executrix hereof, and our said three daughters if appointed executrices under this Will to sell and convey without the order of any Court any real estate wheresoever lo-

cated belonging to *this estate.*" (Emphasis supplied.)

These two paragraphs contain provisions that go to the question of the intent of the makers. I would go to the entire will and to its four corners.

The opening sentence of the will begins with "We" followed by "both" and later by "our joint and mutual Will." The language does not indicate an intent that the makers were drafting a will applicable only to the estate of the first to die except in the case of simultaneous deaths of the two makers. No such suggestion appears in that provision.

The last two words of the will are "this estate." That indicates that the makers of the will contemplated one estate (not estates). By the will they were, in intent, merging their separate estates and making a complete disposition of "this estate."

This is a common provision in wills of husband and wife. Clearly, so far as paragraph 2 is concerned, there is no basis for reading a simultaneous death intent into the will. This provision by its clear language applies only in the event of a nonsimultaneous death.

Paragraph 3 of the will clearly contemplates that "this estate" shall vest in the three daughters "On the death of both of the joint makers." The language used is "all *our* real and personal property." The court construes this to mean as providing for the disposition of the estate only in case of simultaneous deaths. Had such an intent been revealed to the scrivener, the easy statement could have been: "In the event of the simultaneous deaths of the joint makers." Such language was not used and such an intent is not suggested by the will. The paragraph is one making an all-inclusive, general disposition of "our" property. The court construes it to be a paragraph applicable only in the event of the possible contingency of simultaneous deaths.

Paragraph 5(a) explains the omission of a son from the benefits of the will. It is a statement that came from the heart of parents. It expresses a trust in the

daughters, who are beneficiaries in the will, to care for the brother. It expresses the desire of each testator by the use of the word "we" repeatedly in the paragraph.

As the court construes the will that natural desire of the parents and the trust in the daughters were intended to be made effective only in the case of simultaneous deaths. In the absence of simultaneous deaths this court, in result, holds that it was the intent of the makers that the survivor was free to make "no provision for our son." The daughters, although they may later inherit their mother's estate are likewise free from the moral obligations of the trust. I find no suggestion in the will of such an intent. The desire of the father that his son be "well provided for during the term of his natural life" is now optional with the mother.

Paragraph 5(b) starts: "The one dying first * * *." This clearly does not contemplate simultaneous deaths. It recognizes the natural probability of nonsimultaneous deaths. The paragraph, and as a part of the same sentence, provides that "upon the death of both of us" the daughters are appointed as executrices of the will. Taken together these two clauses clearly indicate a quite natural desire and intent that when the first of the makers dies and the will is probated as to that joint maker, the other maker is to be executor of the "joint and mutual will"; and that when the other joint maker dies and the will is probated as to that maker the daughters are to be executrices. It is a normal provision and one that does not in anywise suggest an intent to have it apply only in the event of the simultaneous deaths of the two makers.

The remaining provision of paragraph 5(b) is a general grant of power to sell and convey. It goes first to either of the two makers who survives. It obviously excludes the contingency of simultaneous deaths. If it was the intent of the makers that paragraph 3 was only to apply in the event of simultaneous deaths and that in the event of nonsimultaneous deaths the fee title to

the property vested in the surviving maker, then the survivor would have the power of sale as a matter of law and this provision would be surplusage.

If the daughters were to take under the will only in the event of simultaneous deaths, then they would be receiving a fee title with a like power of sale as a matter of law.

It was suggested in oral argument that this power of sale was included so as to permit a sale to pay debts and costs of administration. Had that been the intent it could have been quite easily expressed in the will. It was not so expressed. It is also obvious that the value of this estate is such that a power of sale for that purpose was not necessary and was not contemplated.

As the court construes the will, except in the case of simultaneous deaths, only paragraphs 1 and 2 are effective and then only as to the "joint and mutual" maker first to die. A "full and complete disposition of their separate estates" is not had. The "four corners" of the will are reduced to include only these two paragraphs:

"1. The first to die directs that his or her funeral expenses, just debts and the costs and expenses of administration of his or her estate be first paid.

"2. The first to die hereby gives, devises and bequeaths to the survivor absolutely and forever the remainder of his or her estate, both real and personal, after the payment of the obligations referred to in Paragraph 1 hereof."

I would reverse the judgment of the trial court and remand the cause with directions to render judgment holding that the plaintiff was devised a life estate and that the defendants were devised the fee title subject to the plaintiff's life estate, and I would do that although the defendants did not pray for such a construction of the will.

DAVID P. LINDQUIST, APPELLANT, V. L. M. TOWLE, APPELLEE.
82 N. W. 2d 631

Filed April 26, 1957. No. 34173.

1. **Judgments: Appeal and Error.** A final judgment is one that disposes of the case either by dismissing it before hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant. A judgment or order is not final unless it determines the rights of the litigants and precludes further inquiry.
2. **Appeal and Error.** An order sustaining a demurrer to a petition, without a dismissal or other final disposition of the case, is not a final order reviewable on appeal.

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

David P. Lindquist, pro se.

Max G. Towle, Farley Young, and *Thomas J. McManus,* for appellee.

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

CHAPPELL, J.

Plaintiff, David P. Lindquist, filed a petition in the district court seeking specific performance by defendant, L. M. Towle, of his alleged statutory duty, as clerk of the Lincoln Municipal Court, to accept and file a request for trial on the merits and other papers with relation thereto in an action filed by plaintiff in that court, while hearing on a special appearance was pending therein. Plaintiff also sought to reverse a municipal court order sustaining such special appearance and to recover damages and attorney's fees from defendant.

Defendant filed a general demurrer to plaintiff's petition. Plaintiff then filed a showing in opposition thereto in which he requested a judgment in favor of plaintiff upon the facts allegedly admitted by defendant's demurrer, the effect of which was simply to contend that plaintiff's petition did plead facts sufficient to state a

cause of action. After a hearing upon defendant's demurrer, it was sustained and plaintiff's request for judgment was refused, the effect of which was to simply conclude that plaintiff's petition did not state a cause of action.

Thereafter, plaintiff did not elect to stand upon his petition, and no judgment was rendered by the trial court disposing of the case and terminating the litigation in that court. Nevertheless, plaintiff appealed to this court, assigning among other things that the trial court erred in sustaining defendant's demurrer and refusing plaintiff's request for judgment in his favor.

In Anson v. Kruse, 147 Neb. 989, 25 N. W. 2d 896, we said: "A final judgment is one that disposes of the case either by dismissing it before hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant. A judgment or order is not final unless it determines the rights of the litigants and precludes further inquiry." Therein we held: "An order overruling a demurrer to a petition, in the absence of further proceedings, is not a final order reviewable on appeal." See, also, Barry v. Wolf, 148 Neb. 27, 26 N. W. 2d 303.

In Koehn v. Union Fire Ins. Co., 151 Neb. 859, 39 N. W. 2d 808, we held: "An order sustaining a demurrer to a petition, without a dismissal or other final disposition of the case, is not a final order reviewable on appeal."

Such rules are applicable and controlling here. Accordingly, we conclude that plaintiff's appeal should be and hereby is dismissed at plaintiff's costs.

APPEAL DISMISSED.

J. HAMMOND MCNISH, ADMINISTRATOR OF THE ESTATE OF BUREL KINNEY, DECEASED, APPELLANT, V. GENERAL CREDIT CORPORATION, A CORPORATION, APPELLEE.
83 N. W. 2d 1

Filed May 3, 1957. No. 34125.

1. **Pleading.** An admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and is therefore a limitation of the issues.
2. **Parties.** The real party in interest is the person entitled to the avails of the suit.
3. **Parties: Contracts.** A person with whom or in whose name a contract is made for the benefit of another may bring an action thereon without joining with him the person for whose benefit it is prosecuted.
4. **Witnesses.** A party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, whenever his own is not of the character of a judicial admission and concerns only some evidential or constituent circumstance of his case.
5. **Penalties: Forfeitures.** Ordinarily courts of equity will refuse to aid in the enforcement of penalties and forfeitures and leave the parties to whatever remedies they may have at law. However, this is not an absolute or inflexible rule and should yield when good reason exists for doing so.
6. **Interest.** A borrower coming under the statutes relating to installment loans is not regarded as being in pari delicto but rather as being in vinculus to the lender, to whom he therefore owes no duty in equity. Insofar as Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429, is in conflict herewith it is overruled.
7. **Usury.** A truck dealer may in good faith sell a truck on time for a price in excess of the cash price without tainting the transaction with usury, even though the difference in the two prices may exceed lawful interest for a loan.
8. ———. A time sale made in good faith at a price in excess of a cash price, which time price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury, even though the difference exceeds the lawful interest for a loan.
9. ———. In order to have the foregoing principles apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash

sale price. It is not enough to merely show that the instruments signed evidencing the indebtedness refer to a time price or time differential when, in fact, the buyer was never quoted a time sale price as such.

10. ———. The statutes make no requirement that a borrower, in order to come within the provisions thereof, must be a necessitous one. In fact, the statutes relating to installment loans have no requirements of any kind in that respect and, in view of that fact, we would not be justified in so limiting the application thereof.

11. **Principal and Agent.** Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority.

12. ———. Whether or not an act is within the scope of an agent's apparent authority is to be determined under the foregoing rule as a question of fact from all the circumstances of the transaction and the business.

13. ———. If the principal desires to repudiate the unauthorized act of his agent, he must, as soon as he acquires knowledge of the facts, return, or tender a return, of any benefits by him received as the proceeds of such acts, or be held to have ratified them.

14. ———. A principal who accepts the benefits of a contract executed in his behalf by an agent is chargeable with the instrumentalities employed by the latter in procuring it.

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

Ewald D. Warnsholz and *J. Max Harding,* for appellant.

Harold A. Prince, Walter P. Lauritsen, Conway & Irons, and *Martin, Davis & Mattoon,* for appellee.

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

WENKE, J.

This is an appeal from the district court for Cheyenne County. Therein, on March 1, 1955, Burel Kinney

brought an action against the General Credit Corporation. The purpose of the action, as set forth in plaintiff's amended petition filed April 2, 1955, on which the action was tried, is to have declared null and void an alleged installment loan in the principal sum of $10,000, made by defendant to plaintiff, because the interest charge of $1,200 made for the use thereof is in violation of the maximum amount authorized by the provisions of section 45-138, R. S. Supp., 1953, which statute deals with "Installment Loans" of over $1,000. The relief asked is that the promissory note evidencing the indebtedness be held null and void and that defendant be required to refund to plaintiff all payments it has received thereon from plaintiff. The primary defense pleaded is that the indebtedness owing from plaintiff to defendant is not a loan but the balance due on the time purchase price plaintiff agreed to pay for a used truck and therefore not subject to the provisions of the foregoing statute. The trial court found for the defendant and dismissed plaintiff's action. Plaintiff thereupon filed a motion for new trial and this appeal is from the overruling thereof.

Plaintiff was accidently killed on January 16, 1956, and this action was thereafter, on February 28, 1956, revived in the name of J. Hammond McNish as administrator of his estate. We shall hereinafter refer to decedent as Kinney.

Kinney had been engaged in the trucking business with headquarters near Sidney in Cheyenne County, Nebraska, since November 25, 1951. Appellee is a Nebraska corporation with its principal place of business in Hastings, Nebraska, where, at all times herein material, it was licensed to and operating an installment loan business at 615 West Second Street. The Hastings Motor Truck Company, a Nebraska corporation, was, at all times herein material, engaged in the selling and servicing of trucks with its principal place of business located in Hastings. Clinton J. Sahling, hereinafter

referred to as Sahling, was a stockholder, the vice-president, and a salesman of this corporation, which we shall hereinafter refer to as H. M. T. Co.

On June 22, 1954, in response to a telephone call from Kinney on June 21, 1954, Sahling went to Sidney where, on June 23, 1954, he met Kinney and, in the presence of Mrs. Kinney, negotiated the sale to him of two used trucks, the sale of one of which is the basis of this action. We shall more fully set out the facts relating to the sale of this truck in connection with our discussion of the nature of the indebtedness herein involved for the principal question to be determined is whether or not the contract entered into was a sale on time, with deferred payments, or one for cash, with a loan being made to pay the balance of the purchase price.

As a preliminary we shall briefly answer three propositions raised but not discussed. The transaction herein involved was entered into at Kinney's place of business near Sidney in Cheyenne County, Nebraska. Consequently the district court for that county had jurisdiction of the subject matter. See § 25-404, R. R. S. 1943. It provides in part: "Actions for the following causes must be brought in the county where the cause or some part thereof arose: (1) An action for the recovery of a fine, forfeiture, or penalty, imposed by a statute, * * *."

Article I, section 3, of the Constitution of Nebraska, provides: "No person shall be deprived of life, liberty, or property, without due process of law." We think sections 45-124 and 45-125, R. R. S. 1943, adequately meet this constitutional requirement. They provide, insofar as here material, as follows:

"No license shall be granted to any person unless and until such applicant therefor shall file with the Department of Banking a designation in writing that appoints the Director of Banking to act as applicant's agent, upon whom all judicial and other process or legal notices directed to such applicant may be served. Service upon the agent, so designated, shall be equivalent to

personal service on the applicant or licensee." § 45-124, R. R. S. 1943.

"Service shall be made in duplicate upon the Director of Banking, or, in his absence, upon the person in charge of his office, and shall be deemed sufficient service upon such licensee. No such service shall be valid or binding against such licensee when licensee is required thereunder to file answer, pleading or defense within less than ten days from the date of mailing the copy of such service to such licensee. When legal process against any such licensee is served upon the director, he shall forthwith, by registered mail, send one of the duplicate copies prepaid and directed to licensee." § 45-125, R. R. S. 1943.

The requirements of these statutes were followed.

Appellee suggests, in view of Article VII, section 5, of the Constitution of Nebraska, that appellant has no standing in court because any penalty arising thereunder must be paid to the common schools in the place where it accrues. We do not think this constitutional provision has application here. See, Graham v. Kibble, 9 Neb. 182, 2 N. W. 455; Clearwater Bank v. Kurkonski, 45 Neb. 1, 63 N. W. 133; Everson v. State, 66 Neb. 154, 92 N. W. 137; School Dist. of the City of Omaha v. Adams, 147 Neb. 1060, 26 N. W. 2d 24.

Appellee raises the question, is the appellant the real party in interest? We doubt if the appellee is in a position to raise this question for in its answer it alleged: "That Hastings Motor Truck Company as agent for this Defendant negotiated with the Plaintiff herein for the sale of said tractor and on June 24, 1954, sold the said tractor to the Plaintiff herein * * *. That subsequently on July 1, 1954, a certificate of title to the said tractor was issued in the name of the Plaintiff being title No. 39-45594 * * *." We said in Wright v. Lincoln City Lines, Inc., 160 Neb. 714, 71 N. W. 2d 182:

"A party may at any time invoke the language of the pleading of his adversary on which the case is tried on

a particular issue as rendering certain facts indisputable; and in so doing he is neither required nor permitted to offer the pleading in evidence.

"An admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and is therefore a limitation of the issues."

We shall, however, for the purpose of discussing the facts relating thereto, consider this question.

Section 25-301, R. R. S. 1943, provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 25-304."

We have said of this section that: "The real party in interest is the person entitled to the avails of the suit." Gregory v. Pribbeno, 143 Neb. 379, 9 N. W. 2d 485. See, also, Dafoe v. Dafoe, 160 Neb. 145, 69 N. W. 2d 700; Uptegrove v. Metropolitan Life Ins. Co., 145 Neb. 51, 15 N. W. 2d 220; Kinsella v. Sharp, 47 Neb. 664, 66 N. W. 634.

Section 25-304, R. R. S. 1943, provides, insofar as here material, that: "* * * a person with whom or in whose name a contract is made for the benefit of another, * * * may bring an action without joining with him the person for whose benefit it is prosecuted."

We have said of this section: "A person with whom or in whose name a contract is made for the benefit of another may bring an action without joining with him the person for whose benefit it is prosecuted." Coe v. Nebraska Building & Investment Co., 110 Neb. 322, 193 N. W. 708. See, also, Stoll v. Sheldon, 13 Neb. 207, 13 N. W. 201.

It is true that Mrs. Kinney testified that Kinney had no interest in the trucks, nor in the trucking business he operated, except as manager thereof for W. W. Beckley of Cozad, Nebraska, who had state-wide authority to operate a trucking business. However, the purchase agreement entered into on June 23, 1954, with

H. M. T. Co. shows Burel Kinney to be the purchaser; the note for the balance of the indebtedness and the chattel mortgage on the truck given to secure this note are signed by Kinney as the owner of W. W. Beckley Trans. Co.; and the letter of H. M. T. Co. to the county clerk of Cheyenne County, dated June 25, 1954, advises him that Kinney would be in to purchase his new title for the truck he had purchased from it and to issue a new title to him. This was done, as requested, and a certificate of title was issued in the name of W. W. Beckley Transportation Co. In this situation the following has application: "* * * where the more favorable evidence relied on by a party to overcome the effect of his own self-injurious statement is in his own testimony, no distinction is drawn as compared with the situation where the curative evidence is from other witnesses. It is still for the trier of fact to decide the issue upon all the evidence." 169 A. L. R. 805. See, also, Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236. As therein stated: "A party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, wherever his own is not of the character of a judicial admission, and concerns only some evidential or constituent circumstance of his case."

We have come to the conclusion that the evidence establishes that Kinney became the owner of the truck purchased and, as such, the real party in interest. We do not think, based on the evidence adduced, that W. W. Beckley was personally liable for the indebtedness herein involved. But even if it can be said the contract entered into was for the benefit of W. W. Beckley, which we do not find to be the fact, the action could still be maintained by Kinney under the provisions of section 25-304, R. R. S. 1943.

Appellee raises the question, can an equitable action be maintained to enforce a penalty or forfeiture? It is true that courts of equity generally refuse to aid in the enforcement of penalties and forfeitures and leave the

parties to whatever remedies they may have at law. See 30 C. J. S., Equity, § 57, p. 398.

We have held this to be true when the provisions of a statute that are being sought to be enforced do not so provide. Davis v. Atlanta Finance Co., 160 Ga. 784, 129 S. E. 51. As well as where they do. Meredith v. Lyon & Healy, 3 Neb. (Unoff.) 485, 92 N. W. 122. However, this is not an absolute or inflexible rule and should yield when good reason exists for doing so. See 30 C. J. S., Equity, § 57, p. 398.

Public policy, as it relates to the effect of any violation of statutes dealing with installment loans by those engaging in the making thereof, has been fixed by the Legislature and not the courts. The Legislature, in this respect, has provided that: "Any contract of loan made in violation of this section, either knowingly or without the exercise of due care to prevent the same, shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges on such loan." § 45-138, R. S. Supp., 1953.

"Any person, firm, partnership, corporation or association, or officer or employee thereof, violating any of the provisions of sections 45-138 to 45-145, shall be deemed guilty of a misdemeanor, * * *." § 45-153, R. R. S. 1943.

"Any contract of loan, in the making or collection of which any act is done which constitutes a misdemeanor under section 45-153, shall be void and the lender shall have no right to collect or receive any principal, interest or charges whatsoever." § 45-154, R. R. S. 1943.

"Violation of sections 45-114 to 45-155 in connection with any indebtedness, however acquired, shall render such indebtedness void and uncollectible." § 45-155, R. R. S. 1943.

These provisions apply to any person making such a loan, whether licensed or not. Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122; State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215.

As stated in State ex rel. Beck v. Associates Discount Corp., *supra:* "Their purpose and design is to license and control the business of making such installment loans, and to restrict the enforcement and collection of illegal installment loans once they have been made by either licensees or nonlicensees, an all-inclusive and proper classification. Thus, the inhibitory provisions thereof include and apply to all lenders of installment loans, whether they be licensees or nonlicensees."

We see no reason why a court of equity should not lend its aid to help carry out this declaration of public policy by the Legislature. In fact, we think it should. Some of the reasons for doing so are well stated in State ex rel. Beck v. Associates Discount Corp., *supra,* as follows: "To declare such contracts void and uncollectible without cancellation thereof, or, more appropriately, without enjoining their collection, would permit defendants to subsequently use them only for purposes of unlawful harrassment and extortion, which this action sought to enjoin. Equity is not so helpless. Equity will always strive to do complete justice. To declare such contracts void and uncollectible and enjoin their collection if they are void and uncollectible, is but a necessary incident to the primary purpose of this action * * *." We recognize the action therein brought was authorized by section 45-157, R. R. S. 1943, but we see no reason why equity should not provide the same measure of relief for individual borrowers. See, also, Rosenblum v. Family Finance Corp., 179 Misc. 1050, 39 N. Y. S. 2d 230; Powell v. Edwards, *supra.* We recognize there are authorities holding to the contrary. See Goodwin Co. v. National Discount Corp., 5 Wash. 2d 521, 105 P. 2d 805, 135 A. L. R. 801. But our holding herein should not be construed to be in conflict with holdings denying such relief where a conspiracy existed between the borrower and lender to evade the law as was the situation in Ryan v. Motor Credit Co., 132 N. J. Eq. 398, 28 A.

2d 181, 142 A. L. R. 640, and Mills v. First State Pawners Society, 192 Ill. App. 231. Nor does this holding conflict with our own decisions, such as Eiseman v. Gallagher, 24 Neb. 79, 37 N. W. 941, and Bolen v. Wright, 89 Neb. 116, 131 N. W. 185, wherein section 45-105, R. R. S. 1943, was involved, for that statute does not make the contract void when a usurious rate of interest is being charged.

Appellee seeks to invoke the doctrine that he who comes into equity seeking relief must come with clean hands, suggesting that no court should lend its aid to a man who bases his cause upon an illegal act. It is true that in Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429, we said: "If the transaction was a loan for usury, as asserted by defendant, instead of a sale on time, the contracting parties entered into an unlawful agreement. Viewed in that light both participated in the lawlessness." However, since then we held in State ex rel. Beck v. Associates Discount Corp., *supra,* that: "Further, all of such borrowers are regarded not as in pari delicto but as in viniculus (sic) to defendants, to whom they owe no duty in equity. See, Davis v. Atlantic Finance Co., 160 Ga. 784, 129 S. E. 51; Cuneo v. Bornstein, 269 Mass. 232, 168 N. E. 810; Horner v. Nitsch, 103 Md. 498, 63 A. 1052; Goble v. O'Connor, 43 Neb. 49, 61 N. W. 131." See, also, Chakford v. Sturm (Fla.), 65 So. 2d 864; Milo Theater Corp. v. National Theater Supply, 71 Idaho 435, 233 P. 2d 425. In view of our more recent holding we find the language used in Grand Island Finance Co. v. Fowler, *supra,* does not correctly reflect the relationship of the parties. In view of the foregoing we do not find the principle here sought to be invoked has any application.

Appellee suggests that Kinney was buying this truck in order to use it in his own business under a certificate of state-wide authority issued to W. W. Beckley, thus violating the Motor Carriers Act, and that, under such a situation, he should have no standing in a court of equity. Assuming what appellee suggests is correct,

we do not think that fact has any relationship to the matter herein involved. Whether or not the contract entered into by the parties left the balance of the purchase price of the truck in the form of a loan or in the form of a deferred time purchase price has no relationship to the purpose for which the truck was intended to be used.

Should Kinney have tendered a return of the truck or the sum of $10,000 in order to be entitled to the relief he seeks? We think not. The statute does not so provide, in fact, it prohibits the collection or receiving of anything on such a loan and consequently the borrower owes no duty in equity to the lender. See, Cuneo v. Bornstein, 269 Mass. 232, 168 N. E. 810; Davis v. Atlanta Finance Co., *supra;* Nash Loan Co. v. Dixon, 181 Ga. 297, 182 S. E. 23. As stated in Nash Loan Co. v. Dixon, *supra*: "* * * the act of 1920 prohibits the collection of any part of the principal or interest, and consequently the borrower owes 'no duty in equity to the lender.'" In view of the relationship of the parties we think the foregoing is correct.

The principle here involved has been stated by this court many times since Grand Island Finance Co. v. Fowler, *supra.* The most recent case is State ex rel. Beck v. Associates Discount Corp., *supra.* In Powell v. Edwards, *supra,* we stated it as follows: "* * * an automobile dealer may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan. * * * a time sale made in good faith at a price in excess of a cash price, even though the difference exceeds lawful interest for a loan, which price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury." However, as also stated in Powell v. Edwards, *supra*: "These rules however do not apply where it is proved that the

transaction was not made in good faith but that it was a scheme and a device pursued to evade the operation against it of the usury statute." In State ex rel. Beck v. Associates Discount Corp., *supra,* we said: "In such cases, however, the transaction between the buyer and seller must be a completed bona fide time price sale agreement." In order to have the foregoing principles apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price. It is not enough to merely show that the instruments signed evidencing the indebtedness refer to a time price or time differential when, in fact, the buyer was never quoted a time sale price as such.

The burden of proof to show the nature of the transaction is on the appellant, since he claims it was a loan. The action being one in equity we will consider the record de novo and, in considering it, apply the usual principles applicable in such cases. In cases of this character courts will look through the form to the substance of the transaction in order to determine whether there was a bona fide time sale or a loan. See, State ex rel. Beck v. Associates Discount Corp., *supra;* General Motors Acceptance Corp. v. Weinrich, 218 Mo. App. 68, 262 S. W. 425. The statutes make no requirement that a borrower, in order to come within the provisions thereof, must be a necessitous one. In fact, the statutes relating to installment loans have no requirements of any kind in that respect and, in view of that fact, we would not be justified in so limiting the application thereof.

The evidence shows that on October 5, 1953, H. M. T. Co. sold to Wayne Crouch of Otis, Colorado, a 1953 5-ton Diamond T tractor, taking a lien thereon for $14,580 as a part of the purchase price; that appellee purchased this lien, H. M. T. Co. guaranteeing the payment thereof; that on June 18, 1954, because he was unable to meet the payments due, Crouch voluntarily turned the truck over to appellee, there being at that time unpaid on the

lien obligation slightly over $12,765; that at the time of the repossession H. M. T. Co. had a second lien on the truck in the sum of $1,059.96 which was unpaid; that the title to the truck was placed in the name of H. M. T. Co. for the purpose of sale, both it and appellee being interested therein; that H. M. T. Co. did not at that time pay appellee the amount of the lien it had guaranteed; that appellee authorized and directed H. M. T. Co. to sell the truck for its benefit; that on June 23, 1954, H. M. T. Co. did sell the truck to Kinney, taking from him in consideration therefor a 1952 International truck and an $11,200 note and chattel mortgage; that appellee accepted the note in part payment of the amount owing on the Crouch obligation, H. M. T. Co. paying the balance pursuant to its guarantee; that H. M. T. Co. guaranteed the Kinney note; and that appellee has kept the $11,200 note and received eight installment payments thereon.

The record shows the negotiations leading up to the sale of the truck took place in Kinney's place of business near Sidney, Nebraska, on June 23, 1954, in the presence of Mrs. Kinney. Mrs. Kinney testified Kinney bought the truck from Sahling for $13,500; that he gave in payment thereof a 1952 International tractor at an agreed value of $3,500 and $10,000; that Kinney advised Sahling he would have to borrow the $10,000 some place; and that Sahling advised Kinney they could take care of that as appellee would loan him that amount. Sahling, on the other hand, testified he and Kinney talked about a cash price and a different price if he wanted time in which to pay; that he told Kinney the price would be more if he wanted time to pay a part thereof; and that they agreed upon an amount which would give Kinney 18 months in which to pay. Since these two witnesses, who were present at the time, cannot agree upon what basis the obligation of $11,200, payable in 18 installments, was created we must turn to the other evidence adduced to assist us in finding out who is testi-

fying to the correct version. In this respect the purchase agreement, as filled in by Sahling, clearly evidences just what the original agreement entered into was. It shows the "Total Price" of the used truck purchased by Kinney as "$13,500.00"; that Kinney was given an "Allowance for Used 1952-L-200 International Truck" of "3500.00"; and that the "Total Price Difference" was "$10,000.00."

In respect thereto the agreement provides: "Purchaser agrees to terms of sale written herein * * *."

Sahling also filled in as part of this purchase agreement the following: "To be Financed 18 months - $10,000.00 Finance Charges - $1200.00 Insurance to be furnished by Customer Loss Payable Clause to General Credit Corporation, Hastings Nebr." In this respect the purchase contract provides: "There are no promises, verbal understandings, or agreements of any kind, pertaining to this contract other than specified herein."

Even the "Dealer's Work Sheet and Agreement," which Sahling testified he filled out with pen prior to Kinney signing the "purchasers Statement and Application for Credit," which is a part thereof, and before Mrs. Kinney signed the financial "Balance Sheet" of "Burel F. Kinney," contained no figure in respect to "Plus Increase in Time Price over Cash Price" although a figure of $1,200 was later put in in pencil.

Considering all of the evidence adduced, particularly the documents Sahling filled in and then had Kinney execute at the time the contract for the sale of the used truck was entered into, we can come to no other conclusion than that the sale of the used truck was made for $13,500, subject to a trade-in for $3,500, thus leaving a balance of $10,000 which was to be paid in cash and that Sahling agreed the people he represented would make Kinney a loan for that amount, and did, for a charge of $1,200. Section 45-138, R. S. Supp., 1953, provides in that respect that: "No licensee shall directly or indirectly charge, contract for, or receive a greater

rate of interest than nine per cent per annum upon any loan, or upon any part or all of any aggregate indebtedness of the same person, in excess of one thousand dollars." The charge of $1,200 made for an installment loan of $10,000 payable in 18 monthly installments is far in excess of the maximum authorized by section 45-138, R. S. Supp., 1953, and, because of that fact, is in violation thereof and consequently subject to the penalties imposed by the statutes, which have hereinbefore been set forth.

Appellee admits H. M. T. Co. was its agent for the purpose of selling the truck but claims such agency was subject to the general rule quoted in 2 C. J. S., Agency, § 114, p. 1322, as follows: "Ordinarily * * * an agent * * * may sell only for cash * * * and cannot assent in behalf of his principal to receiving payment in bonds, notes, or similar paper." It also claims that the general rule stated in 2 C. J. S., Agency, § 42b and c, pp. 1083, 1085, is here applicable. It is as follows: "The rule that the principal must have full knowledge of the facts has been applied among other types of actions noted herein both to unauthorized contracts and to tortious acts of agents. * * * he cannot ordinarily be deemed to have ratified the whole unauthorized act of his agent where the knowledge of such principal is partial or imperfect." We do not think the facts justify the application of either of these principles. The evidence shows appellee had repossessed the truck on which it had a very substantial defaulted lien; that H. M. T. Co. was also interested therein because of a second lien thereon but primarily because it had guaranteed to appellee the payment of the first lien; that the truck was taken in the name of the H. M. T. Co. to facilitate its sale in order to satisfy these unpaid liens, H. M. T. Co. not having paid appellee; that the sales of trucks are not usually on a cash basis but at least part of the purchase price is financed; that Sahling was acting as agent for both appellee and H. M. T. Co. in selling the

truck; and that appellee accepted the proceeds of the sale in part payment of the debt from Crouch, H. M. T. Co. making good the balance.

"Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority." Holt v. Schneider, 57 Neb. 523, 77 N. W. 1086.

"Whether or not an act is within the scope of an agent's apparent authority is to be determined under the foregoing rule as a question of fact from all the circumstances of the transaction and the business." Holt v. Schneider, *supra.*

Under the situation here presented we think Sahling, while acting as agent for both parties, had general authority to make a sale of the truck to the best advantage of both parties and, in doing so, was authorized to make whatever financial arrangements were necessary to finance the purchase price, or any part thereof. Further, as stated in Johnston v. Milwaukee & Wyoming Investment Co., 49 Neb. 68, 68 N. W. 383: "If the principal desires to repudiate the unauthorized act of his agent, he must, as soon as he acquires knowledge of the facts, return, or tender a return, of any benefits by him received as the proceeds of such acts, or be held to have ratified them." And therein we went on to say: "* * * that plaintiff should return the amount so used for its benefit, or tender a return of it, if it desired to repudiate the whole of the act of the agent when he sold the cattle to defendants as unauthorized, and this whether the discovery was made before or after commencement of the action to recover the cattle."

And, as stated in Tylee v. Illinois C. R. R. Co., 97 Neb. 646, 150 N. W. 1015: "A principal who accepts the

benefits of a contract executed in his behalf by an agent is chargeable with the instrumentalities employed by the latter in procuring it."

Under all of the facts disclosed by the record we find Sahling, as agent for appellee, acted within the scope of this authority in advising Kinney that the owners of the truck would finance for him the unpaid balance of the purchase price in the sum of $10,000 and, when he made a charge of $1,200 for doing so and they accepted the benefits thereof, they are now bound by his action and must bear the responsibility for his conduct.

The note herein given in the sum of $11,200 was void from its inception and neither the principal nor interest was collectible and the appellant was and is entitled to have it canceled. But is that the limit of the relief appellant is entitled to? As we have often said: "It is the practice of courts of equity, when they once have obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties." Herrin v. Johnson Cashway Lumber Co., 153 Neb. 693, 46 N. W. 2d 111. See, also, Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131.

The evidence shows Kinney paid eight monthly installments of either $622.26 or $622.22 before instituting this action. The statutes, which have been hereinbefore quoted, not only provide that a loan made in violation of the installment loan statutes shall be void and uncollectible but further provide that the lender is is not entitled to "receive any principal, interest, or charges on such loan." See § 45-138, R. S. Supp., 1953. In view of this language we think the Legislature intended a lender should have nothing in such a situation. We therefore come to the conclusion that the appellee must return the payments which it received on this void loan. See, Rosenblum v. Family Finance Corp., *supra;* Chakford v. Sturm, *supra.* As stated in Rosenblum v. Family Finance Corp., *supra,* under statutes

comparable to ours: "A violation thereof, as indicated, renders the transaction void. Such being the case, the lender may not retain any benefits which it has received thereunder. Nor may it even seek to be placed in statu quo, for it is expressly forbidden, where at fault, 'to collect or receive any principal, interest or charges whatsoever' (sec. 358, supra)."

Having come to the conclusion that the trial court was in error in rendering the decree that it did dismissing appellant's action we reverse its judgment doing so with directions that it render a judgment as follows: First, that it cancel the installment note of June 23, 1954, from W. W. Beckley Trans. Co. by Burel Kinney owner to appellee in the total sum of $11,200; second, that it order the clerk of the district court to pay to appellant the sum of $6,222.24 deposited with him, pursuant to stipulation of the parties, to cover the last ten installments due on the above note; third, that it render a judgment against the appellee for the full amount of the eight payments made to it in the total sum of $4,977.96 plus interest at 6 percent on the amount of each payment from the date it was made; and fourth, that all costs be taxed to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

J. HAMMOND MCNISH, ADMINISTRATOR OF THE ESTATE OF BUREL KINNEY, DECEASED, APPELLANT, V. GRAND ISLAND FINANCE COMPANY, APPELLEE.

83 N. W. 2d 13

Filed May 3, 1957. No. 34126.

Usury. A time sale made in good faith at a price in excess of a cash price, which time price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not necessarily be regarded as being tainted with usury even though the difference exceeds the lawful rate of interest for a loan.

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

Ewald D. Warnsholz and *J. Max Harding*, for appellant.

Harold A. Prince, Walter P. Lauritsen, Conway & Irons, and *Martin, Davis & Mattoon*, for appellee.

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

WENKE, J.

This is an appeal from the district court for Cheyenne County. Therein, on February 3, 1955, Burel Kinney brought suit, consisting of two causes of action, against the Grand Island Finance Company. The purpose of the first cause of action, as set forth in plaintiff's amended petition filed on April 2, 1955, on which the action was tried, is to have declared null and void an alleged installment loan in the principal sum of $11,246.40, made by defendant to plaintiff, because the interest charge of $1,349.57 made for the use thereof is in violation of the maximum amount authorized by the provisions of section 45-138, R. S. Supp., 1953, which statute deals with "Installment Loans" of over $1,000. The purpose of the second cause of action, as set forth in the same amended petition, is to have declared null and void an alleged installment loan in the principal sum of $7,000, made by defendant to plaintiff, because the interest charge of $840 made for the use thereof is in violation of the maximum amount authorized by the provisions of section 45-138, R. S. Supp., 1953, which deals with "Installment Loans" of over $1,000. The relief asked in both causes of action is that the promissory note evidencing the indebtedness in each case be held null and void and that the defendant be required to refund to plaintiff all payments it has received thereon from plaintiff. The primary defense pleaded in each cause of action is that the indebtedness owing from plaintiff to

defendant is not a loan but the balance due on the time purchase price plaintiff agreed to pay for a truck and therefore not subject to the provisions of the foregoing statute.

Plaintiff was accidently killed on January 16, 1956, and the action was thereafter, on February 28, 1956, revived in the name of J. Hammond McNish as administrator of his estate. We shall hereinafter refer to decedent as Kinney.

The trial court found for the defendant and dismissed both of plaintiff's causes of action. Plaintiff thereupon filed a motion for new trial and this appeal is taken from the overruling thereof.

By stipulation of the parties, entered into at the time of trial, the evidence introduced was to be considered by the trial court in both this case and in McNish v. General Credit Corp., *ante* p. 526, 83 N. W. 2d 1. In this court the two cases were consolidated for the purpose of briefing and oral argument. Most of the questions raised are common to both cases and have been answered by our opinion in McNish v. General Credit Corp., *supra*. In view thereof we will not repeat that discussion herein except as a discussion of the facts in either cause of action herein make such reference necessary.

Kinney had, since November 25, 1951, been engaged in the trucking business with headquarters near Sidney in Cheyenne County, Nebraska. Appellee is a copartnership consisting of Edgar Reynolds and Frances Reynolds. Its principal place of business is in Grand Island, Nebraska, where, at all times herein material, it was licensed to and operating a small loan business at 115 West Second Street. The Hastings Motor Truck Company, a Nebraska corporation, was, at all times herein material, engaged in the selling and servicing of trucks with its principal place of business located in Hastings, Nebraska. Clinton J. Sahling, hereinafter referred to as Sahling, was a stockholder, the vice-presi-

dent, and a salesman of this corporation, which we will hereinafter refer to as H. M. T. Co.,

Is the appellant the real party in interest as to his first cause of action? In respect thereto appellee pleaded: "* * * plaintiff, operating under the name of W. W. Beckley, bought said Diamond T. truck from the said Hastings Motor Truck Company; that the said Hastings Motor Company issued to the plaintiff, operating as W. W. Beckley, a transfer of said Manufacturer's Certificate and that a certificate of title to said W. W. Beckley was issued by the County Clerk of Cheyenne County, being No. 39-46753, * * * plaintiff became the owner of said truck; * * *." Under our holding in Wright v. Lincoln City Lines, Inc., 160 Neb. 714, 71 N. W. 2d 182, set forth with approval in McNish v. General Credit Corp., *supra,* we do not think that question can now be raised. The same is true as to appellant's second cause of action for in the answer thereto appellee alleged: "* * * Hastings Motor Truck Company sold said truck to the plaintiff, doing business as W. W. Beckley Trans. Co., * * * Hastings Motor Truck Company sold and delivered said truck to the plaintiff * * *."

As to the second cause of action there is a further factual reason why this contention has no merit. It is true that Mrs. Kinney testified that Kinney had no interest in the trucks, nor in the trucking business he operated, except as manager thereof for W. W. Beckley of Cozad, Nebraska, who had state-wide authority to operate a trucking business. However, the purchase agreement entered into on June 23, 1954, with H. M. T. Co. shows Burel Kinney to be the purchaser; the note for the balance of the indebtedness and the chattel mortgage on the truck given to secure the same are both signed by Kinney as the owner of W. W. Beckley Trans. Co.; the letter from appellee to the clerk of Cheyenne County dated June 25, 1954, advised him the certificate of title covering the truck sold was enclosed "assigned to Burel F. Kinney" and advised him that Kinney would

call to make application therefor and to issue a new title to him; and the "Transmittal Statement" of June 23, 1954, from H. M. T. Co. to appellee shows the purchaser to be Burel F. Kinney. In this situation we think the principles announced in McNish v. General Credit Corp., *supra,* are applicable. In view thereof we come to the conclusion that the evidence establishes that Kinney became the owner of the used truck purchased and, as such, the real party in interest. But even if it can be said that the contract entered into was for the benefit of W. W. Beckley, which we do not find to be the fact, the action could still be maintained by Kinney under the provisions of section 25-304, R. R. S. 1943.

The indebtedness involved in the first cause of action resulted from the sale of a new 1954 Diamond T 7½-ton truck while the indebtedness involved in the second cause of action resulted from the sale of a used 1953 Diamond T 5-ton tractor truck. The principal question to be determined in each case is whether or not the contract was in fact a sale on time, with payments deferred, or one for cash, with a loan being made to pay the balance of the purchase price.

Joe Barger, a salesman for H. M. T. Co., handled the sale of the new truck to Kinney as a result of a telephone call from Kinney, Kinney called H. M. T. Co. by telephone advising Barger, with whom he talked, that he wanted to buy a new tandem axle tractor and that he would like to trade in a 1953 New Moon house trailer thereon at a figure of $6,000. Kinney was apparently quoted a price of $17,246.40 for a new 1954 Diamond T 7½-ton truck of the kind he wanted and offered a trade-in of $6,000 for his house trailer, thus leaving a balance of $11,246.40. Kinney advised Barger he wanted time in which to pay the balance of the purchase price and he and Barger then agreed on 24 months for that purpose. Everett Blackburn, president of H. M. T. Co., then figured out for Barger what the payments would be if Kinney wanted 24 months to pay the bal-

ance of the purchase price, that is, $12,595.97 payable in 23 monthly payments of $524.83 and one of $524.88. Barger then advised Kinney by telephone of the amount it would take to buy the truck if he wanted 24 months in which to pay. Apparently Kinney agreed thereto for the papers were accordingly prepared and taken to Sidney where Kinney signed them on August 18, 1954. We think the record shows that Kinney was informed of what the balance of the cost of the truck would be if he wanted 24 months for the purpose of paying it. We think the agreement entered into between Kinney and H. M. T. Co. resulted in a bona fide time price sale agreement.

It is true that when H. M. T. Co. sold this paper to appellee on the following day that appellee discounted it $1,349.57 and remitted to H. M. T. Co. the sum of $11,246.40, being the exact amount of the balance if Kinney had made a cash purchase. However, as we have often said: "* * * a time sale made in good faith at a price in excess of a cash price, even though the difference exceeds lawful interest for a loan, which price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury." Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122. Consequently the other provisions of the statutes relating to installment loans, which are cited by appellant, have no relationship to this paper.

We turn now to the factual background of the appellant's second cause of action. On June 22, 1954, in response to a telephone call from Kinney on June 21, 1954, Sahling went to Sidney where, on June 23, 1954, he met Kinney and, in the presence of Mrs. Kinney, negotiated the sale to him of two used trucks, the sale of one of which is the basis of the second cause of action herein.

The evidence shows that appellee had repossessed a 1953 Diamond T tractor truck which had previously

been sold by H. M. T. Co. to Raymond Bailey of Kansas City, Missouri; that at the time it was repossessed there was owing to appellee over $10,000 on the lien it held thereon, which indebtedness was guaranteed by H. M. T. Co.; that appellee took a certificate of title thereto in its name but gave H. M. T. Co. possession thereof and directed it to sell the truck; that H. M. T. Co. had a second lien thereon of $707 at the time it was repossessed by appellee; that on June 23, 1954, Sahling, for H. M. T. Co., sold the truck to Kinney, taking from him in consideration therefor a used 1951 Ford F-8 tractor truck and a $7,840 note and chattel mortgage; that appellee accepted the note and applied $7,000 in payment of the balance owing it of $6,806.75 and remitting to H. M. T. Co. the sum of $193.25, H. M. T. Co. in the meantime having paid appellee over $3,000 on the indebtedness pursuant to its guarantee thereof; that H. M. T. Co. guaranteed the Kinney note; and that appellee has kept the $7,840 note and received eight installment payments thereon each in the sum of $435.65 or $435.55 for a total of $3,485.10.

The record shows the negotiations leading up to the sale of the truck were had in Kinney's place of business near Sidney, Nebraska, on June 23, 1954, in the presence of Mrs. Kinney. Mrs. Kinney testified Kinney bought the truck from Sahling for $9,500; that he gave in part payment thereof a used 1951 Ford tractor at an agreed value of $2,500 and $7,000; that Kinney advised Sahling he would have to borrow the $7,000 some place; and that Sahling advised Kinney they could take care of that as appellee would loan him that amount. Sahling, on the other hand, testified he and Kinney talked about a cash price and a different price if he wanted time in which to pay the balance; that he told Kinney the price would be more if he wanted time to pay a part thereof; and that he and Kinney agreed upon the amount that would give Kinney 18 months in which to pay. Since these two witnesses, both of whom were present at the

time, cannot agree upon what basis the obligation of $7,840 payable in 18 installments was created we must turn to the other evidence adduced to assist us in finding out who is testifying to the correct version. In this respect the purchase agreement, as filled in by Sahling, evidences just what the original agreement entered into was. It shows the "Total Price" of the used truck purchased by Kinney as "9500.00"; that Kinney was given an "Allowance for Used 1951 F-8 tractor" of "2500.00"; and that the "Total Price Difference" was "$7000.00." In this respect the agreement entered into provides: "Purchaser agrees to terms of sale written herein * * *."

Sahling also filled in as part of this purchase agreement the following: "$7000.00 Financed 18 months $740.00 Interest Charges Loss Payable Clause to Grand Island Finance Co Grand Island Nebr." In this respect the purchase agreement provides: "There are no promises, verbal understandings, or agreements of any kind, pertaining to this contract other than specified herein." We think the language written in by Sahling reflects the agreement entered into although the interest charge, as shown by the note, was increased to $840.

Considering all of the evidence adduced, particularly the purchase agreement which Sahling filled in and then had Kinney execute at the time the contract for the sale of the used truck was entered into, we can come to no other conclusion than that the sale of the used truck was made for $9,500, subject to a trade-in for $2,500, thus leaving a balance of $7,000 which was to be paid in cash and that Sahling agreed the people he represented would make Kinney a loan for that amount, and did, for a charge of $840. The charge thus made for an installment loan of $7,000 payable in 18 monthly installments is far in excess of the maximum authorized by section 45-138, R. S. Supp., 1953, and, because of that fact, is in violation thereof and subject to the penalties imposed thereby.

Appellee admits it turned the truck over to H. M. T. Co. for sale and authorized it to sell it for appellee's benefit, and thus help liquidate the Bailey loan, but claims H. M. T. Co.'s salesman did not have authority to make a loan in its behalf. Under the situation here presented we think Sahling, while acting as agent for appellee, had general authority to make a sale of the truck to the best advantage possible for both parties and, in doing so, was authorized to make whatever financial arrangements were necessary to finance the purchase price, or any part thereof. We think Sahling acted within the scope of his authority in making the loan. Not only did appellee accept the fruits of what Sahling did, and receive payment thereunder, but it still possesses the note he secured for them and has never offered to return it. In view of the authorities cited in McNish v. General Credit Corp., *supra,* we find appellee is now bound by Sahling's actions in securing it and must bear the responsibility therefor.

The note herein given in the sum of $7,840 was void from its inception and neither the principal nor interest was collectible and appellant was and is entitled to have it canceled together with a return of all payments which have been made to appellee pursuant thereto.

Having come to the conclusion that the trial court was correct in dismissing appellant's first cause of action we affirm its judgment doing so with directions that all money paid to the clerk of the district court pursuant to the terms of the $12,595.97 note be turned over to the appellee. However, we are of the opinion that the trial court was in error in dismissing appellant's second cause of action and therefore reverse its judgment doing so and remand that cause back to the district court with directions to render a judgment therein in favor of the appellant as follows: First, that it cancel the installment note of June 23, 1954, from W. W. Beckley Trans. Co. by Burel Kinney owner to appellee in the total sum of $7,840; second, that it order the clerk

of the district court to pay to appellant the sum of $4,354.90 deposited with him pursuant to stipulation of the parties to cover the last ten installments due on the foregoing note; third, that it render a judgment against the appellee for the full amount of the eight payments made to it in the total sum of $3,485.10 plus interest at 6 percent on the amount of each payment from the date it was made; and fourth, that it tax all costs to appellee.

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

ALLEN L. MCGREE, APPELLANT, V. STANTON-PILGER DRAINAGE DISTRICT, APPELLEE.
82 N. W. 2d 798

Filed May 3, 1957. No. 34168.

1. **Eminent Domain.** Where in a condemnation proceeding a right-of-way was taken pursuant to a plat in the plans and specifications of the project, and the same was surveyed, staked, and flagged on the ground in accordance therewith when the condemnation was commenced, an error in the metes and bounds description may be corrected by the district court to conform thereto when the location of the right-of-way is questioned.
2. **Drains.** A drainage district organized under Chapter 31, article 4, R. R. S. 1943, has no duty to maintain and repair its works unless the plans and specifications of the project specifically provide therefor.
3. ———. A drainage district organized under Chapter 31, article 4, R. R. S. 1943, is liable for damages caused by the negligent construction of its works.
4. **Eminent Domain: Judgments.** The judgment of the district court on appeal from an award in a condemnation proceeding for a right-of-way is conclusive upon the parties thereto as to all matters actually litigated, and also as to all matters necessarily within the issues whether formally presented or not.
5. ———: ———. In the trial of a condemnation proceeding the owner of property taken or damaged is entitled to have all proper elements of damage considered by the jury, and he cannot afterwards maintain an action to recover for damages omitted

which were necessarily involved in the condemnation proceeding.

6. **Constitutional Law: Eminent Domain.** When land is taken outside the boundaries of the right-of-way condemned, it constitutes a second taking of private property for a public use and liability attaches therefor under Article I, section 21, of the Constitution.

7. ———: ———. In an action for damages based upon Article I, section 21, of the Constitution, against a drainage district organized under the provisions of Chapter 31, article 4, R. R. S. 1943, for the taking or damaging of private property for a public use, it is not necessary for plaintiff to plead or prove that he filed a notice as provided by section 31-451, R. R. S. 1943.

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

Bernard A. Ptak, for appellant.

Thomas L. Grady, for appellee.

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

CARTER, J.

The plaintiff brought this action against the Stanton-Pilger Drainage District for damages to his real estate caused by erosion of the banks of the Elkhorn River, and for other lands actually taken and not paid for by the district. The district filed a cross-petition asserting a mistake in the metes and bounds description of the right-of-way procured by condemnation proceedings and prayed that the description be corrected to conform to the lands actually taken. A jury was waived and a trial had to the court. The trial court found for the district on plaintiff's cause of action and for the district on its cross-petition. From the judgment rendered in accordance with these findings the plaintiff has appealed.

The plaintiff is the owner of the south 120 acres of the Northeast Quarter of Section 6, Township 23 North, Range 4 East of the 6th P. M., in Cuming County, Nebraska. The lands involved in this action lie within a large horseshoe bend of the Elkhorn River. The river

in this area is a very crooked stream and has frequently changed its channel at various places by erosion. The district, some time prior to May 27, 1950, determined to construct a pilot channel across the south end of plaintiff's lands and thereby straighten the course of the river. After failing in its attempts to negotiate a right-of-way across plaintiff's lands, it proceeded by condemnation to obtain one. It sought a right-of-way 200 feet in width in the center of which it proposed to construct a pilot channel 24 feet wide at the bottom and 34 feet wide across the top into which the river was to be diverted. The plat describing the land to be taken showed that the pilot channel would enter plaintiff's lands on the west. The center of the right-of-way was to be 790.5 feet north of the southwest corner of plaintiff's lands. The right-of-way was surveyed, staked, and flagged on the ground at the time of the appraisal and at the time of the trial in the district court in accordance with this figure. The record shows, however, that in describing the right-of-way by metes and bounds on the original plat and in the appraisers' award from which the appeal was taken, due to an evident transposition of figures the distance was shown as 709.5 feet instead of 790.5 feet.

It is clear from the record that the right-of-way was correctly marked out on the ground by stakes and flags when the appraisers viewed the premises and when the case was tried in the district court. The misdescription did not prejudice the rights of the plaintiff. The trial court was in all respects correct in reforming the description to conform to the plat and the survey made on the ground. See Holst v. Streitz, 16 Neb. 249, 20 N. W. 307. The contention of the plaintiff that he is entitled to be paid for land actually taken which was not within the right-of-way based on the distance of 709.5 feet from the southwest corner of plaintiff's land to the center of the right-of-way to the north where it entered plaintiff's lands is without merit. The trial

court found that the description contained in the appraisers' award in the condemnation case should be corrected and reformed to read as follows: A strip of land 200 feet wide across the south half of the northeast quarter of Section 6, Township 23 North, Range 4 East of the 6th P. M., in Cuming County, Nebraska. The center line of said strip of land is more particularly described as follows: Commencing at a point 790.5 feet north of the southwest corner of said quarter section as the point of beginning; thence south 73° 36′ east 487.9 feet; thence southeasterly 2,095.9 feet along a 14,324.9 feet radius curve concave northeasterly and tangent to the preceding course, to a point 192.9 feet north of the southeast corner of said quarter section as the point of ending.

The foregoing is the description of the right-of-way actually taken, and constituted the basis on which damages were assessed. The trial court correctly reformed the appraisers' description of the right-of-way to conform to the facts. No pleadings were filed in the district court in the original condemnation proceeding and no description of the right-of-way was set out in the district court judgment. This necessitates the correction of the error in the description contained in the appraisers' award to make it conform to the facts. The authority of the court to reform such an instrument is supported by Beall v. Martin, 48 Neb. 479, 67 N. W. 433; 31 Am. Jur., Judgments, § 639, p. 220; 49 C. J. S., Judgments, § 237, p. 449. The trial court correctly granted the prayer of the cross-petition.

It is clear that plaintiff was paid for all the land within the right-of-way described above. His claim for 5.493 acres of such land so taken, which was outside of a right-of-way based on the distance of 709.5 feet from the southeast corner of his lands to the center of the right-of-way at the point where it entered his lands, was properly denied by the trial court.

The plaintiff seeks to recover for lands taken by the

erosion of the river outside the boundaries of the right-of-way as he contended them to be, and some of which eroded land was outside of the right-of-way as we have found it to be. The district asserts that this was damage contemplated by and fully settled by the condemnation proceeding.

As we have heretofore stated, plaintiff's land lies in a bend of the river. Where the pilot channel was constructed there had been no previous river channel. The plaintiff refused to grant a right-of-way because he was familiar with the tendency of the river to erode and change its course, and he was fearful that it could or would not be contained within the 200-foot right-of-way. The president of the drainage district testified that this tendency of the Elkhorn River was well known and that it was not contemplated that the river would be contained within the banks of the pilot channel. It was contemplated, as he testified, that the river would erode and adjust its course as the full volume of the stream gradually assumed the new course charted by the pilot channel. It is for this reason that a right-of-way of 200 feet was sought and obtained. The pilot channel was 34 feet wide at the top with 83 feet of land on each side within the right-of-way. The river could therefore erode and change its course for 83 feet in either direction from the established banks of the pilot channel without injuring the lands of the plaintiff.

It is the contention of the plaintiff that when the river by erosive action changed its course and washed away his lands outside of the condemned right-of-way, it was a taking in excess of the land condemned and gives rise to an action for compensation under Article I, section 21, Constitution, providing: "The property of no person shall be taken or damaged for public use without just compensation therefor."

The record shows that plaintiff's lands were subject to erosion by the river solely because of the diversion of its natural course by the drainage district. It was

the drainage district which made the determination of the amount of plaintiff's lands to be taken. The plaintiff was in no position to insist that more was needed and should be paid for. It was contemplated that the pilot channel would adjust itself by the erosive action of the river. The river was to be the agent of the drainage district in converting the pilot channel into an adequate watercourse to carry the waters of the Elkhorn River. In performing this function it left the boundaries of the right-of-way and encroached upon plaintiff's lands. This is clearly an additional taking which gives rise to a cause of action for the land taken under Article I, section 21, of the Constitution. This holding is sustained by Compton v. Elkhorn Valley Drainage Dist., 120 Neb. 94, 231 N. W. 685.

The plaintiff contends further that the drainage district negligently constructed the pilot channel when it failed to dam the old river channel and force all of the water in the river into the new pilot channel. The record shows that the plans and specifications of the drainage district did not provide for such construction. The evidence shows that the drainage district only partially blocked the flow of water into the old channel of the river for the very purpose of permitting water to flow therein and fill the old channel by sedimentation. As the old channel filled up, more water was forced into the new pilot channel as the river adjusted its new course by erosive processes. The condemnation proceeding was therefore res judicata of all such damages. Such damages were properly recoverable in the condemnation proceeding and it is conclusively presumed that they were allowed by the verdict of the jury. The record does not sustain a finding that the pilot channel was negligently constructed.

The plaintiff alleges also that he has suffered damages because of a failure of the drainage district to maintain the new channel. We point out that the Legislature has provided two methods for the organization of drain-

age districts to cover a situation such as we have before us. One is an organization by a proceeding in the district court as provided by Chapter 31, article 3, R. R. S. 1943, which type districts will hereafter be referred to as article 3 districts. The other method of organization is by a petition of landowners to the proper county board as provided by Chapter 31, article 4, R. R. S. 1943, which type of districts will hereafter be referred to as article 4 districts. The defendant district is an article 4 district.

Many of the provisions of articles 3 and 4 are similar. The provisions of article 3, however, provide for the maintenance and repair of the project constructed, while the provisions of article 4 impose no such duty upon the district. Consequently, we find cases involving article 3 districts which compel maintenance and repair by the districts, or sustain judgments for damages for failure by the districts to do so. Among the cases so holding are the following: Richardson County v. Drainage Dist. No. 1, 113 Neb. 662, 204 N. W. 376; Mooney v. Drainage Dist., 126 Neb. 219, 252 N. W. 910; Mooney v. Drainage Dist., 134 Neb. 192, 278 N. W. 368; Ritter v. Drainage Dist. No. 1, 137 Neb. 866, 291 N. W. 718; Ritter v. Drainage Dist. No. 1, 148 Neb. 873, 29 N. W. 2d 782; County of Johnson v. Weber, 160 Neb. 432, 70 N. W. 2d 440.

In cases involving drainage districts organized under article 4, the district has been held liable for negligent construction of the improvement, but has not been held liable for failure to maintain and repair, except where the latter was provided for in the plans and specifications of the project. This is due to the fact that article 4 does not impose the duty of maintaining and repairing its works upon the drainage district. In Idlewild Farm Co. v. Elkhorn River Drainage Dist., 116 Neb. 300, 216 N. W. 817, we stated: "The general rule, as we deduce it from the authorities and from our statutes, is that where the law authorizes the diversion of a river, and where such diversion has been effected by a construction which is nonnegligent, the duty devolves upon the

owner of the abutting lands to maintain the river in its new course, and not upon the drainage district which did the work, unless the plans and specifications of the project specifically provide for such maintenance by said district." Other cases to this effect are: Bunting v. Oak Creek Drainage Dist., 99 Neb. 843, 157 N. W. 1028, L. R. A. 1918B 1004; Boschulte v. Elkhorn River Drainage Dist., 102 Neb. 451, 167 N. W. 730; Hopper v. Elkhorn Valley Drainage Dist., 108 Neb. 550, 188 N. W. 239; Compton v. Elkhorn Valley Drainage Dist., *supra*.

The latter case appears to be the last case decided by this court in which an article 4 drainage district was involved on similar issues. It also appears to be the first case in which Article I, section 21, of the Constitution, was given consideration and applied to an article 4 district. The effect of its holding is that liability attaches for a condition amounting to a second taking or damaging of the landowner's property. It superimposes Article I, section 21, of the Constitution, upon previously declared rules governing article 4 drainage districts and, we think, properly so. In an action for damages based upon Article I, section 21, of the Constitution, against a drainage district organized under the provisions of Chapter 31, article 4, R. R. S. 1943, for the taking of private property for a public use, it is not necessary for plaintiff to file the notice required by section 31-451, R. R. S. 1943. Quest v. East Omaha Drainage Dist., 155 Neb. 538, 52 N. W. 2d 417.

The trial court sustained objections to evidence tending to show damage to the remaining lands. The evidence shows that such damages to the lands not taken were issuable in the previous condemnation proceedings. Plaintiff may not again obtain a judgment for damages which were or should have been litigated in the condemnation proceeding. Gruntorad v. Hughes Bros., Inc., 161 Neb. 358, 73 N. W. 2d 700.

We arrive at the following conclusions: No duty is

imposed upon a drainage district organized under Chapter 31, article 4, R. R. S. 1943, to maintain its works. Such a drainage district is liable for maintenance and repair only when the plans and specifications of the project so provide. Such a drainage district may be held liable for negligence in the construction of its works. When the application for condemnation specifies the desired taking and use of the real estate being taken, all damages caused by such taking and use properly exercised will be included in the damages allowed in such proceedings and will bar any further claim for such damage. Where property in excess of that condemned is taken, an action lies for its value under Article I, section 21, of the Constitution.

The trial court erred in dismissing that part of plaintiff's petition praying for the reasonable value of the land taken outside of the right-of-way as condemned by the drainage district. Other causes of action were properly dismissed. The trial court properly sustained the prayer of defendant's cross-petition. The judgment of the district court is reversed and the cause remanded with directions to the trial court to determine the amount of land taken outside of the right-of-way condemned, to determine its value, and enter a judgment for the plaintiff for the amount thus found due.

REVERSED AND REMANDED WITH DIRECTIONS.

MARTHA E. HILLEREGE, APPELLANT, V. CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
83 N. W. 2d 76

Filed May 10, 1957. No. 34074.

1. **Municipal Corporations.** The title to a street vested in a city is not generally a fee simple absolute but is a qualified base or determinable fee and it is held in trust for the purposes to which the street is dedicated.
2. ———. The right which an owner of abutting property possesses in a street is different in kind from that possessed by

one whose interest is only that of a right-of-way along the street.

3. **Municipal Corporations: Constitutional Law.** The right of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement in the street which the owner of the property has, not in common with the public generally, and of which he cannot be deprived without due process of law and compensation for his loss.
4. **Municipal Corporations.** The owner of property abutting on a street is not entitled, as against the public, to access to his land at all points in the boundary between it and a street, although entire access cannot be denied him. The measure of the right of the property owner is reasonable ingress and egress under all the circumstances.
5. **Municipal Corporations: Constitutional Law.** The grant by the state to a city of the power to control and improve streets or any part of them in any manner it deems proper is the delegation of police power to be exercised with a sound discretion in a reasonable and not in an arbitrary or discriminatory manner.
6. ———: ———. It is the right of a city, in the exercise of the police power delegated to it in reference to its streets, to determine the action required for the safety, convenience, and welfare of the public.
7. ———: ———. The action of a city in the exercise of the police power is not absolute or final but is subject to judicial review.
8. ———: ———. The test in such a case is whether or not the action proposed is a good faith, reasonable exercise of the police power or an arbitrary and unreasonable interference with the rights of persons affected thereby.
9. ———: ———. Action taken by a city in the exercise of the police power is presumed to be valid and the burden is on the litigant contesting its validity to establish by clear and unequivocal proof that it is so unreasonable, arbitrary, or discriminatory as to amount to depriving the litigant of his property without due process of law.
10. ———: ———. Municipal action, in the exercise of the police power, is not necessarily invalid because it infringes on private rights or property but such infringement may not be unreasonable, discriminatory, or confiscatory.
11. ———: ———. It is a denial of equal protection of the law to apply a regulation differently to different persons under the same or similar circumstances.
12. ———: ———. Municipal action applicable to all persons affected thereby within the area described is not discriminatory.

13. **Municipal Corporations: Injunctions.** The general rule is that prospective action of a city in the exercise of legislative power in relation to a subject committed to its jurisdiction cannot be enjoined. Courts will not ordinarily intervene until some effort is made to enforce alleged unauthorized action taken by the city.

APPEAL from the district court for Scotts Bluff County: JOHN H. KUNS, JUDGE. *Reversed and remanded with directions.*

Mothersead, Wright & Simmons and *Robert M. Harris*, for appellant.

Clarence S. Beck, Attorney General, *Harold S. Salter*, and *Loren G. Olsson*, for appellees.

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

BOSLAUGH, J.

Appellant by this action seeks an injunction preventing appellees from erecting any structures which will interfere with the use of described parking areas of appellant unless and until appellees establish the right to do so by due process of law, and preventing appellees from giving effect to a designated contract made by them concerning the regulation of parking in the street adjacent to the front of described properties owned by appellant.

The appellant states three causes of action which are in substance the following:

The first relates she is the owner of specifically described real estate in Scottsbluff on which prior to the year 1955 she constructed extensive and valuable improvements, a portion of which is a paved parking area where customers using the improvements may park their motor vehicles thereon and off of the right-of-way of the public streets. The property is in the condition it has been since before the year 1955. The parking area is of value to the appellant and the described premises, and the loss of the use of the parking

area would greatly depreciate the value of the entire premises. Appellees will, unless enjoined by the court, erect structures on the right-of-way of a public street adjoining the parking area, designed, intended, and adequate to make it impractical and impossible to use the parking area. The structures will deprive the appellant of the use of her property without due process of law and will cause her irreparable damage. She has no adequate remedy at law.

The second states appellant is the owner of described real estate in Scottsbluff on which are valuable improvements and in front of which there is and has been for many years an area provided and used for parking motor vehicles. The parking area is of value to the premises and the other improvements thereon. Appellees intend to and will, unless enjoined by the court, construct structures upon the right-of-way of a public street in front of and adjacent to the parking area, designed, intended, and adequate to make it impractical and impossible to use the parking area. The structures will deprive appellant of the use of her property without due process of law and will cause her irreparable damage. She has no adequate remedy at law.

The third claims appellant is the owner of the premises described in the preceding causes of action. The freedom to park motor vehicles on the street adjacent to the premises is of great value to the appellant. Appellees made and executed an instrument in writing on or about August 11, 1955, by which they mutually agreed that parking in the street in front of the premises of appellant should be adjacent to and parallel with the curb and no nearer than 14 feet of the center line of the street. The city bound itself to cooperate fully with the state in the matter of on-street parking at said places; and if the state should require definite regulations other than those in effect, the city agreed to cooperate fully with the state and to pass an ordinance containing and making effective such measures as may be required

by the state. Appellees consider the instrument to be a valid and binding contract and they intend to carry out its provisions. The instrument purported to be authorized by a resolution of the council of the city. It does not appear in the minutes of the proceedings of the council and the instrument has not been published as required by law. The instrument is an attempted illegal delegation of legislative action by the city and is an attempt to create an ordinance without compliance with statutory mandates precedent to the passage and effectiveness of an ordinance. It is unconstitutional and void and its enforcement would deprive appellant of her property without due process of law.

The State of Nebraska, Department of Roads and Irrigation, hereafter referred to as State, denied all claims made by appellant and alleged the following: Appellees made an agreement July 13, 1955, for the widening and improvement of the portion of Twenty-seventh Street of the city of Scottsbluff, referred to hereafter as city, beginning at its intersection with Avenue A and extending westerly to the intersection of Twenty-seventh Street with State Highway No. 87, a copy of which agreement is exhibited as a part of the answer. The city and the State executed the instrument on August 11, 1955, referred to by appellant in her third cause of action, and it is a binding contract between the parties. The city regulates traffic and parking upon its streets and sidewalks. It determines the width of the paved surface, the location and dimension of curbs, and the location and width of sidewalks within the city on its street rights-of-way. Appellant has no vested interest in or property right to the flow of traffic of Twenty-seventh Street.

The city denied all allegations of appellant except those as to the class and status of the city, the ownership of the real estate in the city as alleged by appellant, and the execution of the instrument referred to by appellant as having been made and entered into by

appellees. The city alleged it regulates traffic and parking upon the streets and sidewalks and that it determines the width of the paved surface, the location and dimension of curbs, and the location and width of sidewalks within the city on its street rights-of-way.

The reply of appellant was a denial and a claim that the action contemplated by appellees discriminates against appellant in attempting to deny her use of the streets which is permitted to other persons similarly situated.

The parties agree that Scottsbluff, Nebraska, is a city of the first class with a population of less than 40,000 inhabitants; that it is not a home rule city; and that appellant is the owner of Lots 13 and 14, Block 2, Beatty Tracts, an addition to the city of Scottsbluff, designated herein as Tract 1, and Tract No. 24, Goos Tracts, an addition to the city of Scottsbluff, spoken of herein as Tract 2.

The district court found that: The real estate of appellant abuts Twenty-seventh Street, is improved, and is used for business purposes. Prior to 1955 appellant paved the area of the real estate described in the first cause of action northward from the north line of the sidewalk to the south boundary of Twenty-seventh Street, and customers transacting business on the premises parked motor vehicles partly on that pavement and partly on Twenty-seventh Street but not upon the paved portion of the street. A similar use was made of the real estate involved in the second cause of action except no part of it has been paved. There are no barrier curbs in front of the real estate of appellant. The city adopted an ordinance August 4, 1953, creating an improvement district for widening and improving a portion of Twenty-seventh Street beginning at Avenue A and continuing westward past the real estate of appellant. The ordinance was duly published. Plans and specifications for the project were approved by resolution of the city council and they provide for con-

struction of barrier curbs in front of the premises of appellant. These change the method by which persons operating vehicles have access from Twenty-seventh Street to each of the properties of appellant. The change in access will prevent parking vehicles as was done before such construction and it will lessen and may eliminate such parking. The plan for barrier curbs is uniform within the improvement district except at the entrances to filling stations. Parking space for customers at other business properties is provided in the manner appellant has done on the route of U. S. Highway No. 26 within the city and at other places which do not abut upon the highway. The city has not commenced condemnation proceedings because of the street improvement district or anything that is contemplated to be done within it. No part of the street improvement is upon private property and the proposed construction will not interfere with the use by the public of the street for highway purposes. There is proof that completion of the construction as provided by the plans and specifications will substantially diminish the value of the property and the value of the use of the property of appellant. The State is assisting the city in the preparation of plans and specifications and in the supervision of construction. It does not make or enforce restrictions upon the use of property abutting on the street.

The trial court made no finding as to the four issues indicated because of its conclusion that they were each immaterial in this case and that the record exhibited no facts that would justify findings thereon, to wit:

1. The validity of ordinances which may be subsequently enacted by the city for the regulation of parking upon Twenty-seventh Street.

2. The right of the city to regulate parking and access of vehicles to privately owned property without compensation to the owners of abutting property.

3. The right of the Department of Roads and Irrigation, State of Nebraska, to demand or request the

adoption of ordinances by the city pursuant to the terms of the contract previously executed.

4. The right of the plaintiff to institute action under section 76-705, R. S. Supp., 1955, for the ascertainment and recovery of consequential damages claimed by her.

The judgment was that "both causes of action" be dismissed and the temporary injunction granted in the case be dissolved, all without prejudice to an action at law by appellant for the recovery of damages which may result from the construction proposed by the city or from the adoption of later regulations restricting parking and access of vehicles to the properties owned by appellant. The motion for a new trial was denied; hence this appeal.

This case is concerned with the part of Twenty-seventh Street of the city west of Broadway Avenue which extends north and south. The direction of Twenty-seventh Street, which is also spoken of in the record as West Twenty-seventh Street, is east and west. It is a business street and it continues from Broadway Avenue to Avenue I a distance of about 1 mile. It lies in the route of U. S. Highway No. 26 and Nebraska State Highway No. 29 as they are located through the city. These will be spoken of as Highway No. 26 and Highway No. 29, respectively. The right-of-way of Twenty-seventh Street was, at the commencement of this action, 66 feet in width and the paved surface of it was 20 feet wide. The center line of the paved portion of the street was the center line of its right-of-way. There were no curbs on the street. The surface of the right-of-way on either side of the pavement was dirt or gravel.

Appellant has owned and does own Tract 1 known as Terry's Town and Country. It consists of the real estate and improvements thereon. The building is 100 feet from east to west and about 118 feet from north to south. In it is conducted a drug store, a super-foods market, and other businesses. The front of the build-

ing is toward the north. The real estate abuts on the south side of Twenty-seventh Street and on the east side of Avenue D. The distance from the north line of the building to the north property line, which is the south line of Twenty-seventh Street, is between 18 and 19 feet and the distance from the east right-of-way line of Avenue D to the west property line is about 14 feet. It is 47 feet from the east line of the building to the east property line. This area is devoted to the parking of customer vehicles and it is designated customer parking lot. There is a private concrete sidewalk about 7 feet wide along the entire front or north side of the building. There is a private paved parking area about 11 feet wide extending from the north edge of the sidewalk to the south right-of-way line of Twenty-seventh Street which was provided and completed when the building was constructed about the year 1947. The patrons of the businesses conducted in the building have been permitted to and they have since the building was constructed parked their automobiles to the north of and at right angles to the building with the front of the cars to the south. They have been privileged to have the front wheels of their cars against the north edge of the sidewalk and to let the front of the vehicles overhang the sidewalk. It has been possible to park at one time in the manner described as many as ten or eleven automobiles north of the building. The length of motor vehicles is from 14½ feet to about 18 feet. The rear part of such vehicles parked north of the street in the manner described was far enough north so that it extended into and occupied to some extent the right-of-way of Twenty-seventh Street. There was evidence of the owner of a 1949 Packard sedan, about 17 feet in length, that he had parked it with his front wheels against the north edge of the sidewalk in front of the building and within about 12 inches of another parked car on the left of the Packard car, and that he backed the Packard to a point so that he could proceed to his left or to the east

without any part of his car overlapping or extending to the paving on Twenty-seventh Street.

The south part of Tract 2 owned by appellant abuts the north side of Twenty-seventh Street and the west part of the property abuts the east side of Avenue F. In the building on the premises is a business described as Bendix Laundrette. The front of the building is toward the south and Twenty-seventh Street. Its front line is about 12 feet north of the north right-of-way line of Twenty-seventh Street and the west line of the building is about 6 feet east of the east right-of-way line of Avenue F. There is a private sidewalk about 4 feet wide that is adjacent to and along the front of the building. The patrons of the Laundrette have parked their vehicles in front of the building at right angles to the building. The vehicles parked in this manner extend south into the right-of-way of Twenty-seventh Street but not to or on the paved portion of the street.

In August 1953 the city, by proceedings duly had, decided to improve Twenty-seventh Street from the east line of Avenue A to a point 200 feet west of the west line of Avenue I by laterally extending the concrete roadbed 14 feet on either side of the existing pavement thereon so that the paved highway on the street could consist of four lanes of 12 feet each. The work contemplated by the improvement of the street was described as grading, curbing, guttering, paving, and drainage as provided by plans, specifications, and estimates to be thereafter adopted. The ordinance creating the improvement district was published and notice of the erection of the district was given as required by law. There is no issue as to the regularity of the proceedings creating the district or as to the validity and effectiveness of the city legislation establishing it. The city, in the manner permitted by law, made a contract with the State of such a nature that it enabled the city to obtain federal aid funds on account of the project. The city, by resolution, approved plans for the project July

18, 1955. The plans provided for the work above related, including the installation of median curbs, gutters, and barrier curbs in front of all properties within the project. The regular median curb is at the outer edge of the surfaced portion of the street. It is primarily for drainage purposes and for delineating driveway openings. The median curb is about 9 feet inside of the right-of-way line. The barrier curbs restrict the use of public property, the street right-of-way, for parking purposes or any other use which abutting properties might wish to make of that public property. Barrier curbs are constructed on the right-of-way adjacent to the right-of-way line and join at intersections and driveways with the median curbs. The plans permit ingress and egress to and from all properties abutting on the street. The curb cut for driveway purposes in front of Tract 1 of appellant is 23 feet and, likewise, the curb cut for driveway purposes serving Tract 2 owned by appellant is 33 feet. There is evidence that an object of barrier curbs is to prevent the area between the median curbs and the street right-of-way line being utilized for parking or other purposes that would cause a hazard to the traveling public by obscuring the vision of vehicles entering and leaving abutting properties and of traffic moving on the street. The available means to accomplish these purposes are barrier curbs, guard posts, or guard rails. There is a heavy volume of traffic on Twenty-seventh Street. An estimate of 200 motor vehicles enter and leave the parking stalls in front of Terry's Town and Country in the period of an average 10-hour day when the supermarket is open for business.

The testimony of appellant was not disputed that the value of Tract 1 was about $100,000, that the construction of the barrier curbs in front of and near the building thereon would diminish the value of the property to $40,000 or $50,000, and that the rental value and the rent received from the property is $600 per month. Tract

1 has been rented to the same tenant since it was built and the lease has not expired. The tenant is a partnership and the members thereof corroborated the testimony of the owner of the premises that the fair and reasonable rental thereof is $600 per month and that the rental value thereof, if the barrier curbs are constructed as planned, would be reduced to $300 per month or less. Appellant testified, and is not contradicted in the record, that the value of Tract 2 was $25,000 to $30,000; that it has been and is rented for $115 per month on a term lease that has not expired; and that if the barrier curbs are constructed affecting this property as proposed, the value thereof would be reduced to $12,000 or $15,000.

The essence of the complaint made by appellant in each of the first and second causes of action is that appellees will, unless prevented by mandate of the court, construct on the right-of-way of Twenty-seventh Street in front of the parking area of each of the properties of appellant, structures, median and barrier curbs, designed, intended, and adequate to make it impractical, and probably impossible, to use the parking area of each of the properties of appellant as they have been used and would continue to be used if the curbs were not erected as proposed by the city. If the proposed curbs were eliminated from the street improvement as it affects the property of appellant, the substance of this lawsuit would be dissipated. Appellant believes and argues that the city cannot legally accomplish its purpose in this respect without first ascertaining by proper proceedings and paying, or providing in a legal way for the payment, to appellant any damages accruing to her as an abutting owner occasioned by the contemplated street improvement as planned. Inherently the position of appellant contains a claim that the contemplated improvement of the street, even though attempted by the exercise of the police power, may not be accomplished without the payment of damages to appellant because the mere construction of the barrier curbs in front of the real estate

of appellant will reduce the reasonable value of it about 50 percent and that she contends is confiscatory. Appellant appeals for support of her position to the constitutional assurance that the property of no person shall be taken or damaged for public use without compensation therefor. Art. I, § 21, Constitution of Nebraska. She characterizes this as the basic law involved in this case.

The capability of a city in the exercise of the police power delegated to it is not absolute and unlimited. Municipal action may not be so arbitrary, unreasonable, confiscatory, or discriminatory as to deprive an owner of property without due process of law.

It is said in City of Scottsbluff v. Winters Creek Canal Co., 155 Neb. 723, 53 N. W. 2d 543: "In the exercise of police power delegated to a city it is generally for the municipal authorities to determine what ordinances are required for the health, safety, and welfare of the people, but their action is not final and is subject to scrutiny of courts. * * * The test in such cases is whether the ordinance in question is a bona fide exercise of police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation. * * * A municipal ordinance enacted in the exercise of police power is not necessarily invalid because it infringes on private rights or property, but such infringement should not be arbitrary, unreasonable, or confiscatory."

In Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 332, 28 A. L. R. 1321, it is declared: "As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone." See, also, Chicago, B. & Q. R. R. Co. v. State of Illinois ex rel. Drainage Commissioners, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596.

It is true, as appellant asserts, that it has been some-

times stated that the fee of the street is in the municipality. This form of statement was sufficient for the facts the court was then considering and it was not necessary for it to determine or precisely declare in those cases the exact nature of the ownership a city has of a street or the condition and qualification of its title. It is generally recognized that under legislation such as prevails in this state the title of a street vested in a municipality is not a fee simple title absolute but a qualified base or determinable fee and that the title which the municipality has is held in trust for the purposes for which the street is dedicated. This court stated in Burlington & M. R. R. Co. v. Reinhackle, 15 Neb. 279, 18 N. W. 69, 48 Am. R. 342: "The fee of streets is in the public; but it is held in trust for public use. The municipal corporation cannot sell or permanently obstruct the streets without compensation to the owners of property specially injured thereby. The trust like any other must be exercised in good faith. It was created to give permanency to streets and apply them wholly to the use of the public." See, also, Jaynes v. Omaha Street Ry. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; Belgum v. City of Kimball, 163 Neb. 774, 81 N. W. 2d 205; Annotation, 11 A. L. R. 2d 549.

A city cannot prohibit the use of a street for travel thereon or for any reasonable incident of travel. It may reasonably regulate but it cannot prohibit. The right of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement in the street which the owner of abutting property has, not in common with the public generally, and of which he cannot be deprived without due process of law and compensation for his loss.

It is stated in Jaynes v. Omaha Street Ry. Co., *supra*: "As an abutting property owner she (the plaintiff) has the right to free ingress and egress to and from this property and to and from the street * * *."

Michelsen v. Dwyer, 158 Neb. 427, 63 N. W. 2d 513, states: "The rights which an owner of abutting property possesses in a street are different in kind from those possessed by one whose interest is only that of a right-of-way along the street."

In Hathaway v. City of Sioux City, 244 Iowa 508, 57 N. W. 2d 228, it is said: "Whatever might be our conclusion if we had a simple question between private owners of abutting premises * * * there is involved here an additional and, we think, a controlling element, viz., plaintiffs' right of ingress to and egress from their premises by way of First Street. This is a property right, an easement in the street which the owner of abutting property has, not common to the public generally and which cannot be taken away without just compensation. * * * This property right of access and egress is appurtenant to plaintiffs' premises."

It is stated in Anzalone v. Metropolitan District Commission, 257 Mass. 32, 153 N. E. 325, 47 A. L. R. 897: "Access to a public way is one of the incidents of ownership of land bounding thereon, and this right is appurtenant to the land and exists when the fee of the way is in the municipality as well as when it is in private ownership."

Genazzi v. County of Marin, 88 Cal. App. 545, 263 P. 825, asserts: "* * * an abutting land owner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right of easement which cannot be damaged or taken from him without due compensation." See, also, Liddick v. City of Council Bluffs, 232 Iowa 197, 5 N. W. 2d 361; Breinig v. Allegheny County, 332 Pa. 474, 2 A. 2d 842; 25 Am. Jur., Highways, § 154, p. 448; 64 C. J. S., Municipal Corporations, § 1701, p. 96; Annotations, 22 A. L. R. 942, 47 A. L. R. 902, 66 A. L. R. 1052.

The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the

circumstances. The right of access does not extend to all points in the boundary between the abutting property and the street. In Denman v. City of Tacoma, 148 Wash. 314, 268 P. 1043, it is said: "We recognize the law to be that a land owner may have a special right of ingress and egress to and from his land of a special nature, differing from and superior to the right of the public, even over portions of a highway not directly abutting upon his land. We concede that appellant has such a right under the circumstance here presented. The extent of that right is the real question here presented. Its measure, we think, is simply reasonable ingress and egress under all the circumstances. Freeman v. Centralia, 67 Wash. 142, 120 Pac. 886, Ann. Cas. 1913D 786."

This appears in Genazzi v. County of Marin, *supra*: "Generally speaking, an abutting land owner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right of easement which cannot be damaged or taken from him without due compensation. But an owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway, although entire access cannot be cut off. If he has free and convenient access to his property, and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint."

Bacich v. Board of Control, 23 Cal. 2d 343, 144 P. 2d 818, states: "* * * an owner of property abutting upon a public street has a property right in the nature of an easement in the street which is appurtenant to his abutting property and which is his private right, as distinguished from his right as a member of the public. * * * The extent of the easement of access may be said to be that which is reasonably required giving consideration to all the purposes to which the property is adapted." See, also, 64 C. J. S., Municipal Corporations, § 1703, p. 99.

The charter of the city authorized it to make the street improvement involved in this case. The relevant provisions of section 16-609, R. R. S. 1943, are: "The council shall have power to * * * control, * * * extend, widen, * * * grade, curb, gutter * * * and pave or otherwise to improve * * * in any manner it may deem proper, any street, avenue or alley * * * or part of either * * *." This grant by the state to the city was a delegation of police power to be exercised in harmony with a sound discretion in a reasonable and not in an arbitrary or discriminatory manner. State ex rel. Andruss v. Mayor and Council of City of North Platte, 120 Neb. 413, 233 N. W. 4. It is generally for the municipal authorities, in the exercise of the police power delegated to the city in reference to its streets, to determine what action is required for the safety, convenience, and welfare of the people. Its action in this respect is not final but is subject to judicial review. The test in such a case is whether or not the action proposed is a good faith, reasonable exercise of the police power or an arbitrary and unreasonable interference with the rights of the person or persons affected thereby. The action taken by the city is presumed to be valid and the burden is on the litigant contesting it as invalid to establish by clear and unequivocal proof that it is so unreasonable, arbitrary, confiscatory, or discriminatory as to amount to depriving the litigant of property without due process of law. City of Scottsbluff v. Winters Creek Canal Co., *supra*; State ex rel. Andruss v. Mayor and Council of City of North Platte, *supra;* Council Bluffs Transit Co. v. City of Omaha, 154 Neb. 717, 49 N. W. 2d 453; Graham v. Graybar Electric Co., 158 Neb. 527, 63 N. W. 2d 774.

Scottsbluff is a growing city. The street in question is one of its much-traveled principal streets. It is a business street. It is the route of two improved, favored highways. The volume of traffic upon it is very heavy. The paved part of the street is, or will be when the improvements are accomplished, 48 feet wide. The distance

from the center of the paved portion to the median curb is 24 feet. There are thereon but two lanes of travel of 12 feet each. During an average business day of 10 hours when Terry's Town and County is operating, about 200 automobiles are parked in the parking spaces in front of the building. This is an average of 20 each hour and 1 each 3 minutes coming in and going out. The automobiles are generally about 15 feet to 18 feet long. The facts recited herein make it certain that the rear of an automobile parked in front of the building at right angles thereto is in the right-of-way of the street and quite close to the south edge of the pavement and, according to the evidence, usually about 12 feet from the center of the right-of-way when backed out of the parking sufficiently to leave by turning and proceeding to the right or left past other parked cars.

The rear end of an automobile parked at right angles in front of the building on Tract 2 is close to the median curb. The distance from the south line of the sidewalk in front of the building to the median curb or the north edge of the street pavement is about 17 feet. The operation of parking in that location in that position and the operation of leaving the parking not only necessitates using and occupying a part of the street but going upon and using the paved portion of it. There is even a hazard that vehicles may be backed out of the parking to the south across the center line of the pavement.

The testimony of one operator of an automobile 17 feet in length that was parked with its front wheels against the sidewalk in front of the building on Tract 1 about 12 or 14 inches from a parked car to the left and that the operator backed it out of the parking and drove to the right or east without driving onto the street pavement is not convincing of the absence of hazard from the parking of automobiles north of the building with free and unlimited ingress and egress to and from the street. There was no car parked in the parking space immediately to the right of the car used in this test of the

situation. This experience does not demonstrate much. The city was not confronted with an ideal situation when is was considering and exercising its discretion in the planning and improvement of the street for the safety and convenience of the public. The problem was the hazard in the ordinary operation of automobiles parked in the spaces under the circumstances shown, and not what is possible for a careful driver to do on a single occasion or what could happen in only one of many different circumstances or what would take place if a motorist would never fail to exercise sound judgment and due care.

Appellant insists that there is no traffic hazard involved in the existing situation. She says the State or city has not determined that a hazard existed in the area because of the parking and that the same conditions have existed in front of her property since 1947. The inference is that because there had not been an accident, it is unreasonable for the city to take action to improve a situation for the benefit of the public. It is not essential that inevitable accident will result from a situation before it becomes reasonable for a city to take action to remove the danger of accident and injury from what it evaluates as a hazardous condition.

It was sufficient justification for the action of the city that a condition existed which was of such unusual hazard that in view of the frailty of mankind and the tendency to be careless, accidents would be so likely to happen that the public should not be exposed to them. The city has not invaded and does not propose to invade the physical property of the appellant. The improvement it desires to make is wholly within the right-of-way of the street. It does not contemplate placing any restriction on the property or the use of property of appellant. It has made provision for reasonable ingress and egress by way of the street to and from her property. Appellant has no legal right to appropriate a part of the street to the purposes of her private business or to

be used as a part of or to improve and make more useful a facility used in the conduct of her business. The record makes it clear that the appellant seeks the aid of equity to assure her against the loss of an operation which cannot be carried on without the use of a part of a street which the city holds in trust for the use of the public. The plan proposed by the city is justified for the safety and convenience of the public. It is reasonable and it is a proper exercise of the police power by the city.

The manner of the exercise of the authority of the city to improve the street is not contested. There is an objection based on the fact that the ordinance recites that the improvement of the street is to be done according to plans and specifications thereafter approved; that the plans and specifications were approved by the council of the city by resolution which was only published in the minutes of the meeting of the council; and that the plans provide for median and barrier curbs intended as and constituting a regulation of traffic and this could have only been legally accomplished by the passage and publication of an ordinance as provided by law. This argument is untenable. The charter provision empowered the city to construct curbs in the street. When the city properly exercised power to make the improvement, it could provide for and construct any kind of reasonable curbs the exercise of a sound discretion dictated without further city legislation.

Appellant contends that the plans for the improvement of the street are invalid because they deny use of a street to her which is permitted to others and they are, therefore, discriminatory. The doctrine relied upon in this respect is operative only if a regulation is applied differently to different persons under the same or similar circumstances. The engineer for the Department of Roads and Irrigation testified that curbs are provided generally in front of all properties, without

exception, located on Twenty-seventh Street and that this is reflected in the plans of the project which are in evidence. This means that all abutting property owners in this improvement district are in this regard treated alike. There is no legal discrimination and the complaint is not valid. In Gardner v. City of Brunswick, 197 Ga. 167, 28 S. E. 2d 135, the court said: "The plaintiff in error contends that the ordinance is discriminatory. An examination of the ordinance discloses that it applies alike to all persons and property owners located within the area described in the ordinance. 'It is only in cases where laws are applied differently to different persons under the same or similar circumstances that the equal protection of the law is denied.' (Citing many cases.) * * * As pointed out above, the ordinance in question is applicable alike to all persons and property owners affected within the area described in the ordinance, and under the authorities cited, it cannot be held to be discriminatory." See, also, Hoyne v. Wurstner (Ohio App.), 63 N. E. 2d 229. In addition to the foregoing, the evidence offered in support of this contention is not sufficient to show a legal discrimination.

Appellant assails the validity of a writing supplemental to the original principal contract made by appellees concerning the street improvement to the effect that all parking within the limits of the project shall be adjacent to and parallel with the curb and in no event nearer than 14 feet to the center line of the project; and that if the State should determine later that highway traffic would require definite regulations other than those in effect when the writing was made, the city agreed to cooperate with the State in such matters and to pass an ordinance to incorporate such measures as may be required. The record shows that appellees believe and recognize the writing as a valid and binding obligation and that they expect to observe it. However, it is not established that any action has been proposed or attempted to be taken because of it. The fears of

appellant are anticipatory. The attempt to contest the action of the city council because of the writing is premature. Lee v. City of McCook, 82 Neb. 26, 116 N. W. 955; Chicago, R. I. & P. Ry. Co. v. City of Lincoln, 85 Neb. 733, 124 N. W. 142; Leeman v. Vocelka, 149 Neb. 702, 32 N. W. 2d 274; Noble v. City of Lincoln, 153 Neb. 79, 43 N. W. 2d 578; Annotation, 140 A. L. R. 439.

The city had, when the writing was made, an ordinance requiring parallel parking at the curb on all streets except where otherwise provided by resolution of the city council and the record does not exhibit any resolution of the city council concerning parking vehicles on Twenty-seventh Street in any manner contrary to the requirement of the ordinance. There is no evidence to sustain the third cause of action and the court should have dismissed it because of absence of proof concerning it.

It is recognized that this is a case in equity triable de novo in this court. It has been considered and decided in that manner. Appellant has failed to establish any of the causes of action pleaded. The case should be dismissed. The judgment of the trial court should be reversed because it disposes only of two of the three causes of action and as to these the decision of the court is without prejudice to another action.

The judgment should be and it is reversed, the cause is remanded to the district court for Scotts Bluff County with directions to render a judgment dismissing the case, and the costs should be taxed to appellant.

REVERSED AND REMANDED WITH DIRECTIONS.

ALFRED SCHUTTE, FATHER AND NEXT FRIEND OF GARY SCHUTTE, A MINOR, APPELLANT, V. FREEMAN DECKER, COMMISSIONER OF EDUCATION AND SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL., APPELLEES.
83 N. W. 2d 69

Filed May 10, 1957. No. 34121.

1. **Statutes.** In construing a statute the legislative intent is to be gathered from the necessity or reason for its enactment, and its several provisions should be construed together, in the light of the general objects and purposes of the act, so as to give effect to the main intent.
2. ———. Where words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning, and no court can read a meaning into a statute that is not warranted by the legislative language, nor can it read the plain, direct, and unambiguous language out of the statute, but words must be given their ordinary meaning and, if possible, the entire statute applied.
3. ———. Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning.
4. **Schools.** Sections 43-604 to 43-611, R. R. S. 1943, constitute an independent act dealing exclusively and fully with the education of physically handicapped children and for the expenses of such education.
5. ———. Section 79-490, R. S. Supp., 1955, and other sections of the statutes relating to the general school laws have no applicability to the transportation of a physically handicapped child who is required to attend a special school outside of the school district in which he lives.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

Stiner & Boslaugh and *James W. Hewitt*, for appellant.

Clarence S. Beck, Attorney General, *Gerald S. Vitamvas*, and *Howard S. Foe*, for appellees.

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

MESSMORE, J.

This is an action brought in the district court for

Lancaster County by Alfred Schutte as father and next friend of Gary Schutte, a minor, handicapped child who is educable, against Freeman Decker, Commissioner of Education and Superintendent of Public Instruction for the State of Nebraska, Consolidated School District No. 90, Webster County, and the members of the school board of school district No. 90. The purpose of the action was to obtain a declaratory judgment construing sections 79-490, R. S. Supp., 1955, and 43-607, R. R. S. 1943, and to determine whether or not the plaintiff was entitled to recover certain transportation expenses. The defendant Decker moved to dismiss the plaintiff's action, and the defendant school board demurred to the plaintiff's petition. The trial court, as well as the parties, considered the motion to dismiss by Decker as a demurrer. The trial court sustained the motion to dismiss and the demurrer of the school board, and dismissed the plaintiff's action. The plaintiff filed a motion for new trial. From the order overruling the motion for new trial, the plaintiff appeals.

For convenience we will refer to the parties as designated in the district court; to Freeman Decker, Commissioner of Education and Superintendent of Public Instruction, as Decker; to the Consolidated School District No. 90 as school district; and to the members of the school board of district No. 90 as the school board.

The plaintiff's petition, after identifying the parties, alleged in substance that the school district had no facilities, instructors, or equipment for the education of physically and mentally handicapped children as provided for in section 43-606, R. R. S. 1943; that Hastings, Nebraska, located approximately 35 miles from the school district, had the closest available school for the education and training for handicapped children as defined in section 43-604, R. R. S. 1943, as amended in 1953; that Gary Schutte was educable and qualified for instruction as provided by the laws of Nebraska; that Decker, under section 79-306, R. R. S. 1943, instructed

the school board to refuse to allow transportation costs of Gary Schutte to Hastings; that Decker, in his official capacity, instructed the plaintiff that it was his order and opinion that the laws of Nebraska did not provide for such transportation and he so instructed the school district and the school board, and consequently the school district refused to furnish transportation costs for Gary Schutte to Hastings for educational training, Hastings being located outside the school district; that sections 43-604 to 43-611, R. R. S. 1943, provide for compulsory education of educable children and make provisions for the care and expenses of such education, and section 79-490, R. S. Supp., 1955, provides for transportation outside of said school district; that Decker had ruled that the foregoing sections did not provide for transportation or costs for the said Gary Schutte and had therefore denied such costs for the benefit of Gary Schutte; and that transportation is necessarily included as a part of the educational opportunities and the school board was compelled to furnish it under the statutes heretofore set out.

The only question to be determined in this appeal is whether or not a school district of this state which sends a handicapped child to a special school outside the school district is liable for transportation expenses of such child.

The plaintiff sets forth four assignments of error which may be stated as one, namely, that the judgment of the trial court was contrary to law.

In this connection, the plaintiff argues that this court has recognized the intent of the Legislature regarding privileges of the public schools in State ex rel. Baldwin v. Dorsey, 108 Neb. 134, 187 N. W. 879, as follows: "The decisions of this court uniformly disclose that the school laws have been liberally construed so that all persons of school age without distinction and without discrimination may enjoy public school privileges." It is claimed that the statutes here involved must be

viewed in the light of this pronouncement.

The plaintiff further argues that section 79-490, R. S. Supp., 1955, having to do with pupils, transportation allowance, payment, and when authorized, provides: "When no other means of free transportation is provided to a child attending an elementary school, an allowance for transportation shall be made to the family of such child by the district in which such family resides on the basis of the record of attendance of such child and the number of miles that the child needs to travel, in one round trip each school day, to and from such school as follows: (1) Where a child attends school in his own district and lives more than three miles from the public schoolhouse therein, there shall be paid ten cents per half mile for each one half of a mile or fraction thereof by which the distance of the residence of such child from the schoolhouse exceeds three miles; and (2) where the child is required to attend an elementary school outside of his own district there shall be paid ten cents per half mile for each one half mile or fraction thereof for the distance that the school in the other district is in excess of the distance from the school of his residence. The number of days the child has attended school shall be reported monthly by the teacher to the school board of such public school district; Provided, not more than one allowance shall be made to a family irrespective of the number of children in a family being transported to school. No pupil shall be exempt from school attendance on account of distance from the public schoolhouse."

The plaintiff contends that the foregoing statute covers the instant case in its entirety, for the reason that Gary Schutte was required to attend public elementary school outside the district in which he lived; that the district in which he lived did not furnish the proper facilities for his education; and that the claim of the plaintiff for the payment of transportation of Gary Schutte outside of the school district in which he lived was re-

fused by the local school district and Decker illegally.

The provisions for the education of handicapped children are contained in an independent act under the heading of "Care and Education of Physically Handicapped Children," namely, Chapter 43, article 6, originally passed by the Legislature in 1941, and is hereinafter referred to as the act. This is a special act and deals exclusively and fully with the education of physically handicapped children.

Section 43-607, R. R. S. 1943, provides: "The board of education or board of trustees shall furnish one of the following types of education to the handicapped children who are residents of the school district: (1) Pay the tuition in any district for those handicapped children who are forced to leave the school district temporarily because of treatment, care, or supervision. (2) Provide transportation for those handicapped children within the school district who are physically able to take care of themselves in the regular school, if transportation is provided. (3) Provide visiting teachers for the homebound handicapped child, such teachers to be certified and qualified in the same manner as required for other teachers in Nebraska. (4) Provide correspondence instruction approved by the Superintendent of Public Instruction. (5) Provide any other method of instruction approved by the Superintendent of Public Instruction."

The plaintiff contends that section 43-607, R. R. S. 1943, as above set out, is confusing, therefore it becomes necessary to investigate the legislative intent behind the school laws and to view all of such laws as an integrated whole, so that some sort of orderly scheme may emerge, citing Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409, as follows: "In construing a statute of doubtful meaning courts may consider all statutes on the same subject." See, also, In re Estate of Robinson, 138 Neb. 101, 292 N. W. 48.

The plaintiff further contends that in the light of the

foregoing, if all the laws pertaining to schools and school attendance in Nebraska are to be construed together, the general school laws must be considered along with the provisions relating only to handicapped children; that the provisions relating to handicapped children are merely an adjunct to the general school laws and serve to provide benefits which in some respects supplement the general laws and in some respects replace them; that if the general and special school laws are construed together, it is of no moment that section 43-607, R. R. S. 1943, contains no definite provisions for the payment of transportation of handicapped children going outside the district to attend special schools, because section 79-490, R. S. Supp., 1955, makes provision for the payment of transportation of any child attending an elementary school outside his district; and that no provisos are inserted to qualify the language of this section.

The plaintiff states that all of the sections which were forerunners of section 79-490, R. S. Supp., 1955, contain language to the effect that the act requiring compulsory attendance should not apply to those cases where the child was handicapped and thus incapable of regular school work. But in 1949, in the general revision and codification of the Nebraska school laws, this qualifying language was removed from what is now section 79-490, R. S. Supp., 1955, and section 79-202, R. S. Supp., 1955, is now the only section in the general school laws containing such language.

Section 79-201, R. S. Supp., 1955, relates to compulsory education and the minimum attendance required, and provides in part: "Every person residing in a school district within the State of Nebraska who has legal or actual charge or control of any child, not less than seven nor more than sixteen years of age, shall cause such child to attend regularly the public, private, denominational, or parochial day school for a period of

* * *." Then the days of attendance are set forth, among other things.

Section 79-202, R. S. Supp., 1955, provides: "Section 79-201 shall not apply where the child is physically or mentally incapacitated for the work done in the school, or in any case where the services or earnings of a child, who is fourteen years or more of age, are necessary for his own support or the support of those actually dependent upon him, or when illness or severe weather conditions make attendance impossible or impracticable."

Therefore, the plaintiff asserts, if a student is educable and is attending school, it would appear that section 79-202, R. S. Supp., 1955, would not apply.

Section 79-203, R. R. S. 1943, provides: "In case exemption is claimed on account of mental or physical incapacity, the school board shall have the right to employ a physician or a person skilled in mental diagnosis, who shall examine such child and, if such physician or person skilled in mental diagnosis shall declare that such child is capable of undertaking the work of the schools, then such child shall not be exempt from the requirements of section 79-201."

The plaintiff asserts that the demurrer of the parties admitted that Gary Schutte is educable, therefore he is considered to be subject to compulsory school attendance and governed by the provisions of section 79-201, R. S. Supp., 1955; that the general school laws are applicable to him; and that in considering section 79-203, R. R. S. 1943, it makes no mention of the sort of school a handicapped child must attend but merely states that if a child is capable of undertaking the work of the schools he is subject to compulsory education.

The plaintiff further asserts that what is now section 79-490, R. S. Supp., 1955, was amended in 1949 to apply to all students, the proviso about handicapped children being removed at that time; that the change in the section indicates that the Legislature desired every possible advantage to be accorded to handicapped children

and intended to change the status of handicapped children; and that in such a situation the following is applicable.

In Ledwith v. Bankers Life Ins. Co., *supra,* this court said: "The change in the phraseology of an amendatory statute raises a presumption that a departure from the old law was intended. The Legislature is presumed to know language used in a statute and if a subsequent act on the same or similar subject uses different terms in the same connection the court must presume that a change in the law was intended. Likewise the omission of a word in an amendment of a statute will be assumed to be intentional and for a purpose. Where it is apparent that a substantive portion of a statute has been omitted from an amendment thereof courts have no authority to supply the omission. That would be judicial legislation. The statute should be effectuated as its language warrants."

In School District No. 42 v. Marshall, 160 Neb. 832, 71 N. W. 2d 549, this court said: "We have held that in construing a statute to determine the legislative intent a court may consider the history of its passage, the amendments offered, and action taken by the Legislature thereon." See, also, Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, 174 A. L. R. 856.

We have no doubt of the applicability of the rules stated in the cited cases as they apply to the issues raised therein, however, we believe that they have no applicability to the issue presented in this appeal and the statutes applicable thereto.

The plaintiff concludes, what could be more natural than for the Legislature, having earlier passed legislation specifically designed to provide educational opportunities for handicapped children, to carefully examine the general school laws and amend them so that the general and specific laws meshed into and formed an integrated pattern for the protection of the handicapped?

We are in accord with the plaintiff that the Legislature

sought to provide educational opportunities to handicapped children at least equivalent to other children attending school. However, we are not in accord with the plaintiff's contention that section 79-490, R. S. Supp., 1955, and other sections of the statutes cited by the plaintiff apply to the instant case for reasons hereafter stated. This court is committed to the following rules in construing statutes.

In construing a statute the legislative intent is to be gathered from the necessity or reason for its enactment, and its several provisions should be construed together, in the light of the general objects and purposes of the act, so as to give effect to the main intent. See Anstine v. State, 137 Neb. 148, 288 N. W. 525.

Where words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning, and no court can read a meaning into a statute that is not warranted by the legislative language, nor can it read the plain, direct, and unambiguous language out of the statute, but words must be given their ordinary meaning and, if possible, the entire statute applied. See Franzen v. Blakley, 155 Neb. 621, 52 N. W. 2d 833.

"Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning." Montgomery v. Blazek, 161 Neb. 349, 73 N. W. 2d 402.

Applying these rules to the statutes involved in this appeal, we believe the following to be applicable.

We have heretofore set forth section 43-607, R. R. S. 1943, containing the types of education to be furnished handicapped children. Subdivision (1) under this section we believe to be the only one applicable to the instant case. It applies to the payment of tuition in any district for those handicapped children who are forced to leave the school district temporarily because of treatment, care, or supervision. Subdivision (2) under sec-

tion 43-607, R. R. S. 1943, relates to transportation for those handicapped children within the school district who are physically able to take care of themselves in the regular school if transportation is provided. We need not specifically concern ourselves with the other matters set forth in said section.

The obligations of the school district are specifically set out in section 43-607, R. R. S. 1943, and section 43-609, R. S. Supp., 1955. The latter section provides as follows: "The school board of a school district, wherein handicapped children reside, shall include in its annual budget for each child not less than the regular per pupil cost in the school of the district. When an amount equal to the regular per pupil cost has been spent for the education and care of the handicapped child, the school district qualifies for excess cost reimbursement payable by the state; Provided, that the education and care shall have been secured within the State of Nebraska. This excess cost reimbursement is made to the local school district for the education of both physically handicapped and educable mentally handicapped children. The excess costs, payable by the state for the education and care of these children, shall be determined by the State Board of Education; Provided, that the amount of state funds for the education and care of these children shall not exceed the following amounts per annum: (1) Physically handicapped children, four hundred dollars per pupil, and (2) educable mentally handicapped children, two hundred dollars per pupil."

This section clearly discloses the intention of the Legislature to be that such a handicapped child should have spent on him by the school district an equal amount with other children. If it had been intended that the school district should stand all of the expense of such child's education or all of the expenses in excess of the $400 provided by the state, obviously it would have so stated. In any event, the Legislature has defined the limit and extent of the school district's and state's

liability for the education of such children. If the Legislature intended the expense of transportation or a temporary residence should be paid for by the district or the state, it would have so provided in certain and definite language as it did for the education of deaf-blind children. See § 43-601, R. R. S. 1943. What the Legislature intended to do was to limit the transportation of handicapped children to the confines of the local school district.

Section 79-490, R. S. Supp., 1955, merely provides for transportation in certain cases where a pupil has transferred to a school outside of his district. This section was first passed by the Legislature in 1927, and the law for the education of handicapped children was passed in 1941. It is obvious that the two sections are separate and distinct in application and meaning. Section 79-490, R. S. Supp., 1955, was last amended in 1955, but still no provision was made for the transportation of handicapped children. If the Legislature had seen fit to do so, it would have included such a provision.

It will be noted that in cases where there is a transfer from one school district to another, the local school board has some rights in the matter and may decide under what conditions a pupil may attend a school outside the district of his residence. With reference to a handicapped child, the school district of his residence is not privileged, nor has it the right, to select his school nor the type of education to be furnished him.

When a school board such as the one that comprises consolidated district No. 90 has complied with section 43-609, R. S. Supp., 1955, it has met its obligations, and there is no obligation or funds available for the payment of transportation for a handicapped child such as Gary Schutte in the instant case. When the state has paid out the $400 as set forth in said section of the statute it has met its obligation.

The act heretofore referred to, relating to the education of handicapped children, is an independent act

dealing exclusively and fully with the education of physically handicapped children and is the only act pertinent to the issue raised in the instant case and governs such issue. We hold that school district No. 90, Webster County, and the school board of such district are not liable for transportation expenses of Gary Schutte, a physically handicapped child, for attendance at a special school outside of said school district.

We conclude that the trial court did not err in sustaining defendant Decker's motion to dismiss and in sustaining the other defendants' demurrer, and its judgment in so doing should be, and is hereby, affirmed.

AFFIRMED.

HERMAN KELLE ET AL., APPELLANTS, V. CRAB ORCHARD RURAL FIRE PROTECTION DISTRICT ET AL., APPELLEES.
83 N. W. 2d 51

Filed May 10, 1957. No. 34132.

1. **Fire Protection Districts.** The general rule is that nonjurisdictional irregularities and defects in the formation of rural fire protection districts can be challenged only in direct proceedings to test the validity of their organization, but if they are of such a character that the proceedings are in fact void then that fact may be shown in any action.
2. ———. Rural fire protection districts may be collaterally attacked when the defects complained of are jurisdictional and not merely irregularities.
3. ———. The character and qualifications of persons by whom a petition is to be signed, and the number or proportion of such persons whose signatures must be attached to the petition, are ordinarily prescribed by the statutes which provide for the presentation of the petition and compliance with such requirements is essential to the validity of the petition.
4. **Names.** In law the name of a person consists of one given name and one surname and the two, using the given name first and the surname last, constitute such person's legal name.
5. ———. A married woman's name consists, in law, of her own Christian name and her husband's surname, marriage conferring on her the surname of the husband.

APPEAL from the district court for Johnson County: VIRGIL FALLOON, JUDGE. *Affirmed.*

Ginsburg, Rosenberg & Ginsburg and *Philip F. Nestor,* for appellants.

Raymond B. Morrissey and *Homer L. Kyle,* for appellees.

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

WENKE, J.

This is an appeal from the district court for Johnson County. It involves an action whereby four resident freeholders of the area covered by Crab Orchard Rural Fire Protection District of Johnson County, Nebraska, and who have real and personal property located therein that would be liable for taxes if levied to operate and maintain it, seek to enjoin the district, and its officers and directors, from exercising the statutory duties and functions of a legally created rural fire protection district. The relief sought is grounded on a claim that the petition initially filed in the office of the county clerk of Johnson County for the formation thereof was legally insufficient. The trial court found generally for the defendants and dismissed plaintiffs' petition. Their motion for new trial having been overruled, the plaintiffs perfected this appeal.

Appellee Crab Orchard Rural Fire Protection District, which we shall hereinafter refer to as the district, was organized under and pursuant to the authority of Chapter 35, article 5, R. R. S. 1943, which article relates to the subject of "Rural Fire Protection Districts." The action is in the nature of a collateral attack seeking injunctive relief because of alleged jurisdictional defects in the procedural steps leading up to the formation of the district. Rural fire protection districts may be collaterally attacked when the defects complained of are jurisdictional and not merely irregularities. Prucka v.

Eastern Sarpy Drainage Dist., 157 Neb. 284, 59 N. W. 2d 761; Chicago & N. W. Ry. Co. v. Payne Creek Drainage Dist., 148 Neb. 139, 26 N. W. 2d 607.

The general rule is that nonjurisdictional irregularities and defects in the formation of a district, such as a rural fire protection district, can be challenged only in a direct proceeding to test the validity of its organization, but if they are of such a character that the proceedings are in fact void then that fact may be shown in any action. See, Cacek v. Munson, 160 Neb. 187, 69 N. W. 2d 692; Prucka v. Eastern Sarpy Drainage Dist., *supra;* Chicago & N. W. Ry. Co. v. Payne Creek Drainage Dist., *supra.*

As stated in Cacek v. Munson, *supra,* quoting from 33 C. J., Judgments, § 39, p. 1078: " 'Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked.' "

The provisions of Chapter 35, article 5, R. R. S. 1943, insofar as material to the issues herein raised, provide:

"* * * sixty per cent of the freeholders residing in any territory in the State of Nebraska, equivalent in area to one township or more situated outside the corporate limits of any city or village, are hereby authorized and empowered to initiate the formation of rural fire protection districts * * *." § 35-502, R. R. S. 1943.

"Whenever sixty per cent of the freeholders residing in any rural territory, equivalent in area to one township or more, elects to form, organize, establish, equip, and maintain a rural fire protection district, they shall signify such intention by presenting to the county clerk of the county or counties in which such territory is situated, a petition setting forth the desires and purposes of

such petitioners. Such petition shall contain the full names and post-office addresses of such petitioners, * * *." § 35-503, R. R. S. 1943.

"Upon the filing of such petition in the office of the county clerk, the county clerk shall determine and certify that such petition has been signed by at least sixty per cent of the freeholders whose names appear on the current tax schedules in the office of the county assessor and who appear to reside within the suggested boundaries of the proposed district. He shall thereafter designate a time and place for said petition to be heard by the county board. Notice of such hearing shall be given by publication two weeks in a newspaper of general circulation in the county, the last publication appearing at least seven days prior to said hearing; said notice shall be addressed to 'all persons residing in or having any interest in real or personal property located within the following boundaries' and shall include a statement of the proposed boundaries as set forth in the petition; * * *." § 35-504, R. R. S. 1943.

The petition for the formation of the district was filed in the office of appellee Wayne C. McCoy, the then duly elected, qualified, and acting county clerk for Johnson County, on March 26, 1955. He thereafter, on March 28, 1955, transmitted the petition to the board of county commissioners of Johnson County, certifying that he had "examined the signatures affixed to said petition" and "determined that the persons signing said petition comprise more than sixty percent of the freeholders residing within the boundaries of the proposed district." He therein also designated a time and place for said petition to be heard by the county board and caused proper notice thereof to be published in the Tecumseh Chieftain, a newspaper of general circulation in Johnson County.

In Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734, we quoted the following: " 'The determination of a township board that a majority of the property holders have signed a petition for a local improvement is not

conclusive, and, in the absence of statutory provisions to the contrary, the question may be investigated in a collateral proceeding.' (Auditor General v. Fisher, 47 N. W. Rep. [Mich.] 574.)"

However, in Majerus v. School Dist. No. 52, 139 Neb. 823, 299 N. W. 178, we said: "The law presumes official acts of public officers, in a collateral attack thereon, to have been done rightly, and with authority, in the absence of evidence to the contrary, and, in such a collateral attack, acts done, which presuppose the existence of other acts to make them legally effective, are presumptive proof of the existence of such other acts." See, also, School Dist. No. 49 v. School Dist. No. 65-R, 159 Neb. 262, 66 N. W. 2d 561.

We said in Olsen v. Grosshans, 160 Neb. 543, 71 N. W. 2d 90, quoting from 78 C. J. S., Schools and School Districts, § 37, p. 703, that: " 'The character and qualifications of the persons by whom a petition is to be signed, and the number or proportion of such persons whose signatures must be attached to the position (petition), ordinarily are prescribed by the statutes which provide for the presentation of the petition, and compliance with such requirements is essential to the validity of the petition.' "

From a careful reading of the foregoing quoted statutory provisions it becomes self-evident that the jurisdictional requirements of a petition, in order to give the county clerk authority to proceed and designate a time and place for said petition to be heard by the county board and to cause a notice thereof to be published, are that 60 percent of the freeholders residing within the area of the proposed district have signed it. In the absence thereof the petition would be insufficient and the county clerk without authority to act. See, State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N. W. 2d 626; Morse v. City of Omaha, *supra*. We think the record establishes that 60 percent of the freeholders residing in the pro-

posed district signed the petition before it was filed with the county clerk on March 26, 1955.

But appellants contend that 60 percent of the freeholders residing in the area of the district did not sign their "full names" to the petition nor give their "post-office addresses," as section 35-503, R. R. S. 1943, provides they shall. It is established by the evidence adduced that some 23 of those signing the petition did not do so with their full names nor, in many instances (38), were the addresses given complete and, in a few instances (6), no addresses were given.

In Enewold v. Olsen, 39 Neb. 59, 57 N. W. 765, 42 Am. S. R. 557, 22 L. R. A. 573, we said: "In law, the name of a person consists of one given name and one surname, the two, using the given name first and the surname last, constitute such person's legal name; * * *." See, also, McCabe v. Equitable Land Co., 88 Neb. 453, 129 N. W. 1018; Butler v. Smith, 84 Neb. 78, 120 N. W. 1106, 28 L. R. A. N. S. 436; 65 C. J. S., Names, § 3a, p. 2.

And, as stated in 38 Am. Jur., Name, § 10, p. 600: "A married woman's name consists, in law, of her own Christian name and her husband's surname, marriage conferring on her the surname of the husband. Her correct first name is her maiden Christian name, and not the Christian name of her husband."

We do not think the requirements that those signing a petition do so with their "full names" and give their "post-office addresses" are jurisdictional as relating to their character or qualifications but rather for the purpose of identification and to assist the county clerk in making a determination as to whether or not 60 percent of the freeholders residing in the area proposed as a district have actually signed the petition filed with him for that purpose. In view thereof these deficiencies are merely irregularities and, as such, not a basis for declaring the organization of the district void.

There is one further question raised by appellants that needs to be considered. Most of the signatures on

the petition were obtained thereto in 1954. Then, in the early part of 1955, Keith Lynch submitted the petition to Wayne C. McCoy, the county clerk, and asked him to check it to see if there were sufficient signatures thereon to meet the statutory requirements relating thereto. Lynch did not ask McCoy to file the petition and McCoy did not do so. McCoy took about a week to check the signatures on the petition and then advised Lynch he did not have enough signers. Lynch thereupon took the petition and between March 4 and 12, 1955, 16 additional signatures were added thereto. Lynch then filed the petition in the office of the county clerk on March 26, 1955. We find nothing wrong with this procedure. It seems to us a very practical thing to do and one that avoided the necessity of securing and filing another petition since more than 60 percent of the resident freeholders of the area were actually interested in forming the district. If the petition had been submitted to and filed by the county clerk in the first instance then it is possible that what we said in Ayres v. Moan, 34 Neb. 210, 51 N. W. 830, 15 L. R. A. 501, would apply.

In view of what we have herein held we think the trial court was correct in dismissing the petition. We therefore affirm its judgment doing so.

AFFIRMED.

DWAYNE D. ANDERSON, BY ALVA H. ANDERSON, HIS FATHER AND NEXT FRIEND, APPELLEE, V. LLOYD L. EVANS ET AL., APPELLANTS.

83 N. W. 2d 59

Filed May 10, 1957. No. 34147.

1. **Partnership.** A partnership is the creature of a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions.
2. **Joint Adventures.** A joint adventure is in the nature of a partnership, but may exist where persons embark on an under-

taking without entering on the prosecution of a business as partners strictly but engage in a common enterprise for their mutual benefit.

3. ———. To constitute a joint adventure, there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control over the agencies used therein, though one party may entrust performance to another.
4. **Trial.** In determining the question of whether or not a motion of a defendant for a directed verdict or for judgment notwithstanding the verdict should be sustained the court is required to consider the evidence in the light most favorable to the plaintiff and to resolve every controverted fact in his favor, and he should have the benefit of every inference that can reasonably be deduced therefrom.
5. ———. No proof is required as to the existence of a fact admitted by the pleadings.
6. **Master and Servant: Negligence.** A servant cannot recover from a master where he has subjected himself to manifest and inevitable danger which danger cannot be avoided by the exercise of ordinary care and skill, even if commanded by the master to incur the risk.
7. ———: ———. If a master orders a servant into a place of danger and the servant is injured, the servant is not guilty of contributory negligence unless the danger is so glaring that a reasonably prudent person would not have entered into it.
8. ———: ———. An employee who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is chargeable with negligence or contributory negligence.
9. ———: ———. An employee assumes risks not ordinarily incident to his employment, provided he knows them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know them and to appreciate the danger.
10. ———: ———. Where there is a disputed question of fact as to whether or not an employee was informed or had knowledge of latent dangers of his employment a question is presented for determination by a jury.
11. **Master and Servant: Infants.** Liability or nonliability in an instance where an infant is ordered into a dangerous situation by his employer does not depend upon presumption but upon knowledge and prudent action in relation thereto by the employee.
12. **Evidence.** The official charts and records, kept in the regular

course of business under the rules of a hospital, are admissible in evidence when a proper foundation has been laid.

13. ———. As limited in the opinion, the notes and entries by a nurse relating to care, treatment, and observation of patients in a hospital do not come within the purview of section 25-12,109, R. R. S. 1943.

14. ———. Color photographs showing the physical condition of a plaintiff where his condition is an issue are admissible in evidence.

15. Trial. The giving of oral instructions to a jury in regard to the principles of law applicable to the case and the evidence, in the absence of waiver of written instructions, is reversible error.

APPEAL from the district court for Holt County: DAYTON R. MOUNTS, JUDGE. *Reversed and remanded with directions.*

Max Kier and *Charles Ledwith*, for appellants.

Eisenstatt, Seminara & Lay and *Julius D. Cronin*, for appellee.

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

YEAGER, J.

This is an action in two causes of action for damages for personal injuries and for medical and hospital expenses instituted by Dwayne D. Anderson, a minor, by Alva H. Anderson, his father and next friend, plaintiff and appellee, against Lloyd L. Evans and Edrie Evans, defendants and appellants. The defendants are husband and wife but their liabilities, if any, in this action are not dependent upon the marriage relation but upon an alleged contract of employment whereby the defendants were bound as partners or persons engaged in a joint adventure.

The action was tried to a jury. A verdict was returned in favor of plaintiff and against the defendants for $10,000 upon which verdict judgment was rendered. The defendants separately filed motions for judgment notwithstanding the verdict or in the alternative for a new trial. These were overruled, whereupon the

defendants perfected an appeal to this court wherein they seek reversal of the action of the district court.

An understanding of the matters presented here for consideration requires an outline of the pertinent matters presented by the pleadings and the evidence.

By the petition it is alleged that plaintiff, a minor of the age of 18 years, was on August 5, 1953, employed by the defendants under an oral contract of employment to work on defendants' ranch as a ranch hand; that his employment commenced on August 6, 1953; that on that day plaintiff assisted the defendant Lloyd L. Evans, who will be hereinafter referred to as Lloyd, in removing a stake from a point near the rear end of a pick-up truck; that prior thereto Lloyd had poured fuel on the stake which he had ignited; that he knew of the high explosive and dangerous qualities of the fuel but failed to inform the plaintiff who because of youth and inexperience did not know of these qualities; that Lloyd directed plaintiff and commanded the plaintiff to pour additional oil on the stake; and that in an attempt to comply plaintiff picked up a can of fuel, in consequence of which the can of fuel exploded and plaintiff was severely burned and injured. He alleged in numerous specifications that Lloyd was negligent. A sufficient summary of the specifications is that he was negligent in commanding and directing the plaintiff to pour fuel on the burning stake the hazard and danger of which was known to Lloyd or should have been known to him but which on account of his age and inexperience was unknown to the plaintiff.

By answer the oral contract of employment by plaintiff with Lloyd was admitted but as to the defendant Edrie Evans, who will hereinafter be referred to as Edrie, the contract was denied. The original application of fuel to the stake and that it was lighted was admitted. It was in substance admitted that the fuel had inflammable and explosive qualities which entailed danger when used as was done by plaintiff when the

explosion of which plaintiff complains came about. It was denied that the application was made at any request or direction of Lloyd but that it was done contrary to his express direction and without his knowledge. It was alleged that by reason of age and experience the plaintiff was aware and informed of the dangers incident to the use of the fuel in the manner in which he used it, and in consequence thereof he assumed the risk of his act and was guilty of negligence proximately causing the explosion and his injury and damage.

This résumé of the pleadings has application to both causes of action, the first of which is for damage to plaintiff for his injuries. The second is for medical and hospital expense for which the father was liable and which was assigned to plaintiff.

There are eight assignments of error by which it is urged that the judgment may not be allowed to stand. One of these relates to the question of whether or not on the record Edrie Evans was a party to the oral contract of employment.

On the record and the decisions of this court the only conclusion which may be arrived at is that the assignment is valid and must be sustained. There is no evidence whatever in the record which directly or by reasonable inference proves a partnership or anything in the true nature of a joint adventure between the two defendants or that Edrie was a party to the oral employment agreement.

As to the employment agreement all she did was to accompany the plaintiff to the field where plaintiff and Lloyd entered into it.

As to the existence of a partnership this court has said: "Partnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions." Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912.

In the same case, as to joint adventure, it was said: "A joint adventure is in the nature of a partnership, but may exist where persons embark on an undertaking without entering on the prosecution of a business as partners strictly but engage in a common enterprise for their mutual benefit."

Again in the same case as to the creation of a joint adventure, it was said: "To constitute joint adventure, there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control over the agencies used therein, though one party may entrust performance to another."

In that case, as to proof of the existence of either a partnership or of a joint adventure, it was said: "The burden of establishing the existence of either a joint enterprise or a partnership is upon the party asserting that the relationship exists."

The total substance of the evidence relating to partnership or joint adventure is that Lloyd was engaged in farming partly on land owned by him, partly on land held in joint tenancy with Edrie, and partly on rented land; that they had a joint bank account; and that they talked over the matters relating to the farming operations. There is no word of evidence supporting the existence of any kind or character of contractual arrangement.

By the first, second, and eighth assignments of error it is urged for reasons made apparent by the record that on the evidence and the law there was no basis for a recovery by plaintiff.

Separate motions for directed verdict were made by the defendants at the close of plaintiff's evidence and again at the close of all the evidence. Separate motions for new trial and for judgment notwithstanding the verdict were also made. These motions challenged the

sufficiency of the evidence to sustain a verdict in favor of plaintiff. All of these were overruled. The defendants effectually by these three assignments of error contend that they should have been sustained, and in consequence thereof they are entitled to a reversal of the judgment with direction to the district court to render judgment in their favor.

In the determination of this question this court is required to consider the evidence in the light most favorable to the plaintiff and to resolve every controverted fact in his favor, and he should have the benefit of every inference that can reasonably be deduced therefrom. Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367.

At the close of plaintiff's evidence no testimony had been adduced to describe the contents of the container, which was a 5-gallon can used for the purpose of conveying and pouring tractor fuel into a farm tractor, from which the plaintiff attempted to pour the fuel from which the explosion, about which there is no controversy, resulted. Likewise there was no evidence as to its volatility or its explosive potential when it came in contact with or proximity to fire or otherwise. The plaintiff however pleaded sufficient facts showing that it was highly volatile and dangerously explosive when brought into contact with or close proximity to fire.

The defendants substantially admitted by answer that the can contained tractor fuel having the qualities described by plaintiff in his petition. It must be said therefore that although there was no evidentiary proof that the fuel used as it was had the potential claimed for it by plaintiff the potential did, as claimed, exist.

The applicable rule in this instance is the following: "No proof is required as to the existence of a fact admitted by the pleadings." Faulhaber v. Griswold, 124 Neb. 357, 246 N. W. 727. See, also, Barkalow Bros. v. English, 159 Neb. 407, 67 N. W. 2d 336; Rodgers v. Jorgensen, 159 Neb. 485, 67 N. W. 2d 770.

The plaintiff testified that he proceeded to pour the

motor fuel by order and direction of Lloyd. This is denied by Lloyd and to the contrary he testified that he directed the plaintiff not to do so. Under the rules set out herein this court, for present purposes, must accept the version of the plaintiff.

A further substantial contention of the defendants is that even if Lloyd did direct the plaintiff to pour the fuel, still he may not recover for the reason that in doing so he was guilty of contributory negligence, and also that he assumed the risk of his own act. The basis of this contention as it has been stated by defendants in their brief is as follows: "It is presumed that an 18-year-old boy who has studied auto mechanics in school, owned, operated and repaired four automobiles, operated farm tractors, refueled farm tractors, and who had been employed in haying operations with mechanized equipment for three or more summers, must know and appreciate the dangers in the use of tractor fuel, gasoline and motor fuels generally, including their explosive character and the danger which would ensue from pouring them on a fire or exposing them to fire."

If the contention of defendants is to be sustained it must be sustained on the basis of this proposed presumption and contrary to the direct testimony of the plaintiff. He testified that he did not know of the dangers incident to such handling as he said was directed.

Attention has not been called to any case in this jurisdiction the effect of which is to employ a presumption such as is proposed to defeat the right of trial to a jury under conditions like or similar to those presented by the record in this case. In none of the cases to which attention has been directed has a declaration been found the effect of which is to say that a person who precipitates under direction of an employer dangers which are in their nature hidden, which dangers may not by the exercise of ordinary care be immediately recognized by the senses, although the dangers are inherent and

generally known and recognizable, is guilty of contributory negligence, or that he has assumed the risk of his act, in the absence of evidence that he knew or in the exercise of ordinary care should have known of the dangers.

It was said in a case where an infant of the age of 14 years was involved: "The servant can not fly in the face of the manifest and inevitable danger—danger that can not be avoided, even by the exercise of ordinary care and skill—even though he be commanded by his master to incur the risk; and if he does so he can not recover." Ittner Brick Co. v. Killian, 67 Neb. 589, 93 N. W. 951.

In the opinion in this case Shortel v. City of St. Joseph, 104 Mo. 114, 16 S. W. 397, 24 Am. S. R. 317, was referred to as supporting this statement. In that case it was said: "If, therefore, the master orders the servant into a place of danger, and the servant is injured, he is not guilty of contributory negligence, unless the danger was so glaring that a reasonably prudent person would not have entered into it." This statement discloses a purpose to say that liability or nonliability in an instance where an infant is ordered into a dangerous situation by his employer does not depend upon presumption but knowledge and prudent action in relation thereto by the employee. This is the attitude which has been manifested by the decisions of this court.

This court, in Norfolk Beet-Sugar Co. v. Hight, 56 Neb. 162, 76 N. W. 566, quoted with approval the following from Jones v. Florence Mining Co., 66 Wis. 268, 28 N. W. 207, 57 Am. R. 269: "We think it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the

dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely, with proper care on his part." There has been no departure in the decisions from this pronouncement.

Directly on the question of presumption as it relates to a minor this court, in Collins v. Weise, 110 Neb. 552, 194 N. W. 450, said: "There is no presumption that a boy 16 years of age, who has had little experience as a farm laborer, has as much prudence and understanding as an adult, and where such youth is injured while engaged in dangerous work, which he was ordered to do by his employer's foreman in charge of the work, it is for the jury to say, considering his age and experience, whether he assumed the risks of such employment." This pronouncement has not been modified by later decisions.

It is of course true that an employee who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is chargeable with negligence or contributory negligence. Groat v. Clausen, 139 Neb. 689, 298 N. W. 563; Ring v. Kruse, 158 Neb. 1, 62 N. W. 2d 279.

Also as said in Corley v. Hubbard, 129 Neb. 38, 260 N. W. 551: "An employee assumes risks not ordinarily incident to his employment, provided he knows of them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know them and to appreciate the danger." See, also, Groat v. Clausen, *supra*.

Where however there is a disputed question of fact as to whether or not the employee was informed or had knowledge of the latent dangers of his employment a question is presented for determination by a jury.

Gundy v. Nye-Schneider-Fowler Co., 89 Neb. 599, 131 N. W. 964; Collins v. Weise, *supra.*

In the light of these observations it is concluded that the district court did not err in refusing to sustain the contentions embraced in the first two and the eighth assignments of error.

By the third assignment of error the defendants urge that the court erred in excluding testimony as to what knowledge is commonly possessed of the explosive properties of tractor fuel by persons of similar age to the plaintiff. A sufficient response to this is that it does not appear that any such offer of evidence was made. The only thing that appears in this connection is two questions asked of Ralph Fuqua, who was 22 years of age, by defendants' attorney and similar questions asked of one John Anderson. The questions asked of Fuqua were: "Q. You know enough not to pour gas on a fire, don't you?" "Q. Mr. Fuqua, do you know it is not safe to pour gasoline or tractor fuel on a fire?" The questions were objected to on the ground that they were not proper cross-examination and had no bearing on the issues. The objections were sustained.

By the fourth assignment of error it is contended that the court erred in admitting into evidence hospital records containing opinions of nurses as to pain and suffering of the patient. It is to be observed that by this assignment the admissibility of hospital records generally is not brought into question. It is directed only to admissibility of opinions of nurses as to pain and suffering of the patient contained in the hospital records. The discussion here will be so limited.

Voluminous hospital records from the Nebraska Methodist Hospital in Omaha, Nebraska, were admitted in evidence over objections of the defendants. Among these were notes purportedly made by nurses. Approximately ten pages from these notes covering a period from August 7, 1953, to August 18, 1953, were

read to the jury. Apparently there was much more of this character of evidence which the jury was probably permitted to take to the jury room.

The only foundation for the receipt of these notes in evidence was laid by the then assistant medical record librarian of the hospital. She testified that they were the normal, regular business records maintained by the hospital concerning plaintiff; that after proper service to the patient they were assembled in the record office; that her office only assembled the records; that they are compiled on the floors and do not come to the record office until the patient is dismissed; and that they were kept in the ordinary course of business. There is nothing whatever in the testimony of the witness to identify the person or persons who made the notes or to verify their authenticity.

As to admissibility this court has said: "The official charts and records, kept in the regular course of business under the rules of a reputable hospital, are admissible in evidence when a proper foundation has been laid." Willis v. Order of Railroad Telegraphers, 139 Neb. 46, 296 N. W. 443.

In that case there was no holding that statements of the condition of a patient appearing on hospital charts were not hearsay. The point of the holding in that connection was that the plaintiff, the widow of a deceased person, had in her proof of death in a claim for insurance waived the right to assert inadmissibility on the ground of hearsay.

The admissibility generally of hospital records, in the absence of statutes, is commented upon in the opinion. In the comments it was pointed out that there is great conflict of opinion in other jurisdictions as to admissibility of hospital records in evidence. However no precedent was announced therein for this jurisdiction. It was indicated only that they were not admissible without foundation.

In other jurisdictions the question of foundation has

been considered and views expressed. In the expressions there is no uniformity of language but a summary of the substance appears to be that before hospital records become admissible at least the following must be shown: The custody from which they come; that they were prepared in due process of hospital work; the identity of the person who made them; the manner in which the person or persons making them obtained the information recorded; information as to accuracy; identification of the records by the person or persons who made them; and if such person or persons are unavailable, the reasons therefor. See, Osborne v. Grand Trunk Ry. Co., 87 Vt. 104, 88 A. 512, Ann. Cas. 1916C 74; Clayton v. Metropolitan Life Ins. Co., 96 Utah 331, 85 P. 2d 819, 120 A. L. R. 1117.

This appears to be a proper general rule to be observed in situations such as the one being considered here. The record in this case discloses no such foundation.

The plaintiff contends however that these notes were admissible under a statute which is designated as the Uniform Business Records As Evidence Act. Section 25-12,109, R. R. S. 1943, is as follows: "A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies as to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission." It is on this provision that the plaintiff relies.

It is apparent, assuming that the notes in question could be regarded as business records, that the foundation for admission in evidence required by the terms of the statute was never laid. As to this no further comment is required.

In the light of what has been said as to the purpose and meaning of the statute these notes were not business

records. In Higgins v. Loup River Public Power Dist., 159 Neb. 549, 68 N. W. 2d 170, it was pointed out that the record of the acts and incidents of employees in the performance of duties as such do not come within the purview of this statute. In that case it was said: "The phrase regular course of business as used in the act must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as such. If a record is not of such a character as to give it the status of a business entry it is hearsay and is inadmissible."

The record of these notes was not admissible. The admission of them was error as contended by the defendants.

By the fifth assignment of error the defendants contend that the court erred in admitting into evidence photographs showing the physical appearance of plaintiff after the accident. These photographs were in color. The substantial theory of the assignment is not that the photographs did not reflect the appearance of the plaintiff at the time, but that there was other descriptive evidence of his condition and appearance which rendered unnecessary this evidence, and in this light the evidence should not have been admitted because it was calculated only to create prejudice against the defendants.

In the light of the decisions the assignment of error may not be sustained. In City of Geneva v. Burnett, 65 Neb. 464, 91 N. W. 275, 101 Am. S. R. 628, 58 L. R. A. 287, it was said: "Under the proper precautions and with necessary explanations, what are known as 'X-ray pictures' are admissible in evidence for the purpose of showing the condition of the internal tissues of the body." This pronouncement was referred to with approval in Fries v. Goldsby, 163 Neb. 424, 80 N. W. 2d 171.

If this is true as to internal tissues it would reasonably appear that photographs showing the condition of the external tissues should likewise be admissible. The possibility that the photographs might have a tendency

to create sympathy in favor of one party should not render them inadmissible as proof of an issue on the trial.

The sixth assignment of error requires no consideration at this point. It was effectually disposed of by the conclusion already appearing herein that no cause of action has been proved against Edrie.

By the seventh assignment of error the defendants contend that the court in effect orally gave instruction to the jury and that this was error.

The court did out of the presence of the parties or their attorneys orally instruct the jury as to the manner of preparing a verdict, as to the intent of the court as to the content of a form of a verdict in blank supplied, and the effect of it with the blank or blanks filled out and returned by the jury. This obviously was reversible error.

Section 25-1111, R. R. S. 1943, provides: "It shall be the duty of the judges of the several district courts, in all cases, both civil and criminal, to reduce their charges or instructions to the jury to writing, before giving the same to the jury, unless the so giving of the same is waived by the counsel in the case in open court, and so entered in the record of said case; * * *."

Section 25-1115, R. R. S. 1943, provides: "No oral explanation of any instruction authorized by the preceding sections shall, in any case, be allowed, and any instruction or charge, or any portion of a charge or instructions, given to the jury by the court and not reduced to writing, as aforesaid, or a neglect or refusal on the part of the court to perform any duty enjoined by the preceding sections, shall be error in the trial of the case, and sufficient cause for the reversal of the judgment rendered therein."

In Dow v. Legg, 120 Neb. 271, 231 N. W. 747, 74 A. L. R. 5, it was said: "The giving of an oral instruction to the jury in regard to the principles of law applicable to the case and to the evidence, without waiver of the

statutory requirement that it be in writing, is reversible error."

In the light of these observations the judgment of the district court is reversed. As to the defendant Edrie Evans the cause is remanded with directions to sustain her motion for judgment notwithstanding the verdict. As to the defendant Lloyd L. Evans, it is remanded for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

DARREL F. PARKER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
83 N. W. 2d 347

Filed May 17, 1957. No. 34091.

1. **Criminal Law: Evidence.** In a criminal trial a confession of guilt alleged to have been made by the defendant is not competent in evidence, unless first shown to have been voluntarily made.
2. ———: ———. In laying the foundation for the determination of whether or not a confession was voluntarily made the evidence to establish foundation must be taken out of the presence of the jury, if there is objection to taking it in the presence of the jury.
3. ———: ———. As a basis for the receipt of a confession in evidence the State is required to adduce evidence that the confession was voluntary. Witnesses of the State on this question may be cross-examined and the defendant has the right to adduce countervailing evidence.
4. ———: ———. A confession is admissible if the affirmative evidence shows that it was voluntarily made and that the evidence excludes any other hypothesis.
5. ———: ———. In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats.
6. ———: ———. The question of whether or not in the first instance the State has laid a proper and sufficient foundation

for the admission of such evidence is one of law for the court, and if the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact for the jury.

7. ———: ———. Where separate confessions have been made each dependent on a separate foundation, admissibility depends upon the separate foundations.

8. **Homicide: Evidence.** Ordinarily evidence of conduct, acts, and utterances of a deceased person unrelated to a homicidal act and unconnected therewith is irrelevant and inadmissible in evidence.

9. ———: ———. The admission of evidence of conduct, acts, and utterances of a deceased person unrelated to a homicidal act and unconnected therewith is ordinarily error, but if it appears that the rights of the defendant were not prejudiced thereby the error may not be regarded as ground for reversal.

10. **Criminal Law: Evidence.** It is ordinarily within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting.

11. ———: ———. In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce evidence in its possession for inspection by the defendant's counsel before trial.

12. **Evidence.** The polygraph, commonly known as a lie detector, used for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory.

13. **Trial: Appeal and Error.** 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.

14. **Appeal and Error.** To make error in a trial available for a reversal in the appellate court it should be called to the attention of the district court and be affirmatively shown on the record for review.

15. **Trial.** In a case where counsel for the State referred in argument to the jury to facts not in evidence, and on objection that the statements were unwarranted by the evidence the court instructed the jury to disregard such statements, there was left no ground for complaint, for the reason that the court, when appealed to, granted all relief requested.

16. **Trial: Appeal and Error.** The provisions of section 29-2103,

R. R. S. 1943, are mandatory and a motion for new trial in a criminal action must be filed within 10 days after the verdict is rendered in order to be considered on appeal, except for the cause of newly discovered evidence or unless the defendant was unavoidably prevented from filing the motion within 10 days.

ERROR to the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

Kenneth R. Cook, Edgar E. Cook, William Drake, Max G. Towle, and *Thomas J. McManus,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for defendant in error.

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

YEAGER, J.

This is a criminal action wherein, in the district court for Lancaster County, Nebraska, Darrel F. Parker was charged with the crime of first degree murder. The action was prosecuted in the name of the State of Nebraska by the county attorney. On a trial of the case Parker was convicted of the charge and was sentenced to a term of life imprisonment in the State Penitentiary. A motion for new trial was filed which was overruled. By petition in error filed in this court he seeks a reversal of the conviction and sentence. He will hereinafter be referred to as the defendant.

Numerous alleged errors are assigned which the defendant insists are grounds for reversal. A question which is basic in the determination of the question of whether or not reversible error is present is advanced collectively by the first three assignments of error. This question relates to the admissibility in evidence of confessions. The three therefore will receive collective rather than separate consideration. The consideration of them requires a brief informative background.

On and for some time prior to December 14, 1955, the defendant with his wife, Nancy Parker, lived in a house

at 3200 Sumner Street, Lincoln, Nebraska. Some time before 12 o'clock noon of December 14, 1955, Nancy Parker came to her death at that address. Her death was reported by the defendant a few minutes after 12 o'clock noon. She had apparently been struck in the face. When she was found cords were tied around her throat and her hands had been tied behind her back with cords. Handkerchiefs had been placed in her mouth. The immediate cause of death was strangulation.

The funeral was held in Des Moines, Iowa. The defendant attended the funeral and thereafter until December 21, 1955, remained in that city. On December 20, 1955, the county attorney of Lancaster County, Nebraska, called the defendant and asked him to return to Lincoln, Nebraska, to aid in the investigation of the death of Nancy Parker. He was asked to report to the headquarters of the Nebraska Safety Patrol. He reported as requested on December 21, 1955, at about 11:30 a.m. At about 11:45 a.m. he met one John E. Reid in a room at the Safety Patrol headquarters where he was interviewed by Reid. This interview lasted until about 2:45 p.m. Thereafter he remained at the headquarters until about 6:30 p.m. when he was again interviewed by Reid until about 8 o'clock. At about 10:10 p.m. a court reporter came to the headquarters after which in response to questions asked by Reid, Parker admitted that he had killed Nancy Parker, his wife. The questions and answers were taken down in shorthand and transcribed by the reporter. The time of taking the questions and answers extended from about 10:10 p.m. to 10:57 p.m. The transcription was concluded about 12:30 a.m., December 22, 1955.

At about 11 p.m., December 21, 1955, the defendant confessed to the killing of his wife to Eugene Masters, a police officer of the city of Lincoln, and at 11:45 p.m. on that date he also confessed to Joseph T. Carroll, chief of police of the city of Lincoln. Neither of these was taken down in writing.

After the confession which was taken by the reporter was transcribed, the defendant, the reporter, Reid, and several others sat around a table and the transcription was read aloud by Reid. The defendant and others had been supplied with copies. After the reading and after corrections had been made by the defendant he signed it. He signed on each page of several copies.

All three of the confessions were admitted in evidence over objections of the defendant. The objection of importance made as to the written confession was that no proper and sufficient foundation had been laid for its admission in evidence. There were two substantial objections as to the other two. The first was that no proper and sufficient foundation, independent of the foundation for the written confession, had been made. The second was that the admissibility of these two was dependent upon the foundation for the written confession for which no proper and sufficient foundation had been laid, hence on that ground these were inadmissible.

The foundation which the defendant contends was absent was a sufficient showing that the confessions were within the meaning of the law voluntarily made.

A general statement of the rule as to admissibility of confessions, and one from which no departure has been found in the decisions of this court, is the following: "In a criminal trial a confession of guilt alleged to have been made by the defendant is not competent in evidence, unless first shown to have been voluntarily made." Jones v. State, 97 Neb. 151, 149 N. W. 327. See, also, Tramp v. State, 104 Neb. 222, 176 N. W. 543; Bush v. State, 112 Neb. 384, 199 N. W. 792; Stagemeyer v. State, 133 Neb. 9, 273 N. W. 824; Schlegel v. State, 143 Neb. 497, 10 N. W. 2d 264; Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323; Kitts v. State, 151 Neb. 679, 39 N. W. 2d 283; Gallegos v. State, 152 Neb. 831, 43 N. W. 2d 1, affirmed 342 U. S. 55, 72 S. Ct. 141, 96 L. Ed. 86.

This rule is one of dual significance. Under one

application the court is called upon to determine on evidence, taken out of the presence of the jury if there is objection to taking it in the presence of the jury, whether or not it has been sufficiently shown that the confession was voluntarily made.

Under the other application if the court has found that a sufficient foundation has been laid then the jury under proper instructions is required to determine for itself whether or not on all the evidence, including the foundational evidence which the court considered, the confession was voluntarily made. Unless the jury finds beyond a reasonable doubt that it was voluntarily made its competency as evidence must be rejected.

As a basis for the first application the State is required to adduce evidence to show that the confession was voluntarily made. Its witnesses may be cross-examined, and in addition the defendant may adduce countervailing evidence. Stagemeyer v. State, *supra;* Schlegel v. State, *supra;* Kitts v. State, *supra.* This procedure was followed in the case at bar as to the written confession. As to the other two the foundational evidence was not adduced out of the presence of the jury. Objection was made but in effect withdrawn.

Under this application of the rule the court is not required, in order to allow a confession to be admitted in evidence, to consider the evidence and on the basis of weight determine the question of whether or not the confession was voluntarily made. The question is that of whether or not the affirmative evidence shows that the confession was voluntarily made and that this evidence excludes any other hypothesis. The rule is stated in Holthus v. State, 138 Neb. 200, 292 N. W. 603, as follows: "In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis

of improper inducements or threats." See, also, Kitts v. State, *supra;* Gallegos v. State, *supra.*

The affirmative evidence relating to what occurred is too voluminous to repeat or even to summarize herein. It does however establish that all of the commitments of the defendant with regard to the death of Nancy Parker were in his words; that no threats or promises were made to induce the statements made; that he was under no duress or compulsion at the time; that he was not under arrest; that at the time the transcription of the confession was read to and by him he was asked to examine for errors and to make corrections if he found any; and that he found a number of errors to which he called attention which he corrected in his own handwriting. It does establish that the defendant was questioned with intensity over two very considerable periods of time but this fails to support a hypothesis that his commitments in the confession were not freely and voluntarily made.

It is true that foundational or negative evidence adduced on behalf of the defendant was in conflict with the affirmative evidence, but for the purpose of determining foundation for admissibility under the rule in this jurisdiction only the affirmative evidence requires consideration.

In view of this it must be said that the court did not err in admitting in evidence the written confession. On the same substantial basis it must be said that no error was involved in the reception of the other two confessions.

This rule did not deprive the defendant of any right to have his guilt or innocence determined upon all of the facts and circumstances surrounding the act for which the defendant was being tried, including all of those incident to the confessions.

After the court determined on evidence taken out of the presence of the jury that foundation had been laid for admission of the confession in evidence, but before

submission of it to the jury, it became the duty of the county attorney to submit all of the evidence of foundation to the jury before the confession could properly be submitted.

This was done and in his turn the defendant submitted all of his countervailing evidence. In this manner the jury was permitted to weigh the evidence of the State and of the defendant on the question of whether or not the confessions were voluntary and by its verdict to make its finding thereon. This was in accord with legal principles which obtain in this jurisdiction.

In Kitts v. State, *supra,* it was said: "The question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of such evidence is one of law for the court, and if the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact to be determined by the jury." See, also, Cramer v. State, *supra;* Gallegos v. State, *supra.*

The question of whether or not the jury, in the event of the admissibility and admission into evidence of the confessions, was justified in finding that they were voluntarily made does not require consideration in this opinion. The sufficiency of the evidence to sustain a finding by the jury that foundation had been laid is not challenged by any assignment of error. Also the brief of the defendant contains no assignment of error which challenges the sufficiency of the evidence to sustain the verdict.

By the fourth assignment of error the defendant calls attention to the fact that in instruction No. 15 the court employed the term "persons in authority" without explanation, and that this was prejudicial error.

The term was employed at three different places in the instruction, which instruction directs the jury as to the manner in which it should approach, consider, and de-

termine whether or not a proper foundation had been laid for the admission of the confessions in evidence. In each instance it was cautionary coupled with other cautionary direction. Substantially the particular caution of the first two was that the jury could not find that the confessions were voluntarily made unless they found that they were not procured or induced by promises made by "persons in authority." The third pointed out that the fact that questions were propounded by persons in authority would not of necessity render the confessions inadmissible.

The theory appears to be that by the use of these words the jury was told that the element of procurement or inducement by promises was limited to persons in authority. We cannot so regard it in the light of all of the cautionary provisions of the instruction. It can only be said reasonably that these words are calculated to make specifically applicable to "persons in authority" that which has been made applicable to persons in general by the cautionary instruction.

By the fifth assignment of error it is contended that the court failed to instruct the jury that the burden was on the State to establish that the written confession was voluntarily made. The contention is without merit. In truth by instruction No. 15 the jury was clearly and unequivocally so instructed.

By the sixth assignment of error it is contended that the court failed to instruct the jury on the theories of the defense. In the briefs it is not pointed out with any degree of particularity wherein the court so failed. No instructions in this area or in any other area were requested. Careful examination fails to disclose any such failure. The conclusion reached is that there was no such failure.

By the seventh assignment of error the contention is made that the jury should have been instructed that if it was found that the written confession was involuntary that the oral confessions should be rejected

and disregarded. No case has been cited to sustain this abstract contention.

As it has been pointed out in Leyra v. Denno, 347 U. S. 556, 74 S. Ct. 716, 98 L. Ed. 948, where successive confessions have been made in truth and in fact on a single foundational basis and one has been rejected on the ground that it was not voluntarily made, the others should be rejected on the same basis. No case has been cited and none has been found the effect of which is to say that where, as in this case, the confessions rest upon different foundations that a jury should be told that if it found that the foundation for one failed the others should be rejected.

In this case by instruction No. 15 the confessions and their foundations were in essence submitted properly for separate consideration.

A fellow worker of Nancy Parker was called as a witness for the prosecution who was permitted over objection to describe Nancy Parker's apparent general attitude for a period before and particularly on the day before her death. This did not include conversations relating either to herself or to the defendant. The defendant by the eighth assignment of error urges that this was prejudicial error.

We think this evidence should not have been admitted since it was in no way related to or attempted to be related to any attitude of her to the defendant or of the defendant to her, or to what occurred on December 14, 1955. In 26 Am. Jur., Homicide, § 361, p. 405, it is said: "Generally speaking, however, it is only under exceptional circumstances that evidence of the conduct, acts, and utterances of the deceased becomes relevant and admissible. Ordinarily, what he may have done or said previous to the homicidal act and unconnected therewith is too remote to be considered." While this evidence was inadmissible under this general rule we are unable to see how it could have prejudiced the defendant.

Frank H. Tanner, a physician, went to the residence of

the defendant on December 14, 1955, after Nancy Parker was found. He made what appears to have been a superficial examination which included an examination of the legs. Later at the hospital he made a further examination. He was called as a witness and after testifying as to the examination made at the residence and giving information that he had further examined her at the hospital he was asked to and did give his opinion as to the length of time she had been dead at 1:30 p.m. on December 14, 1955. The defendant called a doctor, who, on the basis of a hypothetical question which included an assumption of facts testified to by Dr. Tanner, gave his opinion as to the time prior to 1:30 p.m. Nancy Parker died. The assumption however did not include a reference to the testimony of Dr. Tanner that he had made a further examination at the hospital as a basis for his opinion. This opinion differed from the opinion of Dr. Tanner. Dr. Tanner was called in rebuttal and at that time he substantially testified more fully as to the later examination and that his opinion as to the time of death related to both rather than to the earlier examination alone.

The defendant by the ninth assignment of error urges that this was evidence-in-chief and that it was error to allow it to be adduced in rebuttal. He insists substantially that it was prejudicial because the witness for the defendant was not allowed to consider it in arriving at his opinion, which prejudice could not be overcome since the witness for the defendant was no longer available.

The testimony was merely elucidative of evidence already given by the witness in the case-in-chief the purport of which had not been properly reflected by the hypothesis presented by the defendant to his witness. In the strict sense this was not rebuttal but since it cannot be observed that it was prejudicial to the defendant the court did not abuse its discretion in admitting it.

In Drewes v. State, 156 Neb. 319, 56 N. W. 2d 113, it was said: "It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting." See, also, Hampton v. State, 148 Neb. 574, 28 N. W. 2d 322.

The next assignment of error to be considered is the twelfth. By the assignment it is urged that the county attorney was guilty of misconduct in the cross-examination of Dr. R. B. H. Gradwohl, a witness for defendant. From the argument it appears that the complaint is that questions were asked which were not gone into and were foreign to the matters inquired about on direct examination. It is not urged that the court erred in rulings but only that the county attorney was guilty of misconduct in his inquiries.

There is nothing whatever in the questions to which reference is made in the briefs which could on their face or otherwise be regarded as prejudicial even if the cross-examination was not proper. The witness was from St. Louis, Missouri, and testified as an expert. Certain articles were taken to him by a Mr. Harris for examination before he was called to testify. On cross-examination the witness was asked: "Q Did he (Mr. Harris) bring something down there for you to examine? A Yes. Q What was that? A He brought down some exhibits, I suppose you would call them. Q What were they? A He brought down blood of the defendant." At that point there was an interruption as follows: "MR. COOK: Just a moment, your Honor." This was followed by the following question by the county attorney: "Q What else?" At that point objection was made that this was not cross-examination. The objection was sustained. One more question was asked as follows: "Q Did he bring down a quilt?" Objection to this was made and sustained.

By the thirteenth assignment of error the defendant urges that Dr. Gradwohl was prejudicially restricted in his direct examination. After having a hypothetical

question propounded to him Dr. Gradwohl was asked if he had an opinion as to the time of death of Nancy Parker. He replied in the affirmative. He was then asked: "Q Will you explain it?" He started an answer which on motion was stricken on the ground that the answer was not responsive. Whether or not the ruling was proper at the time is unimportant, for the reason that immediately following this the witness was allowed to express his opinion and to explain his reasons therefor in great detail. The assignment is without merit.

By the fourteenth assignment of error the defendant contends that the court erred in denying his right to examine contents of the stomach of Nancy Parker after an examination of a portion of such contents had been made on behalf of the State. This leave was denied on February 14, 1956.

The rule which we think should be applied in a situation such as is presented here is the one generally applicable in the case of request for examination of documentary evidence as follows: "In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the state to produce written confessions, statements and other documentary evidence for the inspection of defendant's counsel before the trial. Error may be predicated only for an abuse of such discretion." Cramer v. State, *supra.*

Whether or not however the court in the first instance abused its discretion in denying the motion does not become important since a submission of contents of the stomach was afforded during the course of the trial and evidence was given in regard thereto. There is nothing in the record to indicate that the results obtained were any different from what would or could have been obtained from an earlier examination. In this light if there was error it was without prejudice.

By the eleventh assignment of error the defendant urges that the court erred in refusing to admit in evidence on behalf of the defense the result of polygraph

tests of the defendant made by one Dr. Douglas M. Kelley.

Dr. Kelley was called as a witness by the defendant and during the examination the court was informed that questions would be propounded the purpose of which would be to lay a foundation for conclusions to be drawn from a polygraph examination. The county attorney objected to such questioning on the substantial ground, among others, that under the decisions of this court the results of polygraph tests were not admissible in evidence. The objection was based upon the following from Boeche v. State, 151 Neb. 368, 37 N. W. 2d 593: "The polygraph, commonly known as a lie detector, used for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory."

The question was not immediately ruled upon. The witness was examined at great length and in great detail in the area relating to foundation for admissibility of testimony of one who had made tests with a polygraph. At the conclusion of this evidence as to foundation the objection of the county attorney was sustained.

Of course if we are not to depart from what was said in Boeche v. State, *supra,* and we think we should not do so, the objection was properly sustained.

If however the disposition should be to depart from the former pronouncement, it could not well be said in any event that the ruling was, on the record, prejudicial. After the ruling was made the witness was asked no question the purport of which was to elicit from him any information as to test or tests made, results obtained or observed, or opinion or conclusion of the witness flowing therefrom. Also there was no offer to prove anything in these areas. The rule applicable is the following: "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." Huckfeldt v. Union Pacific R. R. Co., 154 Neb. 873, 50 N. W. 2d 110. See, also, 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 fifteenth, sixteenth, and seventeenth assignments of error deal with three phases of alleged misconduct. One has reference to misconduct of spectators, one to Audrey Wheeler, a State's witness, and the third to the county attorney. Only the one relating to the county attorney requires any consideration beyond calling attention to the fact that nothing relating to the other two is sustained by anything affirmatively appearing on the record. This court said in Shaffer v. State, 123 Neb. 121, 242 N. W. 364: "To make error in a trial available for a reversal in the appellate court it should be called to the attention of the district court and be affirmatively shown on the record for review." See, also, Buck v. Zimmerman, 144 Neb. 719, 14 N. W. 2d 335; State ex rel. League of Municipalities v. Loup River Public Power Dist., 158 Neb. 160, 62 N. W. 2d 682.

As to the county attorney only one phase of misconduct requires attention here. In his opening argument to the jury the county attorney made a remark to the jury, the tenor of which does not require repetition here, which on its face could have been regarded as prejudicial. In the light of subsequent events disclosed by the record it appears that it flowed from a misunderstanding of the record. Exception was taken to the remark and the county attorney frankly admitted his error. Exception was taken to the remark but it is to be noted that a mistrial was not requested. The request in relation thereto was the following: "* * * and the defendant requests the Court at this time to admonish the jury that such fact did not appear as a matter of record and should be disregarded." The court admonished the jury as follows: "* * * you are admonished

to disregard the statement made by the County Attorney and which was objected to by Mr. Cook. Disregard it completely." All of this appears in the bill of exceptions.

Under the pronouncement made by this court in Argabright v. State, 62 Neb. 402, 87 N. W. 146, as follows, it must be said that this assignment does not present grounds for reversal: "Where counsel for the state refered in argument to the jury to facts not in evidence, and upon objection that the statements were unwarranted by the evidence the district court instructed the jury to disregard such statements, there was left no ground for complaint, for the reason that the court, when appealed to, granted all relief prayed for." See, also, Hoover v. State, 48 Neb. 184, 66 N. W. 1117; Hukill v. State, 109 Neb. 279, 190 N. W. 867; Cooper v. State, 120 Neb. 598, 234 N. W. 406.

The assignment of error remaining for consideration is the tenth. By this assignment the defendant urges that the court erred in sustaining the State's motion to dismiss the amendment to defendant's motion for new trial. The amendment was filed June 1, 1956, which was on the 29th day after the verdict.

Section 29-2103, R. R. S. 1943, provides that a motion for new trial shall be filed within 10 days after a verdict is rendered. There are exceptions to the rule but none of them have any application in this case. The statute by its terms is mandatory. Prior to 1947 the period was 3 days. In 1947 the period was extended to 10 days. Before the amendment this court held the statute fixing the time for filing a motion for new trial was mandatory and that the court was without jurisdiction to permit an amendment to a motion after the expiration of the time fixed by the statute. McCoy v. State, 110 Neb. 360, 193 N. W. 716. See, also, Carlsen v. State, 129 Neb. 84, 261 N. W. 339. No reason is apparent why an attitude different from the one applied to the 3-day limitation should attach to the later and more extended limitation. This conforms to the expression of

this court with regard to a like limitation contained in section 25-1143, R. R. S. 1943, on the right to file motion for new trial in civil cases. In Klause v. Nebraska State Board of Agriculture, 150 Neb. 466, 35 N. W. 2d 104, it was said: "A motion for new trial not filed in conformity with section 25-1143, R. S. Supp., 1947 (section 25-1143, R. R. S. 1943), as to time may not be considered by this court on review." The holding therefore is that the limitation of 10 days is mandatory. In this light the assignment of error must be said to be without merit.

From a full consideration of the record in this case no reversible error has been found. The judgment of the district court is therefore affirmed.

AFFIRMED.

NORTON URWILLER, APPELLANT, V. PLATTE VALLEY STATE BANK, A CORPORATION, APPELLEE.
83 N. W. 2d 88

Filed May 17, 1957. No. 34151.

Bills and Notes. Retention for more than 24 hours by a bank of a check forwarded to it for collection and payment does not render the bank liable as an acceptor under section 62-1,137, R. R. S. 1943.

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

Moller R. Johnson, for appellant.

Richard A. Dier, for appellee.

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

WENKE, J.

This is an appeal from the district court for Buffalo County of an action brought therein by Norton Urwiller against the Platte Valley State Bank of Kearney, Ne-

braska, to recover the sum of $2,491.11. The right to recover is claimed under and by virtue of the provisions of section 62-1,137, R. R. S. 1943, of the Uniform Negotiable Instruments Law. The action is based on a check issued by Ira McCord on December 8, 1953, to plaintiff on McCord's account in the defendant bank. The parties waived their right to a jury trial and submitted the matter to the trial court. After hearing the evidence the trial court rendered a judgment dismissing plaintiff's petition. Plaintiff thereupon filed a motion for new trial and this appeal is from the order overruling it.

Appellant maintains a place of business at Ravenna, Nebraska, where he engages in buying and selling livestock, his principal business being the direct buying of hogs. Ira McCord of Kearney, Nebraska, a licensed hog buyer, was a regular customer of his and on Tuesday, December 8, 1953, purchased of appellant 50 head of hogs and a small amount of bedding and feed, shipping the hogs to San Francisco, California, that evening. In payment of his purchase McCord issued to appellant his check on appellee in the sum of $2,491.11. On the following day, Wednesday, December 9, 1953, appellant's wife deposited this check to appellant's account in The Ravenna Bank, of which bank appellant was a regular customer. Appellant's wife deposited it, with other checks, in the regular course of business and gave the Ravenna bank no special instructions in regard thereto. Consequently the bank forwarded the check for collection in the usual course of business through regular channels, doing so by sending it in the mail to its correspondent bank in Lincoln, Nebraska. The bank in Lincoln sent it by mail to the Omaha branch of the Federal Reserve Bank which, in turn, sent it by mail to appellee for payment.

The check was received by appellee in a cash letter from the Omaha branch of the Federal Reserve Bank during business hours on Saturday, December 12, 1953, Saturday being a regular business day. The cash letter

contained no special instructions as to this check. The check was proofed on the day it was received and posted for action on the following business day, which was Monday, December 14, 1953. On Monday it was decided not to pay the check, but mark it for "return," because the drawer thereof did not have sufficient funds on deposit in his account with appellee with which payment could be made, and this was true at all times between December 12 and 18, 1953, both days included. Although marked for return on Monday, December 14, 1953, the actual return thereof was not made to the Federal Reserve Bank until Wednesday, December 16, 1953. This delay in return was caused by the fact that bank examiners came and assumed control of all the records of the bank, including cash items, on Monday morning, December 14, 1953, and did not return such records to those in charge of the bank until they had been checked and proved. Appellant was advised by the Ravenna bank late Thursday afternoon, December 17, 1953, of the fact that payment of the check had been refused although the check was not actually returned to him until Saturday, December 19, 1953. The check has never been paid. Neither has a judgment for the amount thereof been paid which appellant has obtained against McCord.

The record does not show the delay in the return of the check to the Federal Reserve Bank from Monday to Wednesday was due to any fault on the part of appellee, nor is there any evidence that appellant was damaged in any way because thereof. However, appellant contends that under the provisions of the statute hereinbefore cited that retention of a check by a drawee bank for more than 24 hours after it is presented to it for payment constitutes an acceptance of the instrument so that the drawee bank is bound to pay it; that is, under the statute a failure of the drawee bank to either remit the proceeds of or return a check to the holder within 24

hours after it has been received for payment constitutes acceptance.

Chapter 62, article 1, R. R. S. 1943, contains all the legislative enactments relating to the Uniform Negotiable Instruments Law. Thereunder a check is classified as a bill of exchange drawn on a bank payable on demand and, except as therein otherwise provided, the provisions thereof applicable to bills of exchange payable on demand apply to checks. § 62-1,185, R. R. S. 1943. However, a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank and the bank is not liable to the holder unless and until it accepts or certifies the check. § 62-1,189, R. R. S. 1943. The same is true of a bill of exchange as it relates to funds in the hands of the drawee available for the payment thereof. § 62-1,127, R. R. S. 1943. By accepting the instrument the acceptor agrees that he will pay it according to the tenor of his acceptance. § 62-162, R. R. S. 1943. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour on a business day to the drawee or some person authorized to accept or refuse acceptance on his or its behalf. § 62-1,145, R. R. S. 1943.

Division (j) of Chapter 62, article 1, R. R. S. 1943, which includes sections 62-1,132 to 62-1,142, both inclusive, deals with "Acceptance." Section 62-1,132, R. R. S. 1943, thereof provides the acceptance must be in writing and signed by the drawee. Section 62-1,136, R. R. S. 1943, provides the drawee is allowed 24 hours after presentment in which to decide whether or not he will accept the bill. Section 62-1,137, R. R. S. 1943, on which appellant relies, provides: "Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder he will be deemed to have accepted the same." It will be noted this section applies when "a bill is de-

livered for acceptance" - not payment, the latter being the situation here for at no time was the check ever presented to appellee for acceptance.

Presentment for payment and presentment for acceptance are two different acts well known to the law of negotiable instruments. See, First Nat. Bank of Omaha v. Whitmore, 177 F. 397; First Nat. Bank of Goree v. Tally, 115 Tex. 591, 285 S. W. 612; Hunt v. Security State Bank, 91 Or. 362, 179 P. 248; First Nat. Bank of Quitman v. Wood County (Tex. Civ. App.), 294 S. W. 324; First Nat. Bank of Washington v. Whitman, 94 U. S. 343, 24 L. Ed. 229; First Nat. Bank v. Brule Nat. Bank, 38 S. D. 396, 161 N. W. 616, 12 A. L. R. 1079; Hibbard v. Parciak, 94 Conn. 562, 109 A. 725; Blacker & Shepard Co. v. Granite Trust Co., 284 Mass. 9, 187 N. E. 53; State Bank of Chicago v. Mid-City Trust & Savings Bank, 295 Ill. 599, 129 N. E. 498, 12 A. L. R. 989. As stated in First Nat. Bank of Goree v. Tally, *supra*: "Presentment for payment and presentment for acceptance are two different acts well known to the law of negotiable instruments, and the distinction is made clear by the terms of the Negotiable Instruments Act. The difference between the object and effect of presentation for these respective purposes is very marked. The phrases themselves suggest the material distinction. 'Payment' and 'acceptance' when applied to commercial paper mean very different things. Payment extinguishes the debt and puts an end to the paper evidencing the same, while acceptance has the very opposite effect. It creates a new liability upon the part of the acceptor, and gives new life to the instrument."

We do not think the section relied on has any application to the factual situation here presented where the check was presented to appellee for payment and not for acceptance. As stated in First Nat. Bank of Winnsboro v. First Nat. Bank of Quitman (Tex. Comm. App.), 299 S. W. 856: "* * * 'retention for more than 24 hours by a bank of a check forwarded to it for collection and

payment' does not render the bank liable as an 'acceptor' under that law, for the reason that the sections relied upon for that purpose have no application to such a transaction." See, also, Mitchell Livestock Auction Co. v. Bryant State Bank, 65 S. D. 488, 275 N. W. 262.

We recognize that courts are divided on this question. See, Mt. Vernon Nat. Bank v. Canby State Bank, 129 Or. 36, 276 P. 262; American Nat. Bank v. National Bank of Claremore, 119 Okl. 149, 249 P. 424; First State Bank of Talihina v. Black Bros. Co., 187 Okl. 124, 101 P. 2d 802; First Nat. Bank of Winnfield v. Citizens' Bank of Campti, 163 La. 919, 113 So. 147. As stated in First State Bank of Talihina v. Black Bros. Co., *supra*: "The defendant, however, takes the position that when, as in this case, a check is presented to a drawee bank, the action contemplated on the part of the bank is that of payment, and that the term 'acceptance' is contra-distinguishable and not applicable to the transaction involved, and that therefore section 11436, supra, has no application to the case at bar. The argument is not without supporting authority. * * * Indeed from the annotation on the subject appearing in 63 A. L. R. at page 1140, it would appear that the division of authority upon the point is about even."

The opposite view is fully discussed in Wisner v. First Nat. Bank of Gallitzin, 220 Pa. 21, 68 A. 955, 17 L. R. A. N. S. 1266. However, we are not willing to construe a statute so as to impose a penalty upon the banks of this state, such as we are here asked to do, unless the Legislature uses language clearly so providing. In the absence of a statutory right appellant is left to his common law right for either a breach of contract or for a tortious breach of a duty. Henefin v. Live Stock Nat. Bank, 116 Neb. 331, 217 N. W. 91, 58 A. L. R. 758; Omaha Nat. Bank v. Kiper, 60 Neb. 33, 82 N. W. 102.

As stated in 7 Am. Jur., Banks, § 660, p. 479: "A collecting bank is, however, as a general rule, under no absolute obligation to collect the paper intrusted to it,

but is required to use only reasonable care and diligence in making the collection; if it does so, it incurs no liability to its customer for a loss resulting from a failure to make the collection."

And in 7 Am. Jur., Banks, § 694, p. 501, it is said: "According to the overwhelming weight of authority, the measure of damages for breach of duty by a bank in respect of the collection of the commercial paper intrusted to it is the actual loss suffered by the owner of the paper in consequence of the negligent misconduct or default of the bank, * * *."

Since appellant did not bring himself factually within either of the latter, we find the trial court was correct in dismissing his petition. We therefore affirm its action doing so.

AFFIRMED.

W. JACK SMITH, APPELLEE, V. HAROLD ELY ET AL., APPELLEES, IMPLEADED WITH HELEN M. SCHROEDER, APPELLANT.
83 N. W. 2d 55

Filed May 17, 1957. No. 34162.

1. **Fraudulent Conveyances.** A conveyance is declared to be fraudulent when its object or effect is to defraud another, or the intent with which it is made is to avoid some duty or debt due by or incumbent upon the party making the transfer.
2. ———. The intent may be gathered from the acts of the parties, and a conveyance becomes fraudulent in law when it is shown that it was made for the purpose of placing the property beyond the reach of creditors, or that it would hinder or delay them in collecting their just demands.

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

A. G. Abbott, for appellant.

Wellensiek & Weaver, E. Merle McDermott, and *James I. Shamberg,* for appellees.

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

WENKE, J.

This is an appeal from the district court for Hall County. It involves the foreclosure of mortgages on an unimproved 14-acre tract of land located in Hall County. The trial court, on September 28, 1956, rendered a decree of foreclosure therein wherein it awarded to Helen M. Schroeder, a defendant and cross-petitioner, a first lien on these premises in the sum of $5,252.39 with interest thereon at 6 percent from date thereof; to W. Jack Smith, plaintiff, a second lien thereon in the sum of $3,428.60 with interest thereon at 9 percent from date thereof; and to Helen M. Schroeder a third lien in the sum of $19,558 with interest thereon at 6 percent from December 4, 1954. Helen M. Schroeder filed a motion for new trial and, from the overruling thereof, has perfected this appeal.

Appellant contends the mortgage on which appellee W. Jack Smith depends as a basis for his second lien was given to him by Harold and Faye Ely for the purpose of hindering, delaying, and defrauding her as a creditor of the Elys by preventing her from collecting the debts which the Elys then owed her, which are now in the form of a judgment, out of any equity the Elys might have in this 14-acre tract above her first mortgage. In view thereof it is her contention that Smith's lien should be placed third and her judgment lien of $19,558 second. This being an equitable action we shall consider the record accordingly.

We said in Butke v. Nachschoen, 133 Neb. 366, 275 N. W. 318, quoting from 27 C. J., Fraudulent Conveyances, § 11, p. 415, that: "'A conveyance is declared to be fraudulent when its object or effect is to defraud another, or the intent with which it is made is to avoid some duty or debt due by or incumbent upon the party making the transfer.'" See, also, Farmers State Bank

of Ewing v. Dierks, 137 Neb. 442, 289 N. W. 860; Van Steenberg v. Nelson, 147 Neb. 88, 22 N. W. 2d 414.

And in Brown v. Sloan, 61 Neb. 237, 85 N. W. 37, we said: "Where a vendor sells and transfers his property with the intent and purpose of hindering, delaying, or defrauding his creditors, and the vendee purchases such property with knowledge of the fraudulent intent of the vendor, or knowledge of such facts and circumstances as would put a prudent man on inquiry, which, if pursued, would lead to a knowledge or notice of the fraudulent purpose of the vendor, such sale and transfer is fraudulent and void as to the creditors of such vendor."

Harold and Faye Ely, husband and wife, whom we shall hereinafter refer to as the Elys, came to Hall County, Nebraska, in 1942. In December 1944 they purchased an improved 18-acre tract south of Grand Island in Hall County. It was located on South Locust Street at the intersection of U. S. Highways Nos. 34 and 281. The Elys immediately moved onto this property and made it their home. See Schroeder v. Ely, 161 Neb. 262, 73 N. W. 2d 172. In July 1947 appellant agreed to loan the Elys sufficient money to construct and equip a motel on this 18-acre tract on condition that she could have a home with the Elys, as one of the family, for the balance of her life, the Elys agreeing to repay the money but not interest thereon. The construction of the motel was completed in 1949. See Schroeder v. Ely, 161 Neb. 252, 73 N. W. 2d 165.

In July 1950 the Elys bought an unimproved 14-acre tract in the immediate vicinity of the 18-acre tract on which to erect a sign for the motel they had built and to keep out competitors as the site purchased was a desirable location for a motel. The Elys paid $7,000 for this tract, all of which was furnished by appellant. To secure this advance the Elys gave appellant a first mortgage thereon for the full amount, payable $50 per month beginning August 15, 1950.

In July 1953 appellant was no longer able to stay with

the Elys because of Faye Ely's conduct. See Schroeder v. Ely, 161 Neb. 252, 73 N. W. 2d 165. She thereupon, on September 10, 1953, brought a suit to recover the money she had advanced to the Elys to construct and equip the motel on the 18-acre tract, being case No. 12464 in the district court for Hall County. At the same time she brought an action to foreclose the $7,000 mortgage on the 14-acre tract and to reform the mortgage given to secure it as it only described a tract of 11.9 acres, being case No. 12463 in the district court for Hall County. A lis pendens for each case was recorded in the office of the register of deeds of Hall County, the notice in each case relating only to the tract therein involved. A settlement of their difficulties was thereafter made by Harold Ely and appellant on September 17, 1953. This settlement was subsequently set aside. See Schroeder v. Ely, 161 Neb. 252, 73 N. W. 2d 165.

On October 10, 1953, Harold Ely, pursuant to an agreement he had with her, paid appellant, through her attorney, the sum of $3,010.28 on the $7,000 first mortgage on the 14-acre tract, being $1,900 of delinquent monthly payments of $50 each and $1,110.28 of interest then due. This left an unpaid balance of $5,100. Appellant, pursuant to the agreement, took a new note for this amount, payable $50 a month commencing October 15, 1953, and a first mortgage on the 14-acre tract as security therefor. She then had the court dismiss the foreclosure action and caused both the $7,000 mortgage and lis pendens to be released. The $5,100 first mortgage is the indebtedness owing her by the Elys for which she has been given a first lien herein.

In order to pay appellant these past-due amounts on the first mortgage of $7,000 the Elys borrowed from their friend appellee W. Jack Smith, whom we shall hereinafter refer to as Smith, the sum of $2,800, using that amount and $210.28 of their own funds to make the payment to appellant already referred to. When Smith made the loan he knew what the money was to be

used for by the Elys and the Elys had agreed to give him a second mortgage on this 14-acre tract as security therefor, subject only to the unpaid balance of appellant's mortgage in the sum of $5,100. The Elys gave Smith their promissory note in the sum of $2,800, dated October 10, 1953, and due 1 year after date with interest at 5 percent until due and 9 percent thereafter, to evidence their indebtedness to him and, as security therefor, the second mortgage already referred to. This is the indebtedness of the Elys for which Smith was given a second lien in this action.

In case No. 12464, which was the action brought by appellant to recover the funds she had advanced to the Elys to build the motel, appellant recovered a judgment on June 25, 1954, in the sum of $56,055 and was given a lien therefor on the motel property, together with all furnishings and fixtures therein and equipment and chattels used in connection therewith. After the foregoing property had been sold in order to satisfy her judgment there was still owing appellant thereon a balance of $19,558 and interest for which amount she has been given a third lien.

We have carefully examined the evidence as it relates to the loan from Smith to the Elys. It conclusively establishes that Smith actually loaned the Elys $2,800 of his own funds so that the Elys could pay appellant the past-due principal and interest on her first loan on the 14 acres herein involved and that the Elys actually used the money loaned them by the Smiths for that purpose. It is significant that Smith took a second mortgage for the amount of his loan and not a deed to the property since he testified the 14-acre tract was very valuable as a potential motel site and worth as much or more than both mortgage liens then against it. We conclude the transaction was bona fide. As a result thereof appellant received not only the full amount of the loan but, in addition, the sum of $210.28, being money furnished by the Elys. The question of fraudulent in-

tent is a question of fact. See, Hilton v. Clements, 137 Neb. 791, 291 N. W. 483; Farmers State Bank of Ewing v. Dierks, *supra;* Becker v. Linton, 80 Neb. 655, 114 N. W. 928, 127 Am. S. R. 795. As stated in Becker v. Linton, *supra:* "The intent may be gathered from the acts of the parties, and a conveyance becomes fraudulent in law when it is shown that it was made for the purpose of placing the property beyond the reach of creditors, or that it would hinder or delay them in collecting their just demands." Under the factual situation hereinbefore set out it is difficult to see just how appellant can claim the loan was made with the intent and purpose of hindering and delaying her in the collection of what the Elys were owing her at that time or just how it could have the effect of defrauding her. Certainly she was in as good or better position as a creditor of the Elys after she had been paid all the proceeds of the loan as she was before.

Appellant contends the record is so full of suspicious circumstances, often referred to as badges of fraud, that they raise a presumption of fraud sufficient to entitle her to recover. Among them are the fact that the Elys were in financial difficulties, as is evidenced by the two suits which appellant had instituted and were then pending against them, and the fact that Smith made this loan as a friend at a time when he had substantial debts against properties he then owned and was operating. He paid off the latter in 1955 when he sold the properties, which were motels. But inferences or presumptions arising from such suspicious circumstances are subject to being contradicted and may be overcome by evidence which establishes the bona fides of the transaction. That is the situation here.

We think the evidence adduced fully supports the decree rendered by the trial court. We therefore affirm its judgment.

AFFIRMED.

DOLORES LUCILLE WORKMAN, APPELLANT, V. FRANK MUNROE WORKMAN, APPELLEE.
83 N. W. 2d 368

Filed May 24, 1957. No. 34057.

1. **Divorce.** Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty" as defined in section 42-302, R. R. S. 1943.
2. ———. A decree of divorce cannot be granted solely on the declarations, confessions, or admissions of the parties. There must be corroborative evidence of the facts necessary to be established as required by section 42-335, R. R. S. 1943.
3. ———. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.
4. ———. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned.
5. ———. In a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests.
6. ———. The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case.
7. ———. In fixing the amount of alimony in a divorce action the court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts, and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading up to the divorce and to which party the divorce is granted, their age and condition of health, and all other facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties.

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

Crosby, Pansing & Guenzel and *Perry, Perry & Nuernberger,* for appellant.

Max Kier, for appellee.

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

MESSMORE, J.

This is an action for divorce brought by Dolores Lucille Workman as plaintiff in the district court for Lancaster County against Frank Munroe Workman, defendant. The defendant filed a cross-petition praying for a divorce. The trial court dismissed the plaintiff's petition and the defendant's cross-petition, denying a divorce to both parties. The plaintiff and defendant both filed motions to vacate the judgment of the district court. Both of these motions were overruled. From the order overruling the plaintiff's motion to vacate the judgment, the plaintiff appeals.

The plaintiff's petition charged the defendant with extreme cruelty toward her. She asked for custody of the minor children, child support, alimony, and a division of the property acquired by the parties during their marriage. In addition, the plaintiff alleged the formation of corporations and the creation of certain trusts by the defendant and other business matters conducted by him with the purpose of defrauding the plaintiff of any rights she might have in the property of the parties.

The defendant filed a cross-petition in which he charged the plaintiff with extreme cruelty; admitted the formation of corporations and trusts as alleged in the plaintiff's petition; denied any fraud in connection therewith; and prayed for a divorce.

The plaintiff, by reply to the answer and answer to the defendant's cross-petition, denied the allegations of extreme cruelty contained therein and all other affirmative matter alleged by the defendant with reference to the formation of the corporations and creation of the trusts.

In an appeal to this court in a divorce action the cause is tried de novo. Messer v. Messer, 157 Neb. 312, 59 N. W. 2d 395.

We deem the following to be applicable to this appeal.

Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty" as defined in section 42-302, R. R. S. 1943. See, Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321; Egbert v. Egbert, 149 Neb. 227, 30 N. W. 2d 669.

Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony. See Messer v. Messer, *supra*.

A decree of divorce cannot be granted solely on the declarations, confessions, or admissions of the parties. There must be corroborative evidence of the facts necessary to be established as required by section 42-335, R. R. S. 1943. See, Hines v. Hines, 157 Neb. 20, 58 N. W. 2d 505; Smith v. Smith, *supra*.

It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances. See, Schlueter v. Schlueter, 158 Neb. 233, 62 N. W. 2d 871. See, also, Hines v. Hines, *supra*.

The bill of exceptions in this case is voluminous. It would serve no useful purpose to detail the evidence of the respective witnesses.

For convenience we will refer to the parties as designated in the district court.

The record discloses that the parties were married at

Washington, Kansas, on April 20, 1937. At the time of their marriage they were each 29 years of age, and at the time of trial they were each 48 years of age. The plaintiff had been previously married. Her first husband died about February 13, 1937. The defendant had been married twice prior to this marriage to the plaintiff, and was divorced on each occasion. Five children were born to this marriage: Dellouise Workman, born December 19, 1937, and now self-supporting; Joseph Workman, born June 8, 1942; Robert Workman, born June 17, 1943; William Workman, born April 28, 1944, now deceased; and Francine Workman, born March 20, 1947.

The plaintiff came to Nebraska about 1935 or 1936, and was employed as a supervisor of a branch house of a corporation located in this city. The defendant at that time was employed by the telephone company. The defendant engaged in the business of leasing furniture and equipment in certain buildings for the purpose of renting the same to tenants. Prior to their marriage, the defendant would take the plaintiff with him on occasions to look over properties with the idea of purchasing them. After their marriage, by lease and purchase on contract, the defendant procured several properties. The plaintiff helped to plan the alterations in certain of the properties to make more rental apartments, increased the rents, and worked to make the apartments more attractive by painting and hanging wallpaper, scrubbing, varnishing the woodwork, making curtains, and doing other work necessary to induce tenants to rent. She contacted tenants, assisted in the collection of rents, and took complaints over the telephone made by tenants. She did this type of work for a period of about 12 years, or until the office was moved to a downtown location.

It appears that the parties, from the time of their marriage, lived at various locations in properties acquired for business purposes, and finally moved into a house at 940 South Cotner Boulevard to make their

permanent residence. This was sometime in January 1948. Up to 1949, according to the plaintiff's testimony, they were happily married.

The plaintiff, due to the course of conduct on the part of the defendant which she claims constituted extreme cruelty, filed an application in the district court for separate maintenance on September 5, 1953, which she subsequently dismissed. The reason for the dismissal, according to her testimony, was that she effected a reconciliation. As part of the reconciliation there was an amendment made to a revocable trust on February 12, 1954, which the plaintiff signed in June 1954. This amendment gave the plaintiff some advantages that she did not have under the trust previously. In addition, there were certain promises made by the defendant that he would remain at home nights except on occasions during the week when business matters required his absence, and that the parties would unite in their efforts to create a home for the benefit of their children and themselves.

The action of the parties in this respect amounted to condonation, which has been defined by this court as follows: Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned. See, Kidder v. Kidder, 159 Neb. 666, 68 N. W. 2d 279; Wetenkamp v. Wetenkamp, 140 Neb. 392, 299 N. W. 491; Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 808.

It is the plaintiff's contention that the defendant repeated the offense and revived the wrong condoned and by his subsequent conduct continued a course of cruel treatment toward the plaintiff.

The record is replete with confessions, admissions, and declarations of the parties as to their conduct involving each other. These standing alone, without corroborating evidence, would be insufficient to grant either party a divorce. Without considering the admissions,

confessions, and declarations of the parties with reference to quarrels, arguments, charges, and countercharges, there does appear in the record evidence of extreme cruelty on the part of the defendant toward the plaintiff. It would be impossible to detail these incidents. We do, however, set forth briefly some of them.

The parties for some time had been having domestic difficulties, and during September 1952, they voluntarily appeared at the office of the county attorney. One or the other of the parties had been in his office on four or six occasions. These visits were occasioned by visits had by the county attorney with law enforcement officers who had at times been called to the residence of the parties. The plaintiff complained to the county attorney with reference to the treatment she received from the defendant and the physical and mental abuse being done to her. The county attorney testified that at that time she had a discolored eye.

The older daughter of the parties testified to arguments had by them which occurred very frequently in the home, and that the defendant struck the plaintiff during the course of some of these arguments. She did not recall any instance when the plaintiff struck the defendant.

A neighbor of the parties testified that one time during the winter of 1951 or early 1952, the plaintiff came to her home one evening about 9 p.m. She had her small daughter with her. The plaintiff was upset and had a laceration behind one ear which was bleeding.

There is evidence in the record by a witness who saw the defendant and a woman in his car early one morning in June 1954, and on another occasion one evening in July 1955, and saw the same woman using the defendant's car on one occasion in September 1955. There is also testimony of another witness who saw the defendant with this woman in his car. This woman was known to both the plaintiff and the defendant.

On September 15, 1953, the plaintiff and her daughter

Dellouise went to the home of the defendant's parents for the purpose of getting the other children who were there. The defendant was also present. The plaintiff had received a telephone call having to do with the defendant's conduct. She accused the defendant of letting this particular woman out of his automobile and said she could prove it. Dellouise told the defendant that she had received the telephone call and what her mother was telling him was true. The plaintiff's father-in-law jumped to his feet, struck the plaintiff, and pushed her from the house. The defendant made no attempt to intervene or stop his father from striking the plaintiff during the course of this argument. A friend of Dellouise who had taken the plaintiff and Dellouise to the home of the defendant's parents testified that when the plaintiff came out to the car to return home she had a red mark on her cheek.

There is evidence to the effect that law enforcement officers were called by the defendant to the residence of the parties, apparently to take the plaintiff into custody on a charge that she was suffering from mental disability. However, she was not taken into custody. On September 9, 1953, the plaintiff's father-in-law filed a complaint against the plaintiff and a hearing was had on September 22, before the board of mental health. The defendant testified at that hearing from notes he had made from time to time relating to the conduct of the plaintiff toward him. This testimony was for the purpose of showing that the plaintiff needed mental treatment and perhaps confinement. The notes from which he testified were uncorroborated.

There is testimony by a matron in the office of the sheriff that on September 18, 1953, the officers were going to take the plaintiff into custody. When they arrived at the home of the parties the plaintiff had been working in the yard. She asked permission to use the telephone, which was granted. She was in a state of

shock, but, under the circumstances, was as rational as a person could be.

It appears that the complaint made against the plaintiff before the mental health board was not justified. It also appears that on the occasions when law enforcement officers were called to the home of the parties, apparently for the purpose of taking her into custody because of a mental condition, such calls were not justified. Even assuming, but not determining, that the plaintiff had required treatment for a mental condition, the conduct of the defendant toward the plaintiff with reference to such matter was inconsiderate of her feelings which caused her shock and nervousness, and amounted to cruelty on his part.

The plaintiff testified that prior to February 24, 1955, she had been receiving anonymous telephone calls of a disturbing nature with reference to the defendant being in the company of another woman. On or about February 24, 1955, the defendant called her, and two of her neighbors listened to the conversation on an extension telephone. This conversation need not be repeated, but is corroborated for the most part by the foregoing witnesses. In substance, in the conversation the defendant referred to the plaintiff as a dope addict, accused her of procuring drugs by playing up to the doctors, and accused her of running around to Crete and other places in cars and of immorality. When the plaintiff referred to the defendant spending weekends with a lady friend, he acknowledged he had, and stated that he and one of his lady friends had been to Keokuk, Iowa, plaintiff's former home, to check up on her reputation. The defendant called the plaintiff obscene and filthy names, and stated that he wished she had been killed in an automobile accident which she had.

There is evidence to the effect that the plaintiff, accompanied by a private detective and two police officers, visited the apartment of the defendant about 11:30 p.m., on an evening in April 1955, after he had separated

from her. The woman with whom the defendant had been in company on previous occasions was present.

Taking into consideration all of the evidence and considering it as this court must, de novo, the conclusion is that the plaintiff has sufficiently proved her charge of extreme cruelty against the defendant, and that the district court erred in refusing to grant her a divorce from the defendant.

This court has held: "In a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests." Lippincott v. Lippincott, 144 Neb. 486, 13 N. W. 2d 721. See, also, Resnick v. Resnick, 137 Neb. 256, 288 N. W. 816; Bigelow v. Bigelow, 131 Neb. 201, 267 N. W. 409.

The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case. See, Francil v. Francil, 153 Neb. 243, 44 N. W. 2d 315; Lippincott v. Lippincott, *supra.*

In fixing the amount of alimony in a divorce action the court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts, and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading up to the divorce and to which party the divorce is granted, their age and condition of health, and all other facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties. See, Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22. See, also, Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771; Messer v. Messer, *supra;* Lippincott v. Lippincott, *supra.*

The plaintiff and defendant were partners in the apartment house business. This partnership continued until it was finally determined, after there had been

some accumulation of properties and equities, that the business was too large for a partnership and by forming corporations there would be a savings consummated in many respects. Four corporations were formed, namely: The Capitol Real Estate Company, Capitol Apartments, Inc., Capitol Investment Company, and Capitol Land and Investment Company. The defendant managed these corporations, made investments, took care of rentals, and generally transacted all business in connection therewith.

The record shows that both the plaintiff and defendant have great affection for their children and desired to make adequate provision for their support in the future. To do this, there was created an irrevocable trust titled the "Workman Trust." Certain assets of the corporations heretofore mentioned make up this trust, and some accumulation of assets from the business have been added to this trust. Stock certificates, as shown by the testimony, disclose the number of shares of the different corporations comprising this trust. Dividends have been paid by the trustee from the trust to the defendant, as guardian, for the benefit of the children. The assets of this trust are approximately $180,000.

There was also created, as before mentioned, a revocable trust titled the "Frank M. Workman Trust" comprising assets of certain corporations evidenced by certificates of stock. This trust provided in part that it shall continue until the youngest child of the parties becomes of age, then makes provision that in the event the youngest child predeceases the other children the next youngest becoming of age would terminate the trust.

This trust was amended, and among other things provided in substance that in the event the plaintiff is living and the defendant not living at the time the trust would otherwise terminate, the trust shall continue during the life of the plaintiff and she shall be entitled to the income of this trust for her lifetime, but upon her death the benefits of the trust shall go to the surviving children.

In the event the defendant is living at the time the trust would otherwise terminate, then the trust shall continue for and during the period of his life, but upon his death the benefits of the trust shall go to the surviving children.

This trust agreement also provided that the donors reserved the right to amend or revoke this trust agreement in whole or in part at any time, and to withdraw all or any of the principal of the trust fund at any time upon written notice to the trustee signed by both donors, except in the event the defendant predeceased the plaintiff, then in that event the surviving donor shall not have the power to further amend or revoke the trust agreement, and that the trust shall not be changed at or after the death of the defendant.

The trust agreement then provided that upon the death of the defendant in the event he survives the plaintiff, all the trust property shall be delivered to the trustee under the irrevocable trust and shall be subject to the terms and conditions of that trust.

The assets of the revocable trust appear to be approximately $300,000.

We do not in this action disturb the irrevocable trust. It is not our purpose to determine the allegations of fraud alleged by the plaintiff in her pleadings against the defendant in transferring certain properties and placing the title thereto in his parents, or his parents forming other corporations separate and distinct from those previously mentioned allegedly controlled and managed by his parents, or now, his father being deceased, by his mother who claims an ownership interest in certain of the properties.

The record shows that there is a separate action pending in the district court charging the defendant with fraud with reference to such transfers and the making of promissory notes in which his parents are payees and which are claimed not to be collectible. The parties in the action for fraud, separate and distinct from the

instant action for divorce, are not before this court. Their rights are not determinable in an action such as this, under the record here presented. The trial court did not err in so holding.

We do not here disturb the revocable trust, but to arrive at the assets of the marital estate we have taken the same into consideration in awarding alimony.

It appears that the properties here involved are, for the most part, apartment house properties. The success of the business depends upon tenants and rents collected. The income from the business fluctuates, due to its nature. The properties are mortgaged, consequently the corporations have equities therein in most instances. We believe the value placed thereon by the plaintiff is somewhat excessive and inflationary. We conclude that the fair market value of the marital estate would be between $500,000 and $600,000.

We award alimony to the plaintiff as follows: She shall have and remain in possession of the home she now occupies with her minor children located at 940 South Cotner Boulevard for the purpose of making a home for herself and the minor children until such time as the youngest child becomes of age. The defendant shall pay the rent for the same, for the reason that it is an asset of one of the corporations heretofore mentioned under the management of the defendant. The defendant shall see that the taxes and fire and tornado insurance are kept up and paid, and also that the necessary repairs and upkeep are paid on the premises. In addition, the furniture now in the household and the household appliances in the household or in or about the premises, owned by one of the corporations, shall not be removed therefrom but shall be used by the plaintiff. The plaintiff shall be awarded alimony in the amount of $120,000, payable in equal monthly installments on the first day of each month from and after the mandate issues in this case and for a period of 15 years.

All judgments or orders for the payment of alimony

are liens upon the property, as in other actions, and may be enforced by proceedings in aid of execution, or other action or process as other judgments. See, § 42-319, R. R. S. 1943; Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232. The amounts of alimony payable to the plaintiff as heretofore set out constitute a lien on the property owned by the defendant or on any property in which he may have an interest.

We find that the plaintiff is a fit and proper person to have the care, control, and custody of the three minor children now in her custody and living with her at the home place, and award the plaintiff the sum of $200 a month for support and maintenance of the minor children of the parties until the sons Joseph and Robert Workman become of age, are self-supporting, or until the further order of the court, and thereafter the sum of $100 per month for the support of Francine Workman until she becomes of age, is otherwise self-supporting, or until the further order of the court. The defendant is to have the right to be with and visit the children at reasonable and proper times.

We award as costs to the plaintiff attorney's fees in the amount of $10,000, this amount to include $4,000 which has been allowed by the trial court. The cross-appeal of the defendant with reference to allowance of attorney's fees in the district court is denied. All costs of this action shall be taxed to the defendant.

For the reasons given herein, we reverse the judgment of the trial court and remand the cause with directions to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MARY FRANCES BUHRMAN, APPELLEE, V. FRANK A. SMOLLEN ET AL., APPELLANTS.
83 N. W. 2d 386

Filed May 24, 1957. Nos. 34107 and 34112.

1. **Trial.** Where, in a jury trial, a defendant, when plaintiff rests, moves for a verdict in his favor and upon the overruling of such motion proceeds with the trial and introduces evidence in support of the defenses set up in his answer, he thereby waives the right to assign error in the ruling upon such motion.
2. **Trial: Appeal and Error.** A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record, unless its admission is assigned as error here and the assignment is sustained.
3. **Automobiles.** The question of the admissibility of evidence as to the speed of a motor vehicle shortly prior to the time of an accident rests largely in the discretion of the court.
4. ———. When the speed of a motor vehicle is charged as negligence, it is proper to admit competent evidence of the speed at which it was being driven a few seconds before the collision.
5. **Trial.** 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.
6. **Appeal and Error.** Before an error requires a reversal it must be determined that it was prejudicial to the rights of the party against whom it was made.
7. ———. Instructions not complained of in such a way as to be reviewable in this court will be taken as the law of the case, and if, when tested by such instructions the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained.
8. **Trial.** It is the duty of the trial court to present to the jury those issues which are raised by the pleadings and which find support in the evidence.
9. **Appeal and Error.** Erroneous instructions to the jury will not work a reversal of a case unless they are prejudicial to the complaining party.
10. **Negligence: Pleading.** In the absence of an issue of negligence by plaintiff or by a third person imputable to plaintiff, allegations in an answer denying that defendant was negligent and alleging that the accident and resulting damages were solely and proximately caused by the negligence of such third person

is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto, but rather is one entirely consistent with and provable under the general issue.

11. **Trial: Appeal and Error.** Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.
12. **Trial.** It is proper for the trial judge to aid in preventing misconception by properly directed questions or remarks.
13. ———. There is no impropriety in a trial court interrogating witnesses regarding a fact under investigation when the tendency is only to develop the truth and is calculated in nowise to influence the jury save as the testimony will assist it to arrive at a correct conclusion on the questions of fact in issue.
14. ———. Considerable latitude must be allowed counsel at the commencement of a trial in making the opening statement in which he states the evidence by which he expects to sustain his cause of action or defense.
15. ———. The giving or refusing to give a cautionary instruction that the jury is not to allow sympathy or prejudice to control or affect its finding is within the sound discretion of the trial court.
16. ———. Such an instruction should be given, if requested, where the circumstances of the trial and the evidence of the case is such as is likely to appeal strongly to the sympathy of jurors.

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

Wellensiek & Weaver, John A. Wagoner, and *Luebs & Elson,* for appellants.

Harold A. Prince and *Walter P. Lauritsen,* for appellee.

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

SIMMONS, C. J.

In this action cars driven by the defendants Frank A. Smollen and Samuel M. Rank, collided in a street intersection. The defendants will hereinafter be referred to as Smollen and Rank. The Rank car proceeded beyond the point of collision, turned sharply, and went

into the yard of plaintiff's home where she was caught and pinned against the house by the Rank car.

Plaintiff sued for damages. The jury's verdict was in favor of plaintiff and against both defendants. Defendants appealed separately. The appeals are consolidated here and presented on one record.

So far as required, we state in the course of the opinion the assignments of error that are argued.

We reverse the judgment of the trial court and remand the cause for a new trial.

The street intersection involved is that of Louise and Elm Streets in the city of Grand Island. The streets were paved, the weather was clear, and the pavement was dry. The accident happened about 5:30 or 6 p.m. on March 11, 1955, in daylight.

The speed limit at the place of impact was, by ordinance, 20 miles per hour. The streets involved were well-used streets and without stop signs.

Plaintiff's home sat back from Elm and Louise Streets at the northwest corner. Just prior to and at the time of the accident plaintiff was outside her home on the east side or Elm Street side.

There was a hedge 4 or 5 feet high inside the sidewalk line and along the north and east sides of the southwest corner of the intersection. It was not in leaf. The witnesses generally agreed that it interfered with or obstructed vision across that corner.

The Rank car was proceeding north on Elm Street. The Smollen car was proceeding east on Louise Street. The cars made contact somewhere near the center of the street. The left front fender light and grill of the Smollen car were damaged. The left rear fender of the Rank car was damaged. It seems to be agreed that those places of damage fix the points of contact of the two cars. The Smollen car went on east. The Rank car proceeded north, made a sharp turn to the west and in a substantially direct west course went over a 6-inch rise in the curb, across the parking and sidewalk,

then over an eight-tenths of a foot curb on the inside sidewalk line and pinned plaintiff against her house.

Plaintiff suffered severe injuries.

The matters above recited do not appear to be in serious dispute.

Plaintiff alleged that the proximate cause of the collision which caused the Rank car to strike and injure her was the negligence of each and both of the defendants. Plaintiff alleged the negligence of Smollen to be driving in excess of the speed limit and at 35 miles per hour; failure to keep a reasonable lookout for cars approaching from his right; failure to yield right-of-way to the Rank car although the Rank car had the right-of-way; failure to keep his car under control so as to avoid a collision with an automobile approaching from the right; failure to look or if he looked, failure to see the Rank car; failure to stop although he had time to do so; and failure to apply his brakes in time to avoid a collision.

Plaintiff alleged negligence of the defendant Rank in that he was driving in excess of the speed limit and at the rate of 35 miles per hour; failure to keep a lookout for cars approaching from the west; failure to see the Smollen car that was in plain sight; failure to stop or avoid the collision although he had time to do so; failure to apply his brakes to avoid the collision; failure to guide his car so as to avoid a collision between his car and the plaintiff; and failure to apply his brakes so as to avoid striking plaintiff.

Smollen answered, denied negligence, and alleged negligence of Rank for failure to keep a proper lookout; failure to have his automobile under control; failure to yield the right-of-way to Smollen who had entered the intersection first; failure to stop after he saw or should have seen Smollen's car in the intersection; failure to turn to avoid a collision; negligence in driving his car into the car of Smollen; and failure to apply his brakes in time to avoid the collision.

Rank answered and admitted as true the allegations of plaintiff as to the negligence of Smollen, except as traversed in the answer. He denied negligence, and alleged the operation of his car at a "slow, lawful, proper and moderate rate of speed"; that he entered the intersection first; that the speed of Smollen was excessive; and that so far as he was concerned the accident was unavoidable and that he was without blame. He further alleged that as a result of the collision he was thrown against the windshield and rendered unconscious; and that the movement of his car thereafter was not caused by any conscious or voluntary act or omission on his part.

At the close of plaintiff's case-in-chief and at the close of all the evidence, each defendant moved separately for a directed verdict and later for a judgment notwithstanding the verdict. These motions are based on a contended insufficiency of the evidence to prove actionable negligence as to each defendant.

The applicable rules are:

"Where, in a jury trial, a defendant, when plaintiff rests, moves for a verdict in his favor, and upon the overruling of such motion, without protest, proceeds with the trial and introduces evidence in support of the defenses set up in his answer, he thereby waives the right to assign error in the ruling upon such motion." Bradstreet v. Grand Island Banking Co., 89 Neb. 590, 131 N. W. 956. See, also, Russell v. Electric Garage Co., 90 Neb. 719, 134 N. W. 253.

"A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record and its admission is not assigned as error here." Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130.

There is an assignment of error by Smollen as to the

admission of evidence offered by Rank. Smollen offered evidence that he was driving east just before the accident at a speed of approximately 20 miles per hour. On cross-examination he testified that this had been his constant speed for at least 2 blocks west of the point of the collision and that there were no cars immediately in front of him. Rank then produced a witness who testified that she was standing at her kitchen window in her home facing Louise Street a block and a half west of the accident intersection. She had a view of Louise Street for half a block. She saw a car go by 10 or 12 seconds before she heard the crash here involved. She saw no car ahead of or following the car she mentioned. She observed the car for a half a block. She was not able to give a particular discription of the car. She testified that a car going 20 miles an hour was not going very fast; that she would know when a car was going "around" that speed; and that she could tell by comparison whether the car she saw was going more or less than 20 miles per hour. The car was going 5 to 10 miles an hour faster than the 20 miles an hour with which she was familiar.

The applicable rules are:

"The question of the admissibility of evidence as to the speed of a vehicle shortly prior to the time of an accident rests largely in the discretion of the court." Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

"When the speed of a motor vehicle is charged as negligence, it is proper to admit competent evidence of the speed at which it was being driven a few seconds before the collision." Schwarting v. Ogram, 123 Neb. 76, 242 N. W. 273, 81 A. L. R. 769.

The trial court did not abuse its discretion in the admission of the evidence.

We return to the motions of the defendants for a directed verdict or for judgment notwithstanding the verdict.

The applicable rules are: "A motion for directed

verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. * * * 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, 154 Neb. 268, 47 N. W. 2d 569.

There is evidence in the record that would support the following findings:

Defendant Smollen approached the intersection at a rate of speed well in excess of the speed limit in the area involved; he did not look to the south when he could have seen the Rank car then approaching the intersection on his right and at a time when he could have stopped his car so as to have avoided the collision; as soon as Smollen looked and did see the Rank car he put on his brakes and skidded a distance of 40 feet to the point of impact with the Rank car; debris from the Smollen car was scattered on the pavement for a distance of several feet east of the point of impact; and the Smollen car then proceeded east a distance of 140 feet from the point of impact where it stopped with the right front wheel against the curb. Smollen then backed up to near the point of impact.

Rank approached the intersection from the south at a speed of 35 miles per hour; he did not look to the west at a point where he could have seen the Smollen car coming toward the intersection and could have stopped; when he looked and saw the Smollen car he was then almost in the intersection; and he could not then stop his car and accelerated his speed in an effort to get through the intersection ahead of the Smollen car. After the contact of the two cars, Rank then pro-

ceeded straight north a distance of about 25 or 30 feet, made a sharp turn to the west, crossed over the pavement curb, the parking, the sidewalk and sidewalk curb, and struck the plaintiff, pinning her to the house. The total distance traveled by Rank after the collision was 80 feet.

The above summary is sufficient to show that the trial court did not err in overruling the motions for a directed verdict and in overruling the motions for judgment notwithstanding the verdict.

Rank and Smollen assign prejudicial error of the trial court in the giving of instructions Nos. 1, 4, 6, and 8 on its own motion. Smollen makes no argument as to error in instruction No. 1. Instruction No. 1 is the instruction in which the court undertook to define the claims of the parties and advised that the contentions of the parties was not to be considered as evidence in the case.

The first complaint of Rank goes to the statement in the instruction that plaintiff alleged she was on the porch of her home "looking after her children" when the accident happened, and that such a reference is repeated twice in the instructions. We do not find any allegation of that kind in the pleadings. It was an erroneous statement of the pleadings and a correct statement of the fact. The evidence showed without dispute and without objection that the three children were with the plaintiff, the youngest being in a "Taylor-tot" near the plaintiff just before the accident, and that the three children were there immediately following the accident in which plaintiff was seriously injured. We find no prejudicial error in that regard. Before an error requires a reversal it must be determined that it was prejudicial to the rights of the party against whom it was made. Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466. However, as a new trial is required this is an error that need not be repeated.

Plaintiff alleged that Smollen was negligent in that he failed to yield the right-of-way to Rank who "was on

the right and had the right-of-way." Smollen by answer denied this allegation. Rank by answer admitted it. Smollen in allegation of negligence of Rank by answer alleged that he entered the intersection ahead of Rank and had the right-of-way. Rank in his answer alleged that he entered the intersection to the right of and ahead of the Smollen car.

The trial court instructed the jury that Rank contended Smollen to be negligent in that he failed to yield the right-of-way to Rank.

Rank argues here that it was his theory that he had the right-of-way and by reason thereof was not negligent, and that he was entitled to have the jury instructed on his theory of the case. As we read the instruction that was done. In addition the trial court in instruction No. 7, which is not challenged, advised the jury as to the rules where two motorists approach an intersection at or about the same time. The rule is: "Instructions not complained of in such a way as to be reviewable in this court will be taken as the law of the case, and if, when tested by such instructions, the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained." Myers v. Platte Valley Public Power & Irr. Dist., 159 Neb. 493, 67 N. W. 2d 739. We find no merit in this contention.

Rank next sets out two of the four allegations of negligence of Smollen made by plaintiff, as recited in the instruction, as to cars approaching from the right. He says the instructions were prejudicial to him but does not explain the basis of the contention. We see no merit to the contention.

Rank next complains because the court instructed the jury that plaintiff alleged Rank was negligent in that he operated his automobile at an excessive rate of speed and in excess of the speed limit fixed by ordinance. He contends that plaintiff offered no evidence as to that fact although he admits that Smollen's witnesses did directly so testify. Parenthetically it is also a fair in-

ference from the testimony of one of Rank's witnesses. This is equivalent to a contention that as to the issue of the speed of Rank the court should have withdrawn that issue from the jury. We have disposed of that contention in our ruling on the denial of the motions for an instructed verdict.

The rule is: "It is the duty of the trial court to present to the jury those issues which are raised by the pleadings and which find support in the evidence." Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831.

Rank next argues that he was entitled to the benefit of the plaintiff's admission that Rank was on the right and had the right-of-way, and that it "was an admission that the defendant Rank was not violating any speed limit at the time the accident occurred." That is a non sequitur that is self demonstrative.

Rank next complains that the trial court instructed the jury that plaintiff alleged Rank was negligent in operating his automobile at a rate of speed in excess of what was reasonable and proper under the conditions then existing. Plaintiff pleaded such an act of negligence. Rank moved that it be stricken as repetitious, surplusage, and redundant. The journal recites that the court ruled on the motion and granted leave to amend. The transcript shows that the allegation was stricken.

Rank, however, pleaded that he was operating his automobile at a "slow, lawful, proper and moderate rate of speed."

The trial court advised the jury of that allegation. The question was an issue and made so by Rank. We fail to see prejudice to Rank in the instruction.

Rank further complains that the court instructed the jury that plaintiff alleged defendant Rank was negligent in that he failed to keep a reasonable lookout for cars approaching the intersection from his left. Rank's evidence shows that he failed to look when he first could have seen the Smollen car. Rank again argues here that plaintiff alleged he had the right-of-way and he

(Rank) admitted it. The trial court in instruction No. 7 told the jury with reference to one who had a right-of-way that "if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way." No complaint is made as to that instruction. It likewise becomes the law of the case.

Rank by answer alleged that as a result of the collision he was thrown against the windshield and rendered unconscious, making it impossible for him to control his car thereafter, and that the movement of his car thereafter was not the result of any voluntary or conscious act or omission on his part. The court instructed the jury that Rank alleged that as a result of the collision he lost control of his car and was unable to stop before striking the plaintiff.

Rank contends that the court should have in instruction No. 1 informed the jury that he "had lost control by reason of being thrown against the windshield and being dazed as a result thereof." That was a question of fact for the jury on disputed evidence. In instruction No. 9 the court instructed the jury as to the liability of Rank if they found that he had been rendered unconscious as a result of the collision with the Smollen car. The instruction is not challenged here. It also becomes the law of the case. We see no merit in this contention.

Plaintiff alleged that as a result of the accident "a large part of the skin and muscles of the left leg was torn out of her" and the "bones in her knee were broken."

The evidence is undisputed that: "A. She had a laceration of the left knee and then she had a severe deep straddle laceration of—oh, I suppose you might term it the crotch would be the lay term. Q. Tell where it affected her legs? A. Well, it extended from where the thigh would join—the inner part of the thigh

would join the body and extended up into the body, oh, probably five or six inches and the skin of the buttocks was completely undermined, also to the extent of four or five inches, and the rectum on that side was opened for the entire distance and the external muscle of the rectum was torn."

Rank contends that the injury was to the body and not a separation of the left limb from the body and that to so state it exaggerated the nature of the injury. As we read the instruction it was factually correct and minimized the nature of the injury. We see no prejudice to Rank in the instruction.

Rank asserts that the statement that the bones in her knee were broken was not a correct statement. The undisputed evidence is: "The inner ball or inner half ball of the knee was just split right through and just lays right there in place." The trial court accurately stated the allegation as "bones * * * were broken." The evidence is a bone was broken. We fail to see prejudice to Rank in the instruction.

Earlier in this opinion we have referred to the fact that plaintiff in her allegations of negligence of Smollen alleged that Smollen failed to yield the right-of-way to Rank "who was on the right and had the right-of-way" and that Rank admitted that allegation. Plaintiff by reply accepted this admission and admitted Rank's allegation that Smollen was negligent.

The trial court made no reference to these admissions in its instructions. We fail to see where Rank was prejudiced. He points out no prejudice.

If erroneous, the established rule is: "Erroneous instructions to the jury will not work a reversal of a case unless they are prejudicial to the complaining party." In re Estate of Keup, 145 Neb. 729, 18 N. W. 2d 63.

Rank's assignment and argument directed at instruction No. 1 are not sustained.

In instruction No. 4 the trial court instructed the

jury that the burden of proof was on the plaintiff to show the negligence charged against the defendants.

The jury was then instructed that the burden of proof was on the defendant Rank to show the negligence which he charged against Smollen unless such negligence was disclosed by the evidence of Smollen and that such negligence was a proximate cause of plaintiff's injuries; and that a like burden was on Smollen to prove the evidence which he charged against Rank.

Both Rank and Smollen assigned this as error.

The trial court had advised the jury that Smollen charged Rank with negligence as a sole and proximate cause in that he failed to keep a lookout and failed to keep his automobile under reasonable control.

The court had instructed the jury that Rank had charged that the sole cause of the accident was the negligence of Smollen in that he operated his car at an excessive rate of speed in violation of the ordinance and that he failed to yield the right-of-way to Rank who approached the intersection from Smollen's right. Neither Smollen nor Rank prayed for affirmative relief against the other.

We think this instruction was erroneous and prejudicial, and requires a reversal of the judgment and a remand for a new trial.

The rule is: "In the absence of an issue of negligence by plaintiff or by a third person imputable to plaintiff, allegations in an answer denying that defendant was negligent and alleging that the accident and resulting damages were solely and proximately caused by the negligence of such third person is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto, but rather is one entirely consistent with and provable under the general issue." Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21. See, also, Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333; Styskal v. Brickey,

158 Neb. 208, 62 N. W. 2d 854; Burhoop v. Brackhan, *ante* p. 382, 82 N. W. 2d 557.

Both Rank and Smollen assign the giving of instruction No. 6 as error. Smollen does not mention it in argument. Instruction No. 6 set out the speed limit of the city of Grand Island as fixed by ordinance. It is literally correct.

Rank argues that the instruction is erroneous in that it does not advise the jury that its violation was not in itself negligence, but is evidence of negligence. He cites no cases wherein we have held that it is error to fail to include such a statement. We need not decide that question.

The rule is: "Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof." Bell v. State, 159 Neb. 474, 67 N. W. 2d 762.

Instruction No. 7 sets out the "laws" of Nebraska as to right-of-way of motorists approaching an intersection at or about the same time. It refers to motorists traveling at "a lawful rate of speed." The second paragraph refers to the right-of-way of a vehicle which has entered an intersection and is passing through "at a lawful rate of speed." The third paragraph is: "The violation of any of these laws is not of itself negligence, but is evidence which you are to consider * * *."

Rank's contention is that by the use of the word "laws" the last-quoted statement does not apply to the ordinance and hence the instruction does not apply to the instructions as to the ordinance fixing the speed limit.

This contention is obviously without merit. The reference to "a lawful rate of speed" in instruction No. 7 clearly refers to the speed limit as set out in instruction No. 6 and makes the last provision applicable to both. So construed the instructions are complete on the matter covered. The assignment has no merit.

Both Rank and Smollen assign the giving of instruction No. 8 as error. Rank does not point out error in his argument. Smollen mentions it only in connection with his argument as to instruction No. 4. Under rule 8a 2 (4) of the Supreme Court rules, this assignment is not considered.

This concludes the assignments of error in which Smollen joins. The remaining assignments are those of Rank.

Rank assigns error in the refusal to give requested instruction No. 6. He concedes that instruction No. 8 which was given was intended to cover the situation but contends that the instruction given placed the burden on each defendant to show that the other was negligent. He does not point out the language that he contends produced that result. We find no language that even by inference does so. He contends further that the instruction does not correctly reflect the law as stated in Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673. He argues the facts of the Bergendahl case and the facts, as he sees them, in the instant case. He does not point out error in the instruction. The assignment is without merit.

Rank assigns error of the trial judge which he complains altered the effect of the importance of evidence and the credibility of witnesses. In part the matters here mentioned are repetitious of questions earlier argued and here decided. The specific assignment here relates to the examination of the witness offered by Rank which directly contradicted evidence of the plaintiff. The witness testified as to his place of employment by name and street address, and that he was on his way to work when he observed the things about which he testified. He was cross-examined by both plaintiff and Smollen. The court then asked the witness where he worked, if he was on his way to work, and if he was going out of his way. The witness explained why he was on the particular street at that time.

It is obvious that the court recognized that an infer-

ence of false testimony could be drawn and that the examination was directed to that situation.

We have held: "It is entirely proper for the trial judge to aid in preventing misconception by properly directed questions or remarks." Culver v. Union P. R. R. Co., 112 Neb. 441, 199 N. W. 794.

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

The holdings are applicable here. We see no basis for Rank's contention of prejudicial error in this matter.

Rank complains of error in the court not sustaining a motion for mistrial made at the close of the opening statements to the jury. As settled, only the remarks of counsel to which objections were made and rulings thereon were included in the bill of exceptions.

At one point in the opening remarks, Rank objected to "argument" and the court advised counsel not to argue. Some pages later counsel for plaintiff referred to the fact of plaintiff's pregnancy at the time of the accident and that because of the fractured pelvis the child was delivered by Caesarean operation. Rank objected that it was not an issue and the court ruled with him "Unless it is claimed that that caused additional pain and suffering * * *." The court then said to "go on and leave that out of your statement." Several pages later the statement was made that plaintiff had a broken pelvis and that she had not recovered completely from that. The court then admonished counsel to limit his statement to matters pleaded. No further objection by Rank was made.

After opening statements were completed, Rank moved for a mistrial on the ground that counsel had recited evidence broader than the pleadings. The court over-

ruled the motion and admonished the jury that statements made in the opening by counsel are not evidence and are to be disregarded and not considered. Rank assigns this as prejudicial error.

Apparently counsel for plaintiff and the court did not agree on the evidence that was admissible under the issues presented. The court undertook to keep out reference to evidence which might later be offered and then held to be incompetent. During the trial repeated reference was made to the pregnancy of plaintiff and the treatment that was required because of it. Repeated evidence was offered as to the broken pelvis. The court rejected a direct offer of proof as to the Caesarean operation.

The rule is: "Considerable latitude must be allowed counsel at the commencement of a trial in making the opening statement in which he states the evidence by which he expects to sustain his cause of action or defense." Yechout v. Tesnohlidek, 97 Neb. 387, 150 N. W. 199.

We find no prejudice to Rank particularly in consideration of the fact that the court directly and clearly admonished the jury in the matter.

The bill of exceptions contains one isolated statement of counsel for plaintiff made in argument to the jury. It is: "He says don't pay any attention to sympathy. Now, you do pay attention to sympathy. If she has received a condition that makes you cry your eyes out for her, then you sympathize for that condition and you give her the money that will pay her for that condition. If she is in a condition that does not merit sympathy for them, why don't give her money for that, but if she is in a condition that merits sympathy, she is in a condition to be paid for it."

Rank moved for a mistrial. It was overruled. Rank claims this was prejudicial error as an appeal to the jury for sympathy.

This is a case where a suggestion of an appeal to

sympathy should not have been made. The statement made that suggestion if not direct appeal for sympathy. Such an argument was improper and constituted prejudicial error under the circumstances of this case.

Defendant Rank requested an instruction to the effect that the jury should not take into consideration any element of sympathy or pity for the plaintiff or criticism or prejudice against the defendants or either of them. The trial court refused the instruction. Rank assigns the refusal to give the instruction as error.

Here Rank restates his argument as to various matters specifically assigned as error and heretofore referred to herein. He refers to one additional matter not separately assigned as error. During the trial a newspaper carried a news item regarding the trial. Rank offered it in evidence and moved for a mistrial. The court overruled the motion and pointed out to the jury certain inaccuracies in the item and admonished the jury to listen to and act on that which was testified to in court and that alone.

Rank contends that the sum total of all of these matters adds up to a requirement that a cautionary instruction on sympathy and prejudice should have been given and that it was prejudicial error not to do so.

The applicable rule is: The giving or refusing to give a cautionary instruction that the jury is not to allow sympathy or prejudice to control or affect its finding is within the sound discretion of the trial court. Hoskovec v. Omaha Street Ry. Co., 85 Neb. 295, 123 N. W. 305; Copeland v. Omaha & C. B. St. Ry. Co., 98 Neb. 42, 151 N. W. 947; Blackwell v. Omaha Athletic Club, 123 Neb. 332, 242 N. W. 664.

Plaintiff, at the time of the accident, was 24 years of age, married, and the mother of three children.

We have heretofore quoted the evidence as to the torn and bruised area in the crotch; her pelvis was fractured; and she had a sacroiliac dislocation and the fractured, torn left knee. These were the major injuries.

The first night at the hospital she was in shock and was given 8 to 11 pints of blood by transfusion. That night began a series of operations, not yet ended at the time of the trial. The number of the operations performed depends on whether the series of things done were classed as operations or surgical treatments. She was in the hospital for 96 days. During all of that time she was in pain, described at one time as excruciating by her surgeon. She was under the influence of narcotics administered to relieve pain from 2 to 4 hours apart for weeks on end during most of this time.

During that time she underwent a personality change where the doctors feared she was going insane from the memory of the accident, the pain, and the fear of operations. That condition had improved at the time of the trial, but still remained with her.

Several operations were performed on the knee and the pelvis area to restore the fractured bones. This ultimately resulted in putting pegs in the bones to get traction. She was in traction for that purpose for several weeks.

Infection developed in the torn crotch area resulting in an abscess. To remove a cause of infection a colostomy was performed on March 26, 1955, 2 weeks following the accident. On August 30, 1955, following the accident the reverse operation was performed putting the bowel and the functioning of the rectum back in its proper place. The leg is left in a deformed position permanently. At the time of the trial another knee operation was anticipated to remove the cause of continuing weakness and pain there. The doctors testified that the final result would be a fixed knee or, as we interpret it, a stiff leg from the hip to the ankle.

The above in broad outline is the undisputed evidence of the plaintiff's physicians and surgeons.

The injuries of the plaintiff were such as obviously would appeal strongly to the sympathy of jurors. This coupled with the circumstances connected with the trial

mentioned herein were such as required the giving of the cautionary instruction, the request having been made for it, and failure to do so was prejudicial error. See, Copeland v. Omaha & C. B. St. Ry. Co., *supra;* 88 C. J. S., Trial, § 320(b), p. 848.

The jury returned a verdict for the plaintiff against both defendants in the sum of $35,500. Rank assigns as error that the verdict is excessive and was given under the influence of passion and prejudice.

A reversal and new trial being required, we need not determine this assignment. It can have no bearing at a new trial.

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

REVERSED AND REMANDED.

MARTIN W. O'NEILL, APPELLEE, V. WINIFRED O'NEILL, APPELLANT.
83 N. W. 2d 92

Filed May 24, 1957. No. 34116.

1. **Divorce: Appeal and Error.** A decree of divorce granted on the uncorroborated testimony of a party which has been appealed on that ground requires reversal by this court.
2. **Divorce: Attorney and Client.** Attorney's fees are not allowable in an action for divorce in the absence of statutory authority therefor.
3. ———: ———. The statutes of this state contain no provision for the allowance of attorney's fees in an action for divorce in favor of a husband and against a wife.
4. ———: ———. The courts are without authority in an action for divorce to fix the amount of the attorney's fees the parties are to pay their respective attorneys.

APPEAL from the district court for Douglas County: HERBERT RHOADES, JUDGE. *Reversed and remanded.*

Schrempp & Lathrop, for appellant.

Irvin C. Levin and *Jerry M. Gitnick,* for appellee.

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

YEAGER, J.

This is an action for divorce by Martin W. O'Neill, plaintiff and appellee, against Winifred O'Neill, defendant and appellant. In the action the plaintiff filed a petition for divorce from the defendant on the ground of extreme cruelty. The defendant filed a cross-petition wherein she asked for a decree of divorce from the plaintiff likewise on the ground of extreme cruelty.

The case was tried, at the conclusion of which the prayer of plaintiff's petition for divorce was granted and that of defendant denied. Accordingly a decree was rendered. Prior to the trial the defendant had been represented in the case in the following order by John S. Samson and Cranny & Moore. On the trial she was represented by William J. Hotz, Jr. The plaintiff was represented by Irvin C. Levin.

The court found, among other findings, that there was a balance in an account in the Omaha Loan and Building Association in the amount of $1,274.32 which represented an accumulation of the savings of plaintiff and defendant which stood in the name of the defendant. By the decree it was directed that $300 of this amount should be paid to John S. Samson for his services, that $100 should be paid to Cranny & Moore, that $150 should be paid to William J. Hotz, Jr., and that $400 should be paid to Irvin C. Levin.

From the decree the defendant has appealed. As grounds for reversal the defendant has set forth two assignments of error. The first is that the court erred in granting plaintiff a decree of divorce. The second is that the court erred in ordering the attorneys' fees paid from the savings account.

The point of the first assignment of error is that there is no corroboration of the testimony of plaintiff as to any charge of cruelty made against the defendant.

From an examination of the record and the law applicable thereto the only conclusion possible is that the assignment of error must be sustained.

In an effort to sustain his alleged cause of action the plaintiff testified in his own behalf. The substance of his testimony was that the defendant constantly nagged him; that she would not allow members of plaintiff's family to visit in the home of the parties; that she did not properly cook and provide meals for him; and that she filed a complaint against him with the board of mental health of Douglas County, Nebraska.

There was no corroboration whatever of the testimony of the plaintiff in any of these respects. A decree of divorce granted on the uncorroborated testimony of a party must on appeal be reversed.

Section 42-335, R. R. S. 1943, provides: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose." This rule has been approved and applied by numerous decisions of this court. See, Spray v. Spray, 156 Neb. 774, 57 N. W. 2d 926; Hines v. Hines, 157 Neb. 20, 58 N. W. 2d 505.

The second assignment of error, as pointed out, challenges the propriety of the decree requiring the payment of attorney's fees out of funds on deposit in the name of the defendant. The propriety of the allowance of the fees as such is not challenged. The complaint made is that they could not properly be charged against this fund.

It should be said here that there is nothing in the record which competently shows that these funds were not funds in actuality belonging to the defendant. The defendant testified that they belonged to her and that the plaintiff did not contribute to them in anywise. There is nothing in the evidence on which to base a finding that this is not true.

The decree was rendered herein on March 28, 1956. Prior thereto John S. Samson had been attorney for the defendant but had withdrawn. Incident to his withdrawal he had been awarded a fee for his services in the amount of $300. The award of the decree in the amount of $300 in favor of Samson was a reaffirmation of the earlier award of $300. The award was neither against the plaintiff nor the defendant. The order provided only that it should be paid out of the fund on deposit with the Omaha Loan and Building Association "belonging to the parties herein standing in the name of the defendant." The Omaha Loan and Building Association was not made a party to the proceeding in which it was required to pay out money in its possession. Thereafter for a period of time it appears that the defendant was represented by the law firm of Cranny & Moore. This firm apparently withdrew since William J. Hotz, Jr., represented the defendant at the trial. Apparently no attorney's fee was allowed in favor of Cranny & Moore or Hotz prior to the entry of the final decree. Irvin C. Levin, as pointed out, was at all times attorney for the plaintiff.

By the terms of the decree none of the amounts allowed as attorney's fees, that is $300 for John S. Samson, $100 for Cranny & Moore, $150 for William J. Hotz, Jr., and $400 for Irvin C. Levin was made a charge against the plaintiff or the defendant. The charge was made against the fund on deposit in the Omaha Loan and Building Association. The effect however, on the record, if carried out, would be to charge the defendant, a wife in a divorce action, by order of court, with the payment of the fees for her attorneys and also the fees for the attorney for the husband.

The first point flowing from this which will be considered is that of whether or not there is any authority in the law of this state to allow an attorney's fee in favor of a husband in an action for divorce. We have found no authority either in the statutes or the deci-

sions of this court. Pursuant to the terms of section 42-308, R. R. S. 1943, this court has held that attorney's fees may be allowed a wife to enable her to carry on or defend a suit. Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232. It has not been held however that allowance for this purpose may be made in favor of a husband.

Under the terms of the statute costs may be taxed to either party but authority is not granted to tax suit money which includes attorney's fees against a wife.

The general rule is that it is only where there is a statute authorizing it that an attorney's fee may be allowed for the husband in an action for divorce. 27 C. J. S., Divorce, § 217, p. 912. See, Peters v. Peters, 172 Okl. 575, 46 P. 2d 487; State ex rel. Jacobson v. Superior Court, 120 Wash. 359, 207 P. 227, 24 A. L. R. 488. We think the general rule should be regarded as appropriate.

In this view it must be said that the court was without power to impose the fee for plaintiff's attorney upon the defendant directly or indirectly.

The second point relates to the other three fees which were allowed or those which were allowed in favor of the attorneys for the defendant. If it be assumed that it was the intention of the court to make them a charge against the plaintiff but payable out of the fund in question such intention could not properly be effected. To do this would in actuality be to transfer to the defendant the obligation imposed by the court upon the plaintiff pursuant to the provisions of section 42-308, R. R. S. 1943, to pay fees for the attorneys for the defendant. No provision of statute and no decision has been cited or found permitting this to be done.

If it be assumed that it was the intention of the court to fix the fees of the defendant's own attorneys and to render judgment in their favor against her in this action for divorce and to order satisfaction out of her property the action of the court in so doing must be regarded as being without authority of law.

It is the rule that the legislative authority of the state

has full control over the mode, manner, time and place of the proceedings for divorce and generally of the procedure in actions for divorce. See 27 C. J. S., Divorce, § 9, p. 531. No legislation has been enacted by the Legislature of this state granting the power involved in this assumption. In Nickerson v. Nickerson, 152 Neb. 799, 42 N. W. 2d 861, it was said: "There is no authority for a court, in a divorce action, to fix the amount of the attorney fees each party is to pay their respective attorneys."

The decree of the district court is reversed and the cause is remanded with directions to dismiss the action. An attorney's fee is allowed in favor of the defendant and against the plaintiff for the services of her attorney in this court in the amount of $300.

REVERSED AND REMANDED.

ELMER HOFFMAN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

83 N. W. 2d 357

Filed May 24, 1957. No. 34120.

1. **Criminal Law.** It is only where there is in fact no preliminary examination upon a criminal charge, either in form or substance, that a plea in abatement may successfully be directed to the sufficiency of such hearing.
2. **Habeas Corpus.** The sufficiency of evidence adduced at a preliminary hearing to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings.
3. **Embezzlement.** Under section 28-538, R. R. S. 1943, the failure of an agent to deliver property entrusted to his care to the proper person upon demand is prima facie proof of an intent to embezzle.
4. **Indictments and Informations.** Where a crime created by statute may be committed by any of several methods set forth in the statute, the information may charge in a single count that it was committed by any or all of the enumerated methods if they are not inconsistent with or repugnant to each other.

5. **Embezzlement.** Embezzlement is the fraudulent appropriation or conversion of another's money or property by a person to whom it has been entrusted or into whose hands it has lawfully come by virtue of his employment with the felonious intent to defraud or deprive the owner thereof.
6. ———. Conversion of the property alleged to have been embezzled to the personal use of the person charged is not an essential element of the crime of embezzlement.
7. **Embezzlement: Evidence.** The falsification of books and records and misrepresentations of fact for the purpose of concealing shortages of money or property entrusted to the defendant's care is competent evidence that such actions were done with a felonious intent.
8. **Appeal and Error.** A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered.
9. **Embezzlement: Trial.** In a prosecution for the embezzlement of gasoline, the amount to be allowed for normal shrinkage is a jury question.
10. **Embezzlement: Evidence.** Where evidence is adduced in such a prosecution that a gasoline tank used by the defendant was found to be leaking on a date subsequent to the period in which the embezzlement is charged, it is admissible as a circumstance to be considered by the jury in determining if there was a reasonable doubt as to the guilt of the defendant.
11. ———: ———. In such a case evidence of shortages of other products which suffered no loss by leakage is admissible as bearing upon the question of whether or not the shortage of gasoline resulted from a felonious act of the defendant or otherwise.
12. **Embezzlement: Trial.** An error by the jury in calculating the amount embezzled is not material where it does not have the effect of changing the punishment of the defendant to his prejudice.

ERROR to the district court for Saline County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Merril R. Reller and *John McArthur*, 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.

In this case the State prosecuted the plaintiff in error, Elmer Hoffman, hereinafter referred to as the defendant, on a charge of embezzlement under section 28-538, R. R. S. 1943. The jury returned a verdict of guilty and the trial court sentenced the defendant to serve a term of not less than 2 years nor more than 3 years in the State Reformatory for Men. The defendant brings the case to this court for review.

The substance of the complaint filed against the defendant was "that Elmer Hoffman, in the County of Saline and State of Nebraska, there being an agent of the Farmers Elevator Company, a corporation, of Wilber, Saline County, Nebraska, to-wit: manager of the said Farmers Elevator Company's gasoline and oil station, and not being an apprentice nor a person within the age of eighteen years, did then and there, beginning on or about the 1st day of January, 1954, and continuously thereafter until, and including the 15th day of June, 1955, by a series of acts during the same employment, wilfully and unlawfully, feloniously, fraudulently and continuously, without the consent of his employer, embezzle certain personal property, to-wit: 57,000 gallons of gasoline, the same being the property of the said Farmers Elevator Company, of the value of $11,400.00, which gasoline came into the possession and care of the said Elmer Hoffman by virtue of and under color of his employment as manager of the aforesaid Farmers Elevator Company's gasoline and oil station, with the intent of him, the said Elmer Hoffman, to defraud the Farmers Elevator Company, a corporation, of the value of the same, * * *."

The defendant complains of the action of the district court in overruling his plea in abatement. The basis of the plea was that the evidence was insufficient to show that an offense was committed or that the defendant probably committed it. When the sufficiency of a preliminary hearing is called in question by a plea in

abatement, "the only question to be considered is with reference to the powers of the magistrate which are called into action in the determination of what shall be the result of such hearing. If he is compelled to act judicially, and to determine as a judicial question the matters over which he has jurisdiction, and does determine such questions upon competent evidence, then an error in judgment as to the result reached can not be determined by a plea in abatement. It is only where there is in fact no preliminary examination, either in form or substance, that advantage can be taken of by such a plea." Jahnke v. State, 68 Neb. 154, 94 N. W. 158.

"It is the rule in this jurisdiction that the sufficiency of the evidence adduced at a preliminary examination to hold an accused to answer for a crime with which he has been charged may be raised and tried in habeas corpus proceedings." Birdsley v. Kelley, 159 Neb. 74, 65 N. W. 2d 328. See, also, State ex rel. Flippin v. Sievers, 102 Neb. 611, 168 N. W. 99; Jahnke v. State, *supra*. The evidence shows that a preliminary hearing was held in which evidence was taken and submitted. The evidence was clearly sufficient to invoke the judgment of the court on a matter over which it had jurisdiction. This constitutes a preliminary hearing sufficient to defeat an attack upon it by plea in abatement. The trial court correctly overruled the plea.

A motion to quash the information on the same grounds as were advanced in the plea in abatement was also made. They afford no grounds for a motion to quash the information and the trial court properly overruled it.

The case was tried to a jury in the district court for Saline County. The evidence adduced at the trial is sufficient to sustain the following findings of fact. The Farmers Elevator Company is a corporation and the defendant was the manager of its gasoline and oil station at Wilber, Nebraska, from January 1, 1954, to June

15, 1955, the period in which the embezzlement is alleged to have occurred. Defendant had been the manager of the station since 1943 and at the time of the trial was about 38 years of age. As manager of the station it was the duty of the defendant to make purchases, pay bills for fuels, oils, and accessories, and keep the books and records of the company, including the making and recording of inventories. On June 15 and 16, 1955, the company caused an audit to be made of the books and records of the gasoline and oil station. It was determined that between January 1, 1955, and June 15, 1955, there was a shortage of gasoline in the amount of 20,847 gallons. During this period the daily sales of gasoline were overfooted an even 100 gallons per day on so many days that it could be described as a common practice. A subsequent audit commencing with January 1, 1954, was made which revealed a shortage of 55,893 gallons of gasoline, the value of which was between 20 and 23 cents per gallon, depending upon the grade of the gasoline. The auditors appeared and testified as to their findings, all of the books of the station which they examined being in the courtroom subject to examination by the defendant, in accordance with the rule announced in Hogoboom v. State, 120 Neb. 525, 234 N. W. 422, 79 A. L. R. 1171. The evidence shows also that the Farmers Elevator Company, by its president, secretary, and attorney, made a formal demand upon the defendant at his home in Lincoln, Nebraska, on August 8, 1955, to refund approximately 57,000 gallons of gasoline which came into his possession and was unaccounted for. There was no compliance with the demand. There was evidence that the corporation through its officers did not consent to the appropriation of any gasoline by the defendant.

There is evidence in the record that defendant falsified three inventories made by him and recorded in the inventory record to conceal the existing shortages. The record shows also that defendant overfooted his

accounts receivable in excess of $2,800. When the audit was commenced defendant falsely informed the auditor that there were no unrecorded liabilities, when in fact there were liabilities outstanding in the amount of $5,001.85. The invoices making up this amount were recent and would not necessarily be entered on the books of the company in the usual course of business at the time the inquiry was made. It was the false statement and not the failure to enter them on the books of the company that appears to be material here. The evidence shows that records made by an assistant while defendant was on vacation were completely changed by the defendant on his return. The evidence shows further that defendant did not at any time report any shortage of gasoline to the officers or directors of the corporation. The record shows that the defendant did not take the stand nor produce any other evidence.

There is evidence that two carloads of gasoline of 5,085 gallons each were charged to kerosene and distillate. The evidence is that the 10,170 gallons of gasoline was received and, though charged as other products, it was in no way accounted for. It was clearly gasoline which came into the possession of defendant and for which he should account.

It is the contention of the defendant that the conviction cannot stand for the reason that the evidence does not show that defendant fraudulently and feloniously converted any gasoline to his own use. In this respect we point out that in 1915 the Legislature amended what is now section 28-538, R. R. S. 1943. The amendment as it now appears in part provided: "The failure, neglect or refusal of such officer, attorney at law, agent, clerk, servant, factor or commission agent, as hereinbefore in this section enumerated to pay, deliver or refund to the proper person, company or copartnership such money, goods or property, entrusted to his or her care or which shall come into his or her possession, upon demand, shall be prima facie proof of in-

tent to embezzle." Under this statute, when other elements of the crime of embezzlement have been established, it is not necessary to offer other evidence of intent to embezzle where a proper demand has been made. The statute creates a prima facie case on the question of intent to embezzle under such circumstances and, in the absence of any evidence on the subject, is sufficient to take the case to the jury. In Bolln v. State, 51 Neb. 581, 71 N. W. 444, a prosecution for embezzlement applicable to public officers in which the statute provided that a refusal to account to a successor in office would constitute prima facie evidence of embezzlement, we said: "To establish embezzlement it did not devolve upon the state to show how or where the moneys were converted by the defendant to his own use. The proof adduced by the state in support of the ninth count is fully as convincing, and is ample to sustain the averments of said count. The state, by uncontradicted testimony, traced the $3,000 of the school money therein mentioned into the hands of the defendant, and he failed and refused to account for the same in any manner whatever." The foregoing case was followed in Whitney v. State, 53 Neb. 287, 73 N. W. 696.

The crime of embezzlement is a statutory crime in this state. The statute, section 28-538, R. R. S. 1943, states at least three ways in which the crime may be committed. For the purposes of the case before it the trial court properly defined the crime of embezzlement in its instructions to the jury as follows: "Embezzlement is the fraudulent appropriation or conversion of another's money or property by a person to whom it has been intrusted or into whose hands it has lawfully come by virtue of his employment, with the felonious intent to defraud or deprive the owner thereof." The contention that conversion to the defendant's use is an essential element of embezzlement cannot be sustained. In the present case the defendant was charged with embezzling certain described property. He was not charged with

the conversion of property to his own use. In Winkelmann v. State, 114 Neb. 1, 205 N. W. 565, this court said: "It may be fairly said that the term 'embezzlement' includes the idea of abstracting and misapplying the funds of another." In the first paragraph of the syllabus, the court summarized its holding as follows: "Where a crime created by statute may be committed by any of several methods set forth in the statute, the information may charge in a single count that it was committed by any or all of the enumerated methods if they are not inconsistent with or repugnant to each other." The trial court's definition of embezzlement was correct. The State was not required to allege or prove that defendant converted the property to his own use. 29 C. J. S., Embezzlement, § 11 b, p. 682. We conclude under the reasoning and holding of the foregoing authorities that a prima facie case of intent to embezzle was made and that it was sufficient to take the case to the jury.

The defendant asserts that the evidence is not sufficient to sustain a finding by the jury of a felonious intent to deprive the Farmers Elevator Company of its gasoline. To sustain the conviction of an agent for embezzling the property of his principal, the facts must warrant the conclusion that such appropriation was made by the agent with a felonious intent. Hamilton v. State, 46 Neb. 284, 64 N. W. 965. It must be borne in mind that the intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant, viewed in the light of all the surrounding circumstances.

The record in this case shows a shortage of 55,893 gallons of gasoline during the period in which the embezzlement was charged. It shows that defendant falsified three inventories, a large number of daily sales records, and the accounts receivable. He falsely informed the company's auditor that there were no un-

recorded liabilities. He admitted that he falsified the inventories and books. He never at any time reported any losses of gasoline to the company or its officers. We think that these facts are such that it is within the province of the jury to determine with what intent the act was done. Buckley v. State, 131 Neb. 752, 269 N. W. 892. We think the falsifying of the records and the misinformation given to the auditor, together with all the circumstances surrounding the case, constitute sufficient evidence to sustain the jury's finding that a felonious intent existed.

The defendant urges that the conviction in the present case was wholly upon circumstantial evidence and that the facts do not exclude every hypothesis other than of guilt. There is ample direct evidence from which the jury could find the defendant to be guilty. The court, however, gave an instruction on the weight to be given to circumstantial evidence to which no exception has been taken by the defendant. The contention that the verdict is based upon speculation and conjecture only cannot be sustained. The falsifying of records day after day and the false statements made to the company's auditor are clear evidences of fraud and a felonious intent. Unexplained, they point towards guilt. Human experience is that an innocent agent does not falsify records and facts to conceal unusual losses from his principal. It is a badge of fraud and evidence of a felonious intent. Such evidence is direct and not circumstantial. It is the usual way of establishing the intent with which an act is done. The jury could well say, as it did, that the acts of the defendant were done with a felonious intent.

The defendant assigns as error the admission in evidence of purported admissions or confessions by the defendant's wife. This assignment is directed to the evidence of Albert Chmelir, the president of the company, who testified that at the time he made demand upon the defendant for the 57,000 gallons of gasoline the de-

fendant's wife said: "Albert, do you want Elmer to pay all when others were involved?" Two other persons accompanying Chmelir testified to the same statement. The record shows that no objection was made to the evidence of any one of these three witnesses. It is fundamental that error may not be predicated on the admission of evidence to which no objection was made. There is no merit in this assignment.

On cross-examination of the auditor employed by the State, counsel for the defendant inquired whether an allowance had been made for shrinkage. The auditor testified that he allowed 1 percent for shrinkage. Before completing his cross-examination, he indicated that shrinkage might run as high as 3 percent, although he disqualified himself as an expert on that question. The question of shrinkage was clearly one for the jury to determine under the evidence.

The defendant contends that a reasonable doubt as to his guilt arose as a matter of law because of evidence adduced concerning a leaky gasoline tank. The evidence shows that the shortage of 55,893 gallons of gasoline occured between January 1, 1954, and June 15, 1955. The defendant left the service of the company on July 8, 1955. The evidence is that sometime prior to December 6, 1955, a leaky gasoline tank was suspected. An engineer from the Omaha Testing Laboratory was employed to check the company's tanks. He commenced his tests on December 6, 1955, and completed them about April 7, 1956. The testing engineer's report showed that one of four underground gasoline tanks was leaking. For the 30 days following December 6, 1955, the tank leaked 1,800 gallons of gasoline. The defendant asserts that the leaky gasoline tank casts such a doubt upon the guilt of the defendant that defendant's motion for a directed verdict should have been sustained.

We point out that the leaky gasoline tank was not discovered until almost 2 years after the defendant commenced falsifying the company records to conceal short-

ages of gasoline. There is not one word of evidence that any leakage occurred during the period the embezzlement was alleged to have occurred. There is not even any evidence that the leaky gasoline tank was in use or that it had any gasoline in it during the time the defendant was charged with embezzling gasoline. The leaky tank was not discovered until 4 or 5 months after defendant left the service of the company. The treasurer of the company testified that no abnormal loss of gasoline occurred after the defendant left the service of the company until the leaky tank was suspected sometime before December 6, 1955.

The charge in the present case was for the embezzlement of gasoline. There was no charge that defendant embezzled kerosene, tractor fuel, or distillate. The audit revealed large shortages of these products. As an example, the audit shows that from May 24, 1955, to June 11, 1955, defendant overfooted the sales of tractor fuel an even 100 gallons on each of 10 different days. The audit further shows that from January 1, 1955, to June 15, 1955, there was a shortage of 7,199 gallons of kerosene, 2,757 gallons of tractor fuel, and 9,569 gallons of distillate. There was no evidence that any tanks containing these fuels had ever leaked. A leaky gasoline tank could in no manner account for the shortages in these fuels. The jury had the right to consider these facts in determining whether the loss of gasoline resulted from leakage.

It is the contention of the defendant that the losses by leakage occurring after December 6, 1955, should be related back to the period commencing January 1, 1954, and ending on June 15, 1955, and credited against the amount charged to have been embezzled as a matter of law and thus create a reasonable doubt, at least, of the guilt of the defendant. Such a credit would be nothing less than pure speculation and conjecture. No objection was raised to the evidence of leakage, in fact it was put in evidence by the State. Its admissibility

rests on the fact that it is a circumstance which the jury might consider in determining whether or not there was a reasonable doubt as to the guilt of the defendant. But it is only a circumstance which the jury could consider in arriving at a verdict. It presents no situation requiring the direction of a verdict and the trial court was clearly right in overruling such motion.

Defendant contends that the finding of the jury that he was guilty of embezzling 57,000 gallons of gasoline of the value of $11,400 is not sustained by the evidence and has the effect of vitiating the verdict. The maximum amount of gasoline shown by the evidence to have been embezzled is 55,893 gallons. We point out in this connection that the purpose in having the jury determine the value of the embezzled property is to enable the court to fix the penalty. The penalty provided by section 28-538, R. R. S. 1943, is as follows: "* * * every such person so offending shall be punished in the manner provided by law for feloniously stealing property of the value of the article so embezzled, * * *." Grand larceny is the stealing of property of the value of $100 or upwards. § 28-506, R. R. S. 1943. Petit larceny is the stealing of property of less value than $100. § 28-512, R. R. S. 1943. Consequently, in a prosecution for embezzlement the jury must fix the value in order to determine if the penalty for grand or petit larceny applies. The fact that the finding of the jury as to the amount and value of the property embezzled exceeds that which the evidence will sustain is not material where the variance does not operate to change the penalty. The amount which the evidence sustains has a value in excess of $100. It is not contended that its value was less than that amount. No prejudice resulted to the defendant. The fixing of the value of the property embezzled is not an element of the crime of embezzlement, it goes only to the penalty.

In Young v. State, 44 Ohio App. 1, 184 N. E. 24, a similar situation arose. The defendant was charged

with embezzling $46,948. The jury found that he embezzled $22,090. The court found that the evidence would sustain a finding that defendant embezzled $9,311.76 only. The court then stated: "In any event, the jury was justified in finding the amount embezzled to be more than $35, and, if it was more than that amount, the crime was a felony, and the amount of the embezzlement could have no effect on the punishment to be inflicted. If any error was committed by the jury in fixing the amount embezzled, it could not prejudice the rights of the defendant, nor in any way affect the punishment."

Defendant contends the sentence of the court is excessive. The sentence was from 2 to 3 years in the State Reformatory for Men. The statutory penalty is from 1 to 7 years in the Nebraska State Penitentiary. We find no reason to interfere with the discretion exercised by the trial court in imposing the penalty that it did.

A consideration of the entire record and the assignments of error here made disclose that no prejudicial error occurred, that defendant had a fair trial, and the judgment should be affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

I disagree with certain statements of the evidence made by the court. That disagreement goes to lack of detail and definiteness in most instances and will not be developed here.

I limit this dissent to two matters. The first is the complete lack of any evidence that the defendant converted or appropriated any gasoline or other property of the elevator company. There is a failure of proof of an essential element of the crime charged. The second is the construction which the court puts upon the 1915 amendment to what is now section 28-538, R. R. S. 1943.

The defendant in this case was the manager of the company's gas station at Wilber. There were at all

times four or five other employees of the company who sold and delivered gasoline and other commodities including bulk deliveries to farm customers. They had access to the commodities sold and made deliveries when the defendant was not present. The defendant's possession of the gasoline of the company and the transaction of its business was not an exclusive possession.

There was a shortage of gasoline. However, every witness for the State, including the auditors, testified that there was no evidence that the company had been deprived of any gasoline or other commodity including a "nickel" by the defendant. There was no evidence of an "appropriation" or "conversion" of the company's gasoline or other property by the defendant. The company's president testified that he did not know of any gasoline that defendant had taken wrongfully and a coemployee testified that he had no idea where the missing gasoline went. The State's case as to this element of the offense rests solely and exclusively upon the shortage of gasoline. The court points out no evidence to the contrary.

The court holds: "Embezzlement is the fraudulent *appropriation or conversion* of another's money or property by a person to whom it has been entrusted or into whose hands it has lawfully come by virtue of his employment *with the felonious intent* to defraud or deprive the owner thereof." (Emphasis supplied.)

Here the court recognizes two elements of the offense—appropriation or conversion with felonious intent.

In Chaplin v. Lee, 18 Neb. 440, 25 N. W. 609, we held: "To constitute embezzlement it is essential that the owner should be deprived of the property alleged to be embezzled by an adverse use or holding."

In McAleer v. State, 46 Neb. 116, 64 N. W. 358, following Chaplin v. Lee, *supra*, we held: "To constitute embezzlement the owner must be deprived of his property by an actual adverse use or holding."

In Nelson v. State, 86 Neb. 856, 126 N. W. 518, following the above decisions, we held: "* * * failure to pay over or account for money received by defendant as agent would not amount to embezzlement, if his principal was not in fact deprived of the property by a felonious, adverse use or holding. Under the information, actual conversion with felonious intent was essential to a conviction."

Changing the word "money" to "gasoline" makes the holding directly applicable here.

Following Chaplin v. Lee, *supra,* we held in State v. Hill, 47 Neb. 456, 66 N. W. 541: "It is essential to the crime of embezzlement that the owner be deprived of the property alleged to have been embezzled, by an adverse use or holding."

In Colley v. Chicago & N. W. Ry. Co., 107 Neb. 864, 187 N. W. 98, a civil action for conversion, we held: "The act alleged to be a conversion must be positive and tortious." This decision was followed in Talich v. Marvel, 115 Neb. 255, 212 N. W. 540. Heretofore we have not deviated from these decisions in prosecutions under section 28-538, R. R. S. 1943.

The court points out no evidence of appropriation or conversion, fraudulent or otherwise. There was none.

The court then holds: "Conversion of the property alleged to have been embezzled to the personal use of the person charged is not an essential element of the crime of embezzlement."

Implicit in this statement is the recognition that conversion is an element of the offense. The distinction seems to be in "the personal use of the person charged." The distinction is a play on words.

Following several of the above decisions in Luther College v. Benson, 126 Neb. 410, 253 N. W. 421, we held: "'Embezzle' and 'convert to his own use' are synonymous terms. 'Conversion to his own use' would be accomplished by any unauthorized act of dominion or

ownership exercised by one person over property of another." The court ignores this definition.

Our decisions are in accord with the rules as stated in the authoritative texts. In 18 Am. Jur., Embezzlement, § 21, p. 581, it is stated: "To constitute the crime of embezzlement there must be a fraudulent conversion or misappropriation of property with felonious intent." In 29 C. J. S., Embezzlement, § 11, p. 682, it is stated: "To constitute a conversion so as to make out a case of embezzlement, the owner must be deprived of his property or money by an adverse using or holding; * * *."

In Underhill's Criminal Evidence (5th Ed.), Embezzlement, § 576, p. 1418, it is stated: "The gravamen of the crime is the fraudulent intent, coupled with execution."

In Buckley v. State, 131 Neb. 752, 269 N. W. 892, we held: "The word 'embezzle' includes within its import the fraudulent appropriation of the funds of another to one's own use."

How then does the court avoid the complete lack of evidence and the affirmative negation of any evidence of conversion or appropriation?

The court goes first to the 1915 amendment to what is now section 28-538, R. R. S. 1943, that being the statute upon which the charge here rests. Throughout, the statute uses the synonymous terms embezzle or convert to his own use.

The 1915 amendment as it now appears provides in part: "The failure, neglect or refusal of such officer, attorney at law, agent, clerk, servant, factor or commission agent, as hereinbefore in this section enumerated to pay, deliver or refund to the proper person, company or copartnership such money, goods or property, entrusted to his or her care or which shall come into his or her possession, upon demand, shall be *prima facie proof of intent to embezzle.*" § 28-538, R. R. S. 1943.

The italics are mine. The quoted provision goes only to the second element of the offense, to wit, "proof of intent to embezzle."

The element of conversion remains and requires proof. We held in Nelson v. State, *supra,* that "actual conversion with a felonious intent" was essential to a conviction. The court here recognizes this requirement for it says: "Under this statute, *when other elements* of the crime of embezzlement *have been established,* it is not necessary to offer other evidence of intent to embezzle where a *proper demand has been made.*" (Emphasis supplied.) I shall return to the "proper demand" presently.

Where is the proof of the "other elements of the crime"? The court recites none and there is none.

To avoid that situation the court goes (without citation) to what is now section 28-543, R. R. S. 1943, an act relating to the embezzlement of public money. That act provides in part: "The refusal of any such officer or person, whether in or out of office, to pay any draft, order or warrant which may be drawn upon him by the proper officer, for any public money in his hands, no matter in what capacity the same may have been received or may be held by him, or any refusal by any person or public officer to pay over to his successor any public moneys or securities promptly, on the legal requirement of any authorized officer of the state or county, shall be taken, on the trial of any indictment against such officer or person for embezzlement, as *prima facie evidence of such embezzlement.*" (Emphasis supplied.)

The difference in the two statutes is patent. In the instance of the statute under which the defendant was charged the Legislature made failure to comply with a proper demand prima facie proof of intent to embezzle. In section 28-543, R. R. S. 1943, the Legislature made a refusal to comply with a proper demand prima facie evidence of embezzlement.

Because in Bolln v. State, 51 Neb. 581, 71 N. W. 444, and Whitney v. State, 53 Neb. 287, 73 N. W. 696, we held the evidence sufficient under section 28-543, R. R.

S. 1943, the court concludes that a prima facie case of *intent to embezzle* is sufficient to take this case to the jury in a prosecution under section 28-538, R. R. S. 1943. The court ignores the fact that the "other elements of the crime" have not been established.

There remains the void of evidence of appropriation or conversion by the defendant.

State v. Boatman, 142 Neb. 589, 7 N. W. 2d 159, 144 A. L. R. 585, was a prosecution under what is now section 28-543, R. R. S. 1943. In that case the court referred to the rule of strict construction applicable to all criminal statutes and held that any change in the act was a matter for legislative action and not judicial interpretation.

So here, if the refusal to comply with a proper demand under section 28-538, R. R. S. 1943, is to be made prima facie evidence of embezzlement and not "intent to embezzle," that is a matter for legislative action and not judicial construction. The Legislature has said in section 28-538, R. R. S. 1943, only that it is prima facie proof of intent to embezzle. It involves only one element of the offense of embezzlement under the statute involved here.

I now go to the demand which the court says was a "proper demand" under the statute and in and of itself made a prima facie case of embezzlement to take the case to the jury.

It was a demand to "refund * * * Approximately 57,000 gallons of gasoline * * * which is at this time missing and not properly accounted for."

It was a demand for the "refund" of at least 1,100 gallons (and under one version of the State's evidence, 11,100 gallons) more gasoline than the State claimed at any time was missing and not accounted for.

Was it a "proper demand"? Obviously the company knew it was demanding a refund of more gasoline than was unaccounted for. Obviously every one knew that the defendant could not refund that gasoline.

If the defendant had agreed to the refund, under the court's construction of the act, he would have been confessing guilt of embezzlement of more than the claimed shortage. If defendant had pointed out the over demand, then under the court's theory he would have been admitting guilt of embezzlement of some amount. By denying the "refund" he, without more, under the court's holding established evidence to go to the jury sufficient to sustain a verdict of guilty. The defendant did not have the chance of a person playing Russian roulette. Here every chamber of the gun was loaded against him.

Were the evidence of intent to embezzle as to these matters fully stated, I think it insufficient to sustain a conviction under the circumstantial evidence rule stated in Larson v. State, 161 Neb. 339, 73 N. W. 2d 388.

But I pass that. Conceding it sufficient to prove intent to embezzle, it does not prove the required element of conversion or appropriation.

In Nelson v. State, *supra,* an embezzlement case, we held: "* * * an unexecuted purpose to embezzle is not embezzlement * * * actual conversion with a felonious intent was essential to a conviction."

In Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539, we said: "A conviction should not be based on the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained."

All that is necessary under this decision to take a case of embezzlement to the jury under section 28-538, R. R. S. 1943, is for the State to submit evidence of a shortage of money or commodities and a "proper demand" to pay, refund, or deliver. Under this decision a manager of a store could be found guilty of embezzlement for shortages in cash from a money till used by other employees; for shrinkage in stored potatoes, if the full measure put in a bin were not accounted for; or flour leaking out

through a rat hole where he could not prove when the leak began or the amount of leakage.

The State could prove a proper demand and without more a case for the jury is made, and without more a conviction must be sustained. I do not agree.

I would reverse the judgment of the trial court and remand the cause with directions to dismiss.

FEDERAL INSURANCE COMPANY, APPELLANT, V. INTERNATIONAL HARVESTER COMPANY, A CORPORATION, APPELLEE.
83 N. W. 2d 382

Filed May 24, 1957. No. 34184.

1. **Automobiles: Bailments.** An owner of a garage with whom a motor vehicle is left by its owner for repairs or to be serviced is a bailee for hire or for mutual benefit and is required to exercise ordinary care for the safekeeping of the vehicle.
2. **Bailments.** A bailee of a chattel for the mutual benefit of the parties to the bailment or for hire, in the absence of an express contract, is liable to the bailor only for any loss resulting from the negligence of the bailee.
3. ———. The petition of a bailor in an action to recover for damage done by fire to the subject of such a bailment while in the custody of the bailee which does not allege that negligence of the bailee was the proximate cause of the damage does not state a cause of action.
4. **Negligence.** A litigant who charges his adversary with negligence has the burden throughout the litigation to establish it.
5. **Pleading.** The failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation.

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

Robert W. Haney and *Thomas J. Walsh,* for appellant.

Fitzgerald, Hamer, Brown & Leahy, for appellee.

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

BOSLAUGH, J.

Lyman-Richey Sand & Gravel Corporation of Omaha was the owner of a 1950 tractor, sometimes referred to in the record as a truck. The owner was indemnified against loss of or damage to it by fire by virtue of a policy of fire insurance issued to it by appellant. The tractor, while in the custody of appellee for the purpose of having a change made in a part of its equipment, was damaged by fire to the extent of $1,992.91. This amount was paid to the owner of the tractor by appellant. It seeks to recover that amount from appellee on the basis of the subrogation of appellant to the rights of its insured.

The substance of the petition is that on May 24, 1950, the tractor was being serviced by employees of appellee acting within the scope of their employment at its place of business; that while the gasoline tank of the tractor was being drained of gasoline the tractor burst into flames and the fire caused damage to the tractor in the amount of $1,992.91; that the tractor and the apparatus used in reference to it were in the control of appellee; and that appellant was obligated by the policy of insurance to pay and it paid the amount of the damage to the insured as evidenced by a subrogation receipt, a copy of which was attached to the petition. The answer of appellee admitted ownership of the tractor, the issuance of the fire insurance policy, and the damage to the tractor by fire while it was in the shop of appellee and while the gasoline tank thereon was being drained of gasoline, as alleged in the petition of appellant. A denial was made of the other statements of the petition.

The appellee, at the first offer of testimony by appellant, objected to the introduction of any proof in the case because the petition did not allege facts sufficient to state a cause of action in favor of appellant and against appellee. The trial court reserved ruling thereon. Appellee, at the close of the evidence of appellant in its

case-in-chief, interposed a motion for an instructed verdict in favor of appellee. The motion challenged the sufficiency of the petition to state a cause of action against appellee. The motion was denied. Appellee made a motion to dismiss the case or, in the alternative, for an instructed verdict, after the evidence was concluded and a specification thereof was that the petition of appellant did not state facts sufficient to constitute a cause of action against appellee and failed to allege any negligence of appellee which was the proximate cause of the fire of May 24, 1950. The court sustained the motion, discharged the jury, and rendered a judgment of dismissal of the case. A motion for new trial was denied. This appeal tests the correctness of the action of the trial court in rendering a judgment of dismissal and refusing a new trial of the cause.

The issue concerning the sufficiency of the petition to state a cause of action against appellee is of primary importance in this case. Appellant asserts that if a bailee accepts delivery of a chattel for the purpose of special service in relation to it for a consideration and agrees to return the subject of the bailment to the bailor in otherwise unaltered condition, upon the completion of the service and payment of the agreed charge therefor, the duty of the former is to return the chattel to the latter in the condition it was when received, except as altered by the service performed on it by the bailee, and the bailment is not conditioned upon the exercise of due care and the observance of due care is not a defense to an action of the bailor against the bailee for damages for breach of the agreement. Appellant says that the case of Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc., 162 Neb. 47, 75 N. W. 2d 366, is a leading case on this subject and is determinative of the instant case. It is said therein: "* * * the defendant contracted to return the plaintiff's car to it in substantially the same condition as when it was received. It was not conditioned on the exercise of due care * * *.

The promise as testified to by both parties was absolute. The exercise of ordinary care is not a defense under these conditions. The law does not warrant it." The facts in that case and the facts pleaded in this case have no similarity and what is said in Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc., *supra,* is unimportant in the cause now being considered because appellant has not pleaded an express or a special contract of bailment of the machine concerned in this case. The petition states only that Lyman-Richey Sand & Gravel Corporation of Omaha was the owner of the International truck, that it was being serviced by appellee acting by its employees in its place of business, and that while the gas tank was being drained under the exclusive control and management of the employees the truck burst in flames and was damaged. Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc., *supra,* is not only not decisive of this case but it has no application to and can have no effect in the decision of it.

The most that the petition says is that the owner of the tractor placed it in the custody of appellee to be serviced, that appellee accepted the assignment and was performing it when the fire occurred, and that the tractor was thereby damaged. It was a bailment for hire sometimes referred to as a reciprocal bailment. Although no direct hire was pleaded for the bailment, it was a necessary incident of the business conducted for profit. Nagaki v. Stockfleth, 141 Neb. 676, 4 N. W. 2d 766; Shiman Bros. & Co., Inc. v. Nebraska Nat. Hotel Co., 146 Neb. 47, 18 N. W. 2d 551. In the instance of such a bailment, ordinary care is required of the bailee and he is liable for his negligence in case of loss or damage of the subject of the bailment.

It is stated in Mattern v. McCarthy, 73 Neb. 228, 102 N. W. 468: "When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for negligence." The opinion in that case contains this:

"The contract was for the benefit of both parties. The bailor delivered the possession of his cattle to the bailee with the intention upon the part of both of the parties to the contract that the result of the agistment would be mutually advantageous. * * * The general rule of law is that, where a bailment is mutually advantageous to both parties, the bailee is required to exercise only ordinary and reasonable care and diligence. He must exercise such care as a man of ordinary prudence would use under the same circumstances toward his own property."

The statement first quoted above is repeated in Nagaki v. Stockfleth, *supra,* and it is further said therein: "The following is a pertinent general rule: 'A repairman with whom a motor vehicle is left for repairs is, under the rules applicable generally to bailees for mutual benefit or bailees for hire, required to exercise ordinary care for its safe-keeping, and is liable to the owner for any loss resulting from his negligent acts or omissions, or those of his agents or employees while acting within the scope of their employment.' 42 C. J. 814. This is in harmony with the Nebraska rule * * *."

In Shiman Bros. & Co., Inc. v. Nebraska Nat. Hotel Co., *supra,* the appellant, plaintiff in the trial court, contended that the rule in this state places the burden on a bailee for hire to show that property entrusted to his care was lost without negligence on his part. The appellant requested an instruction which placed the burden on the appellee, defendant in the district court, to establish that the trunk and contents were not lost by reason of the negligence of appellee. It was not given and its refusal was claimed to be error. This court said the case was predicated on negligence of the appellee and that: "In this state when a party alleges and charges negligence, the burden of proving negligence on the part of the defendant rests upon the plaintiff and never shifts to the defendant in any stage of the case. * * * The court's instructions properly placed the

burden of proof * * *." See, also, Fuelberth v. Splittgerber, 150 Neb. 309, 34 N. W. 2d 380; Armstrong v. State Farm Mutual Automobile Ins. Co., 153 Neb. 144, 43 N. W. 2d 501; Blackburn v. Norris, 46 Ohio App. 469, 189 N. E. 262; Clark v. United States, 95 U. S. 539, 24 L. Ed. 518; 6 Am. Jur., Bailments, § 242, p. 345; 8 C. J. S., Bailments, § 27, p. 269; Annotation, 15 A. L. R. 681.

Appellant does not in its petition plead a case of nonreturn of the property, the subject of the bailment, or damage thereto in an unknown manner but appellant goes further and alleges the property was damaged in a definite manner, that is, by a fire, which alone does not give rise to any presumption of negligence of the bailee. Security Ins. Co. v. Coca-Cola Bottling Co., 157 Neb. 923, 62 N. W. 2d 127. In such a situation the litigant claiming a right of recovery from a bailee must allege negligence on his part as the proximate cause of the damage. The petition does not allege that negligence of appellee was the proximate cause of the fire or of the damage to the tractor. It does not state a cause of action against appellee and the court properly dismissed the case. The failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation. § 25-808, R. R. S. 1943; Martindale v. Panter, 137 Neb. 522, 289 N. W. 869; Stitzel v. Hitchcock County, 139 Neb. 700, 298 N. W. 555.

The judgment should be and it is affirmed.

AFFIRMED.

CHARLES TERRENCE EGENBERGER, A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, CHARLES EGENBERGER, APPELLEE, V. NATIONAL ALFALFA DEHYDRATING AND MILLING COMPANY, A CORPORATION, ET AL., APPELLANTS.

83 N. W. 2d 523

Filed May 31, 1957. No. 34102.

1. **Trial.** A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence.** In an action for damages for negligence the burden is on the plaintiff to show by direct or circumstantial evidence that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.
3. ———. Proof of negligence is sufficient if the facts and circumstances proved, together with the reasonable inferences which may be drawn therefrom, shall indicate with reasonable certainty the negligent act of which complaint is made.
4. **Negligence: Pleading.** In the absence of an issue of negligence by plaintiff or by a third person imputable to plaintiff, allegations in an answer denying that defendant was negligent and alleging that the accident and resulting damages were solely and proximately caused by the negligence of such third person is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto, but rather is one entirely consistent with and provable under the general issue.
5. **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.
6. **Negligence: Highways.** The violation of a statute, the purpose and design of which is to protect the safety of people in the use of the public highways, is not negligence per se, but is evidence of negligence, which may be considered by the jury together with all other facts and circumstances in determining whether or not negligence is established thereby.

7. **Automobiles: Trial.** In order for physical facts to be sufficient to warrant a directed verdict in an automobile collision case, they must conclusively demonstrate that the collision out of which the injuries arose was not caused by any negligence on the part of the party making the motion. Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury.
8. **Negligence.** 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 reasonable in the nature of things to be contemplated or foreseen by him, and produces the injury, it is the dominant cause.
9. ———. 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.
10. **Negligence: Appeal and Error.** In a jury case involving issues of negligence and proximate cause, where different minds may reasonably draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, such issues must be submitted to the jury for its determination, and its verdict based thereon will not be disturbed unless clearly wrong.
11. **Automobiles: Evidence.** Generally, testimony as to tire marks on the highway is admissible in civil actions for injury or damage, where a sufficient foundation therefor is laid, as by showing, for example, that the condition of the road was the same as it was at the time of the accident and had not been changed by the weather or traffic, and there is sufficient identification that the marks were made by the automobile involved in the accident.
12. **Negligence.** Although evidence of use of intoxicating liquor at or about the time of an accident may be insufficient to prove intoxication, yet if the occurrence is so close in time to an accident as to be considered an incident related thereto, it may be admitted as a circumstance proper to be considered by a jury in determining the existence or nonexistence of negligence.
13. **Trial.** While it is not the duty of the reporter to take down the arguments to the jury unless he is directed to do so, he should be available, and if objections are made or controversy arises during the course of the argument, the court, whose duty it is to be present at all stages of the trial, should direct a record to be made thereof.

14. ———. Generally, a trial court may in its discretion permit counsel, in addressing the jury, to display and use schematic drawings, diagrams, or maps, not put in evidence, by way of illustration or elucidation of evidence actually adduced, provided the jury understands that they are employed merely for such purposes and are not of themselves evidence in any sense.
15. **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 evidence, and such rule applies in cases wherein defendant pleads and adduces evidence that plaintiff's driver was negligent in certain specified particulars and that such negligence was the sole proximate cause of the accident and injuries.
16. **Trial.** The purpose of an instruction is to furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable it to accomplish the purpose desired.

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

Maupin, Dent, Kay & Satterfield and *William E. Morrow, Jr.*, for appellants.

Smith Brothers, Beatty, Clark, Murphy & Morgan, Donald W. Pederson, and *Frank E. Piccolo, Jr.*, for appellee.

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

CHAPPELL, J.

Plaintiff, Charles Terrence Egenberger, a minor, brought this action by his father and next friend, against defendants, National Alfalfa Dehydrating and Milling Company, a corporation, and Leon A. Turner, employed by the corporation as a truck driver, seeking to recover damages for personal injuries alleged to have been proximately caused by negligence of defendants while the truck driver was operating the corporation's power wagon and attached alfalfa trailer in the regular course of his employment.

Plaintiff's petition alleged in substance that on August

29, 1954, at about 11:40 p. m., while he was a passenger in the left rear seat of a 1947 Pontiac sedan driven by another in an easterly direction on the right side of a graveled county road, defendant truck driver, while operating defendant corporation's red 1947 Dodge power wagon pulling a dark green four-wheel trailer loaded with chopped green alfalfa, negligently collided with the car in which plaintiff was riding, which proximately caused plaintiff to suffer painful permanent personal injuries, damages, and disability, requiring repeated hospitalization and extensive surgical and medical treatment. The alleged negligence of defendants, as important here, was as follows: (1) That defendant driver negligently failed to give the car in which plaintiff was riding one-half of the main-traveled portion of the roadway, as nearly as possible; (2) that he negligently operated defendant's trailer at night without displaying a clearance light at the left front edge of the trailer; and (3) that he negligently failed to exercise reasonable control over the operation of the power wagon and trailer.

The joint answer of defendants admitted the occurrence of a collision at about the time and place alleged between the car in which plaintiff was riding and the vehicles owned by defendant corporation, then operated by its driver while in the regular course of his employment. Such answer then denied generally and alleged that the sole proximate cause of the collision and any resulting injuries and damages suffered by plaintiff was the contributory negligence of plaintiff and the negligence of plaintiff's driver. In that connection, the evidence failed to establish that plaintiff was guilty of any contributory negligence, and no complaint is here made that such issue was not submitted to the jury. The alleged negligence of plaintiff's driver as important here was: (1) That he failed to keep a proper lookout, and (2) failed to have his car under reasonable control while driving on the wrong side of the road

around a curve at an excessive rate of speed after theretofore engaging in the consumption of intoxicating liquor. Plaintiff's reply was a general denial.

The cause was tried to a jury and defendants' motions to direct a verdict or dismiss, made at conclusion of plaintiff's evidence, and at conclusion of all the evidence, upon the ground that there was insufficient competent evidence adduced to support a verdict in favor of plaintiff and against defendants, were overruled. Thereafter, upon submission of the cause to the jury, it returned a verdict for plaintiff and against defendants, and fixed the amount of plaintiff's recovery at $40,000. Subsequently, defendants' motion for judgment notwithstanding the verdict, or in the alternative for new trial, was overruled, and judgment was rendered upon the verdict. Therefrom defendants appealed to this court, assigning in substance that the trial court erred as follows: (1) In failing to sustain their motion for directed verdict or dismissal and in failing to sustain their motion for judgment notwithstanding the verdict or for new trial; (2) in excluding certain evidence and in permitting plaintiff's counsel during final arguments to use and display to the jury exhibit No. 29 theretofore excluded from evidence; (3) in refusing and failing to give and in giving certain instructions; (4) in denying defendants' request to have all of plaintiff's final arguments officially reported; and (5) in failing to set aside the verdict as clearly exorbitant. We sustain assignment No. 3 in part, reverse the judgment, and remand the cause for new trial, which requires no determination of assignment No. 5. A disposition of the other assignments requires an examination of the record and the application of certain statutes and established rules of law thereto.

"A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion

is directed. 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." Colvin v. Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900.

"In an action for damages for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.

"Negligence is a question of fact and may be proved by direct or circumstantial evidence.

"Proof of negligence is sufficient if the facts and circumstances proved, together with the reasonable inferences which may be drawn therefrom, shall indicate with reasonable certainty the negligent acts of which complaint is made." Hansen v. Henshaw, 163 Neb. 191, 79 N. W. 2d 15. See, also, Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112; Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

"In the absence of an issue of negligence by plaintiff or by a third person imputable to plaintiff, allegations in an answer denying that defendant was negligent and alleging that the accident and resulting damages were solely and proximately caused by the negligence of such third person is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto, but rather is one entirely consistent with and provable under the general issue." Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333.

"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, 154 Neb. 268, 47 N. W. 2d 569. See, also, Bergendahl v. Rabeler, 133 Neb. 699,

276 N. W. 673, wherein we held: "When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, though one of them alone might not have caused the injury.

"Where the negligence of the driver of an automobile in which plaintiff is riding as a passenger is the sole proximate cause of a collision in which plaintiff is injured, plaintiff cannot recover from a third person for such injury." See, also, Burhoop v. Brackhan, *ante* p. 382, 82 N. W. 2d 557.

"As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision.

"The basis of this rule is that a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it.

"Exceptions have been recognized to this general rule where the object or obstruction or depression is the same color as the roadway and for that reason, or for other sufficient reasons, cannot be observed by the exercise of ordinary care in time to avoid a collision." Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870.

"The violation of a statute the design of which is to protect the safety of people in the use of public highways is evidence of negligence." Segebart v. Gregory, 156 Neb. 261, 55 N. W. 2d 678.

"The violation of statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se, but evidence of negligence, which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby, and where the evidence is such

that reasonable minds may draw different conclusions therefrom, the questions of negligence * * * are for the jury." Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612.

In Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683, we held that: "A traveler on a highway is required to exercise reasonable care for the safety of others thereon.

"What is reasonable care does not permit of definitive statement applicable to all cases but the presence or absence of reasonable care must be determined by the facts and circumstances of each case.

"If there is evidence adequate to justify a finding for the party who has the burden of proof, in an action triable to a jury, the trial court may not disregard the proof and decide the case as a matter of law."

Further, "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.

"The violation of an ordinance or statute requiring automobiles and other vehicles to drive to the right of the center of the highway does not constitute negligence per se, or as a matter of law; but whether or not such violation constituted negligence is a question for the jury under proper instructions." Davis v. Dennert, *supra.*

"In order for physical facts to be sufficient to warrant a directed verdict in an automobile collision case, they must conclusively demonstrate that the collision out of which the injuries arose was not caused by any negligence on the part of the party making the motion.

"Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury." Young v. Stoetzel, 159 Neb. 624, 68 N. W. 2d 186.

Contrary to defendants' contention, there is a reasonable dispute as to what the physical facts show and

they do not conclusively demonstrate that the collision out of which plaintiff's injuries arose was not caused by any negligence of defendants.

"Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened.

"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 reasonable in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause.

"If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence." Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831. See, also, Colvin v. Powell & Co., Inc., *supra*.

"Although the question of proximate cause is ordinarily for the determination of the jury, where, upon the evidence produced, only one inference can be drawn, it is for the court to declare whether a given act or series of acts is the proximate cause of the injury." Bergendahl v. Rabeler, *supra*.

However, in a jury case involving issues of negligence and proximate cause, where different minds may reasonably draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, such issues must be submitted to the jury for its determination, and its verdict based thereon will not be disturbed unless clearly wrong. Colvin v. Powell

& Co., Inc., *supra;* Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293.

The following statutes are pertinent and applicable in the case at bar. Section 39-746, R. R. S. 1943, provides: "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."

Section 39-748, R. R. S. 1943, provides: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one half of the main traveled portion of the roadway as nearly as possible."

In Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839, we concluded that such sections are to be construed together, and that the "right half of the highway" as that term is used in section 39-746, R. R. S. 1943, means the right half of the main-traveled portion of the highway available for traffic.

Also, in Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593, citing Klaus v. Soloman Valley Stage Lines Co., 130 Neb. 325, 264 N. W. 747, and Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682, we held: "A traveler may ordinarily occupy and use any part of a public highway he desires if it is not needed by another whose right thereto is superior to that of the traveler."

Section 39-7,108, R. R. S. 1943, 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. * * * (3) The following speeds shall be prima facie lawful, but in any case when such speed would be unsafe, they shall not be lawful: * * * sixty miles per hour between the hours of sunrise and

sunset and fifty miles per hour between the hours of sunset and sunrise upon any highway outside of a city or village. (4) 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 going around curves, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazards exist with respect to * * * other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any * * * vehicle or other conveyance on * * * the highway in compliance with legal requirements and the duty of all persons to use due care; * * *."

Section 39-735, R. S. Supp., 1953, provides in part: "Every vehicle, * * * (1) having a width, including load, of eighty inches or more, or (2) having any part thereof or having any load thereupon which shall extend forty inches or more to the left of the center of the chassis shall display, when driven, pulled, operated, or propelled upon any state highway, during the period from one half hour after sunset until one half hour before sunrise, and at all other times when there is not sufficient light to render such vehicle clearly discernible, *two clearance lights* on the left side of such vehicle. One of such lights shall be located at the front and display a green or amber light visible, under normal atmospheric conditions, *from a distance of three hundred feet to the front of such vehicle.* The other clearance light shall be located at the rear and display a red light visible under normal atmospheric conditions, from a distance of three hundred feet to the rear of said vehicle. The light at the rear shall be located at a sufficient distance above the tail light of such vehicle so it will not be confused with such tail light by those approaching from the rear. *Such light* shall be located on a line with the extreme outer point of such vehicle or the load thereon; Provided, *suitable reflectors* of like color, equal visibility, and of a

type approved by the Department of Roads and Irrigation may be substituted for *such clearance lights;* and provided further, *the installation of all lamps shall be made in such a manner that no hazard will be created by their use on the highway.*" (Italics supplied.)

With regard to such section, a part of defendants' tendered instruction No. 2 requested the trial court to inform the jury with regard to defendants' trailer that: "At the time of the collision involved in this case the statute did not specifically provide where the front light should be located upon the vehicle other than upon the left side thereof." The trial court refused to do so, and by instructions Nos. 5, 6, and 9 informed the jury substantially that the left front clearance light of defendants' trailer was required by law to be located and displayed on a line with the extreme outer left front edge or point of such vehicle. In that connection, defendants argued that the refusal to inform the jury as requested, and the information with relation thereto contained in instructions Nos. 5, 6, and 9, was a judicial extension of the language of section 39-735, R. S. Supp., 1953, and prejudicially erroneous. We do not agree.

A history of the statute and its related language, when considered in context, refutes defendants' contention. The solution depends upon whether the italicized portion aforesaid, to wit, "Such light," refers to both clearance lights or only the one at the rear. We conclude that it refers to both.

The history of that section discloses that as originally enacted by Laws 1931, chapter 106, section 2, page 280, the section read "Said lights." When amended by Laws 1939, chapter 78, section 3, page 319, it read "Said lights." Thereafter, it appeared in section 39-735, R. S. 1943, as "Such lights." When amended by Laws 1945, chapter 92, section 1, page 314, it read "Such lights." When amended by Laws 1949, chapter 117, section 1, page 313, it read "Such lights." However, when that act was carried over as section 39-735, R. R. S. 1943, by the reissue

of volume 3 of the statutes in 1952, there was simply an inadvertent typographical omission of the letter "s" from the words "Such lights," which erroneously made the section read "Such light." Thereafter, when amended by Laws 1953, chapter 131, section 13, page 409, in order only to make the section applicable to any such vehicle operating "upon any state highway" instead of "upon any paved or bituminous surfaced highway," the aforesaid typographical omission was inadvertently carried forward as "Such light" instead of "Such lights," into section 39-735, R. S. Supp., 1953. From such history and language, we find no clear legislative intent to change the basic law and make it an absurdity by permitting a clearance light to be located in such manner that it could not reasonably be seen from a distance of 300 feet from the front of such vehicle in order to clear, but would create a hazard on the highway, contrary to the very language, purpose, and design of section 39-735, R. S. Supp., 1953.

As hereinafter observed, it is undisputed that defendants violated section 39-735, R. S. Supp., 1953, in failing to locate the left front clearance light of their trailer "on a line with the extreme outer point of such vehicle or the load thereon," so that it would be "visible, under normal atmospheric conditions, from a distance of three hundred feet to the front of such vehicle," which was evidence of negligence that might be taken into consideration with all other facts and circumstances by the jury in determining whether or not defendants were negligent, and if so, whether or not such negligence proximately caused or contributed to the accident and plaintiff's injuries.

The record discloses evidence adduced in plaintiff's behalf substantially as follows: On the early evening of August 29, 1954, four young men and two young women, all of whom were minors, drove to Gothenburg in a 1947 Pontiac hard-top four-door sedan, owned and driven by one of the young men named Joe Tetro, who was a

friend of the group. There they all went to a picture show which ended about 11:15 p. m. They then drove out to a parkway just west of Lake Helen near Gothenburg and parked the car, facing north. One of the young men had a one-half pint bottle of bourbon whiskey and six bottles of Seven-Up. Someone in the group then spiked each of the six bottles of Seven-Up alike with one ounce plus of bourbon, and discarded the whiskey bottle. None of them had any other drinks of intoxicating liquor during that day or the evening hours while they were together. While there, each of the young people consumed one such drink while they casually visited with each other for 15 or 20, maybe 30 minutes. By that time a rain storm with gusty wind and lightning was approaching, so they decided to go home. They started to do so with Joe Tetro at the wheel. All other occupants, including plaintiff, were simply guests in the car. Kathleen McCullough sat next to the driver in the middle of the front seat, with John William Egenberger, plaintiff's brother, sitting on her right. Plaintiff sat in the left rear seat, with Betty Hoagland, a friend of Kathleen's in the middle, and with Bill McCullough on her right. Kathleen and Bill were brother and sister, and cousins of plaintiff and John William Egenberger. Four occupants of the car who saw and recalled the facts and circumstances surrounding the accident, and plaintiff, who, because of his injuries, had no memory or recollection with regard thereto, testified as witnesses for plaintiff.

From the parkway, plaintiff's driver drove north about one-fourth mile on the right side of a rather hard, dry, graveled road, which then turned east at a 66-degree curve and slightly inclined upward for about a block to a crest, then leveled off some distance and turned northeast around a 23-degree curve to a main-traveled highway. All four witnesses testified that none of the occupants, including plaintiff's driver, was affected in any manner by the one and only drink of intoxicating

liquor. Plaintiff's driver had driven with care and none of them had any worry or anxiety about the manner in which the car was driven. No one testified that any of the occupants were under the influence of intoxicating liquor or had any odor thereof upon them after the accident.

The accident occurred on the graveled road near a point about 148 feet east of the 66-degree curve. At the place where the collision occurred, the graveled portion of the road was 28½ feet wide, with a ditch 3 feet wide south of the graveled portion. North of the main-graveled portion was an additional solid north shoulder 3½ feet wide, having a slope of only 6 or 7 inches to a north bank over which defendants' driver could reasonably have operated his vehicles. In other words, it was 32 feet from the north bank to the south edge of the graveled portion of the road. Also, at the point of collision there was a driveway level with the road leading north into the west gate of the so-called rodeo grounds on the north side of the road upon which the driver of defendants' vehicles, traveling west, could have safely turned out if not driving at a high rate of speed.

Defendant Turner was driving defendant corporation's dark red power wagon west. It had a four-wheel, dark green trailer, with a box thereon, containing about 3 tons of chopped green alfalfa, attached to the rear of the power wagon by a 4 foot 1 inch tongue. The power wagon concededly weighed 6,000 pounds. The trailer itself concededly weighed 5,600 pounds, and as so loaded it weighed 11,600 pounds. Thus the total weight of the power wagon and loaded trailer was 17,600 pounds. The power wagon, equipped only with ordinary foot and emergency brakes, was 6½ feet wide and 16½ feet long, with headlights 43 inches above the ground and 48 inches apart from center to center, which would make the level of the driver's eyes when seated in the cab about 5½ feet above ground. The cab had no border or side lights. The trailer had no brakes. Its box was

14 feet long, which would make the power wagon and attached trailer some 34½ feet long. The trailer box was 8 feet 4½ inches wide, and protruded out over the left or south side of the road 4½ inches farther than it did on the right or north side. The bottom of the trailer box was 45 inches above the ground. An amber clearance light on the left side or front of the trailer was located 47 inches above the ground and 12 inches to the right of the extreme left lower outer corner of the box where a steel lever-operated gate was located to the left of it with which to dump the alfalfa. A witness for defendants testified that such front clearance light was located 7 inches to the right of the left lower outer corner of the trailer, but the jury could have found from his testimony that such measurement had been made after the trailer had been repaired by the removal of about 4 inches of the over-protruding left side of the trailer box. In any event, such clearance light was not located "on a line with the extreme outer point of such vehicle or the load thereon" as required by section 39-735, R. S. Supp., 1953, heretofore discussed. The jury had a right to believe that such clearance light was located 12 inches to the right of the lower left corner of the trailer which would place it just 4 inches higher and behind the left headlight on the power wagon, and leave 12 inches or more of the over-protruding left corner of the trailer box without any clearance light. Thus the jury could have reasonably concluded that such clearance light was not discernible to plaintiff's driver and the occupants of his car, approaching from the west.

As the car in which plaintiff was riding turned east at the 66-degree curve on its right side of the road traveling 20 or 25 miles an hour without any skidding or weaving, four of the passengers who were then looking, saw defendants' power wagon headlights approaching from the east at the top of the crest about a block away. The wind was blowing gustily and there was

some dust, but their observations were not obstructed thereby. Contrary to defendants' contention, such observations about which they testified were affirmative and not negative evidence.

Although they were looking, none of them ever saw any clearance light on the left front side of the trailer and all were entirely unaware that it was on the road. One such occupant was unfamiliar with the road and, although looking, could not tell whether or not the headlights of defendants' power wagon were approaching in the middle of the road, or estimate defendants' speed, although they did not seem to be approaching exceedingly fast. Another who was looking observed that the approaching headlights "were in the center" of the road "over their line." Another who was looking observed that defendants' approaching headlights were "a little on our side" of the road and approaching at "about the same speed" as the car. The latter statement is corroborated by the fact that the collision occurred about 148 feet, or one-half of the block, between the crest and the curve. Another observed that the approaching headlights "looked like they was over toward the center" of the road and approaching at about the same speed as the car, although plaintiff's driver accelerated his speed some, up to maybe 40 miles an hour, after turning the curve. Four occupants of the car observed that plaintiff's driver was driving with care over on his own side of the road at all times and they had no anxiety or anticipation that a collision would occur.

The car passed the power wagon without incident, but suddenly without warning the lower left-hand protruding corner of the trailer collided with the car at the upper left-hand corner of its cowl, just ahead of the left windshield post. The collision tore off the left windshield post and glass, without touching the steering wheel. It tore off the left front door post, permitting that door to sag down and outward toward the ground on the left side of the car. It tore off its left back door,

which was later found in the road some distance east of the trailer. It tore the top of the car entirely loose from its moorings and laid it back on the trunk. The impact threw John William Egenberger, who sat on the right side of the front seat, out of the car into the south edge of the road, where, unconscious, he remained for some time until some one came to his assistance. The impact knocked plaintiff's driver unconscious, and, with the power still on, he slumped down in his seat with his hands off the steering wheel and his foot down on the accelerator while the car went down the road toward the east. Thereupon Bill McCullough, the young man sitting in the right rear seat, reached over the front seat, grabbed the steering wheel, and told his sister Kathleen to turn off the ignition. However, bleeding from lacerations around her eyes, she could not see to do so. In that situation, Bill steered the car along the road toward the east until he intentionally turned it off the road and crashed into the east rodeo gate about 594 feet from the place of collision, where it stopped with its rear about 12 feet north of the road. There the car struck the west gate post and all remaining occupants except plaintiff were thrown out to the ground. Plaintiff was thrown to the floor with his head hanging out over the running board. He was unconscious and gravely injured about his left shoulder, head, and face, which resulted in permanent disfiguration of the left side of his face. The other occupants were also injured in varying degrees unimportant here.

A state patrol sergeant, who testified as a witness for plaintiff, arrived at the scene of the accident about midnight, accompanied by a state patrol trooper. The Gothenburg chief of police and defendant driver were there at that time and defendant corporation's manager arrived some time later. It began to rain lightly at about the time the sergeant and trooper arrived, and they sat in their car a few moments until a more severe shower abated. The sergeant then investigated the sit-

uation, made measurements, and prepared a diagram to illustrate his findings. It appears in the evidence as exhibit No. 18. He examined the car and orally described damages thereto substantially as heretofore recited. He examined the trailer and found that the wood and metal gate latch at the bottom of the left front corner of the box thereof had been damaged. He found no other damages to the trailer. The graveled portion of the road was 28½ feet wide and fairly smooth, with no marked center line. It was 32 feet from the north edge of the 3-foot south ditch across the graveled portion of the road and the north solid shoulder thereof to the north bank. There was no gravel piled along either side of the graveled portion of the road. There were no visible tracks indicating the course of the vehicles prior to the collision. He found a gouge mark or marks about 10 inches long and 4 inches wide extending east and west under a Pontiac car door, which had been picked up by someone east of that point and so placed to prevent obliteration of the gouge by the rain. It was 13 feet 6 inches from the north edge of the gouge to the north edge of the graveled portion of the road. The county surveyor, as a witness for plaintiff, indicated that such distance should have been 14 feet, but his measurements were made sometime later. The north edge of the gouge was 17 feet south of the north bank of the road. The south edge of the gouge was located 14 feet 8 inches north of the south edge of the graveled portion of the road. Thus, by respectively measuring from the north and south edges of the gouge, a differential of 4 inches in the width of the graveled portion was accounted for. It was 23 feet 8 inches from the west post of the west rodeo gate and across its driveway directly south to the north edge of the gouge. It was 15 feet diagonally northwest from the gouge to the left rear corner of defendants' trailer box, which had stopped with the right rear corner of the box 4 feet 6 inches south of the north bank and about

1 foot from the north edge of the graveled portion of the road. The sergeant testified that the gouge could have been made by the left end of the Pontiac's front bumper which extended out several inches to the left of the car as it went under the left front corner of the trailer and was pushed down to the ground, or that it could have been so made by the car door when it was torn loose and swung out to the left or north away from the car and went down into the road. All parties have generally assumed the latter to be true.

The record discloses evidence adduced in defendants' behalf substantially as follows: Defendant truck driver testified that he was driving the power wagon in low gear at about 5 miles an hour on the right side of the graveled portion of the road, but not out on the shoulder because he didn't feel it was safe there. His headlights and clearance lights were on as he came over the crest and started down grade to what he called the blind intersection. He was familiar with the road, having traveled over it many times recently with that or other similar vehicles. He first saw the headlights of the car after it crossed a canal bridge about 300 feet south of the curve, which would then be about 600 feet from him. The car was approaching the curve at about 60 miles an hour or more, but slowed down to about 40 miles as the car made the turn. There it plowed up quite a little dust as the car went over the left center of the road in front of him and he thought they would meet head-on. However, the car then straightened up and missed his power wagon but collided with the left front corner of the trailer. He felt the impact but drove on a little way further until he heard the tin car door strike the ground, after which he put on his brakes and stopped within about the length of his vehicles. The collision mashed the left front clearance light and bent the dump gate latch to the left of it. When the collision occurred, the rear of his truck was about 7 feet east of the west post of the west rodeo gate where the drive-

way thereto was level but not long enough he thought to put his whole vehicle upon it. He testified that he drove only 16 feet after he first saw the car 300 feet south of the curve until the collision occurred about 154 feet east of the curve, and that he drove only 2 or 3 feet after the car came around the curve until the collision occurred about 3 seconds later. He testified that he had no time to apply his brakes or give a signal or move over after the car came around the curve, but admitted that after the first time he saw the car speeding 300 feet south of the curve he at all times just kept in the same lane of travel and proceeded down the declining road toward the blind intersection in the same manner as he did before he first saw the car.

One witness for defendants saw the power wagon and trailer stopped on the north side of the graveled portion of the road and could not tell how far the trailer was from the north edge thereof, but claimed that he saw tracks which indicated that it had traveled along in a straight line. Neither the patrol sergeant nor anyone else was able to find any such tracks.

In that connection, although several cars had traveled along the road after the accident, defendant corporation's manager attempted to testify that he saw the tracks of some car which had been skidding around the curve on the wrong side of the road. However, he did not in any manner attempt to trace or connect such tracks to the Pontiac. As a matter of fact, when such evidence was stricken as a conclusion and without foundation, counsel for defendants admitted that he was unable to prove by any evidence that such tracks were made by that car or any other particular vehicle. Nevertheless, defendants argued that the trial court erred in excluding such evidence. We hold otherwise.

In the annotation to 23 A. L. R. 2d at page 116, it is said, citing among other authorities Koutsky v. Grabowski, 150 Neb. 508, 34 N. W. 2d 893, Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436, and Danner v. Walters,

154 Neb. 506, 48 N. W. 2d 635: "The general rule is that testimony as to tire marks on the highway is admissible in civil actions for injury or damage, where a sufficient foundation therefor is laid as by showing, for example, that the condition of the road was the same as it was at the time of the accident, and had not been changed by the weather or traffic, and there is sufficient identification that the marks were made by the automobile involved in the accident." Defendants' contention is controlled thereby.

In the light of the evidence heretofore recited and the authorities heretofore set forth, we conclude that the issues of negligence and proximate cause were for determination by the jury and the trial court did not err in overruling defendants' motions to direct or dismiss, or in refusing to sustain their motion for judgment notwithstanding the verdict.

In Callahan v Prewitt, on rehearing, 143 Neb. 793, 13 N. W. 2d 660, we held: "While evidence of use of intoxicating liquor at or about the time of an accident may be insufficient to prove intoxication yet if the occurrence is so close in time to an accident as to be considered as an incident related thereto it may be admitted as a circumstance proper to be considered by a jury in determining the existence or nonexistence of negligence." See, also, Cunning v. Knott, 157 Neb. 170, 59 N. W. 2d 180.

Concededly, each of the six youthful occupants of the car had consumed one spiked drink containing one ounce plus of bourbon whiskey a few moments before the collision. Four of them testified as witnesses for the plaintiff that they were not affected in any manner by such liquor. As heretofore recited, they also testified concerning their observations and opinions with regard to the distance, speed, relative location of their own and defendants' vehicles, and other matters relating to the collision. Two of such witnesses were asked on cross-examination whether they had been in the habit of

drinking whiskey upon other occasions prior to that night, purportedly in order to establish that they were neophyte drinkers. Objection thereto was sustained, and the trial court limited such inquiry to the consumption of liquor by the witnesses during the day on which the collision occurred. In that connection, defendants argued that the trial court erred prejudicially in so doing. We conclude otherwise.

In 58 Am. Jur., Witnesses, § 624, p. 345, it is said, citing authorities from this and other jurisdictions: "While the principle that cross-examination should be confined to matters relevant and material to the issues is not disputed, the rule of relevancy is much more liberally construed on cross-examination than on direct examination. The exact extent to which cross-examination respecting collateral matters may go rests almost entirely in the discretion of the trial court, since from the nature of the case no fixed rule can be devised defining the right and limiting the extent of irrelevant inquiry which will be just or safe in universal application. This must be determined by the relation and apparent character and bearing of the witness under examination, and the circumstances attending the particular case on trial, and an appellate court will not interfere with the exercise of discretion by the trial court unless a clear abuse thereof appears."

Also, as stated in 58 Am. Jur., Witnesses, § 704, p. 381: "As affecting the credibility of a witness, it may be shown that he was intoxicated at the time of the occurrence of the events about which he testified. This may be done not only by the evidence of another witness, but also by cross-examination of the witness himself, and it has been held unnecessary to lay a foundation for the introduction of proof of this character by first questioning the witness as to his condition at that time.

"Generally speaking, however, the right to impeach a witness by showing intoxication at the time of an occurrence to which his testimony relates extends no

further than the admission of material evidence relevant to the witness's condition during the period covered by such occurrence." See, also, 58 Am. Jur., Witnesses, § 117, p. 91; 61 C. J. S., Motor Vehicles, § 516, p. 250. We conclude that under the circumstances presented in this case, the trial court did not abuse its discretion.

Defendants also argued that the trial court erred prejudicially in refusing to permit their physician, as an expert witness, to answer certain questions with relation to the length of time necessary for alcohol to affect the senses and judgment of a neophyte drinker, and in striking his answer that a neophyte drinker would have quicker reaction from alcohol than one with a tolerance therefor. That contention has no merit because defendants' physician was permitted, without objection, to affirmatively testify fully and at length about such matters. That conclusion also disposes of defendants' contention that the trial court erred in refusing to permit their physician to answer certain hypothetical questions and in refusing a related offer of proof. The substance of the offers made already appeared in the record. Further, one such hypothetical question about which defendants complain was in fact answered in full, and such answer was never stricken from the record.

Section 24-340, R. R. S. 1943, provides: "The reporter shall attend all terms of the district court held within and for the district for which he is appointed, and shall make a stenographic report of all oral proceedings had in such court, including the testimony of witnesses with the questions to them, verbatim, *and any further proceedings or matter when directed by the presiding judge so to do,* or requested by either party to said proceeding, and, when requested at the beginning or during the progress of the trial by any party to the proceedings, all comments and statements made by the judge in the presence of the jury shall in all cases be taken down and recorded by the reporter; but the parties may, with the consent of the judge, waive the re-

cording by such reporter of any part of the proceedings herein required to be taken. *Arguments to the jury shall not be recorded;* and whenever, during the progress of the cause, any question arises as to the admissibility or rejection of evidence or any other matter causing an argument to the court, such argument shall not be recorded, but the reporter shall briefly note the objection made and the ruling of the court thereon, and any exceptions taken by either party to such ruling." (Italics supplied.)

In that connection, defendants argued that the trial court erred in denying defendants' request to have all of plaintiff's final arguments to the jury officially reported. In doing so, they cited and relied upon Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151, which is clearly distinguishable.

The trial court had theretofore excluded exhibit No. 29, a schematic drawing which illustrated plaintiff's theory about where and how the collision occurred, because it constituted an argument by counsel for plaintiff, but stated to counsel and the jury that such "ruling does not go to the extent of preventing the plaintiff from using the drawing in arguing to the jury about the relationship of the various details disclosed in the testimony." Thereafter, but before the cause was argued to the jury, an all-inclusive objection of counsel for defendants to the display and use of exhibit No. 29 in argument was overruled, whereupon defendants requested that plaintiff's entire final arguments should be reported by the official court reporter. This the court declined to do, but did direct the reporter to remain available during the course of the arguments for the purpose of recording any objections made during such arguments. In argument, as counsel placed exhibit No. 29 upon an easel in view of the jury, defendants requested that such part of plaintiff's argument should be reported, which was done.

We believe the applicable and controlling general

rule appears in Caesar v. Wegner, 262 Wis. 429, 55 N. W. 2d 371, wherein the court, citing authorities, said: "While it is not the duty of the reporter to take down the arguments to the jury unless he is directed to do so, he should be available; and if objections are made or controversy arises during the course of the argument, the court, whose duty it is to be present at all stages of the trial, should direct a record to be made." See, also, Sandomierski v. Fixemer, 163 Neb. 716, 81 N. W. 2d 142. We conclude that the trial court complied with such rule in every respect, and failure to require the reporting of all of plaintiff's final arguments was not prejudicial to defendants.

Further, generally a trial court may in its discretion permit counsel, in addressing the jury, to display and use schematic drawings, diagrams, and maps, not put in evidence, by way of illustration or elucidation of evidence actually adduced, provided the jury understands that they are employed merely for such purposes and are not of themselves evidence in any sense. 53 Am. Jur., Trial, § 490, p. 395; 88 C. J. S., Trial, § 177, p. 348; Annotations, 9 A. L. R. 2d 1046, 37 A. L. R. 2d 662, 44 A. L. R. 2d 1205, L. R. A. 1918 D 80.

Contrary to defendants' contention, we conclude from an examination of the evidence adduced, and arguments made by plaintiff's counsel with relation to exhibit No. 29 in connection with demonstrative photographs and other evidence appearing in the record, that the trial court did not abuse its discretion.

Defendants argued that the trial court erred prejudicially in giving instructions Nos. 11 and 13, and in failing to properly instruct upon their theory of defense as shown by the pleadings and evidence. We sustain that contention.

In that connection: "It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence.

"A litigant is entitled to have the jury instructed as

to his theory of the case as shown by the pleading and evidence, and a failure to do so is prejudicial error.

"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, *supra*.

In such respect, the rule also applies in cases wherein defendant pleads and adduces evidence that plaintiff's driver was negligent in certain specified particulars and that such negligence was the sole proximate cause of the accident and injuries. See, also, Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N. W. 2d 609, wherein we said: "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 should be noted that this is not a case wherein defendants pleaded generally that the negligence of plaintiff's driver was the sole proximate cause of the accident and thereby left themselves in a position about which they could not complain if the court failed to submit specific claimed acts of negligence. However, as heretofore noted, defendants pleaded that plaintiff's driver was negligent in certain specific particulars as alleged aforesaid, and that such negligence was the sole proximate cause of the accident, yet the trial court erroneously failed to specifically submit defendants' theory of defense as alleged by them. In that connection, the court only recited in instruction No. 2: "Defendants claim that the sole cause of the collision was the negligence of plaintiff's driver, Joe Tetro," and "The plaintiff has filed a reply denying the affirmative claims made by the defendants." In that connection, instruction No. 3 said in part: "The 'burden of proof' is the duty resting upon a party who claims a fact to be true, to establish such fact by a preponderance of the evidence."

Such language, when read in the light of the aforesaid language contained in instruction No. 2, erroneously left a clear inference that in such respect defendants did have a burden of proof which was prejudicial to defendants.

"The purpose of an instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired." Langdon v. Loup River Public Power District, 144 Neb. 325, 13 N. W. 2d 168. See, also, Barney v. Adcock, *supra*.

"Where an instruction assumes to define the whole law of the case but omits a material element therefrom, it is reversible error which may be relied upon although no proper instruction has been requested by the party seeking to take advantage of the defect.

"An instruction which conflicts with propositions of law properly and correctly stated in another instruction in the same charge on a vital issue of fact, and tends to mislead or confuse the jury in deliberating on conflicting evidence, is erroneous and prejudicial." Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661. See, also, Brooks v. Thayer County, 126 Neb. 610, 254 N. W. 413.

"Where a party has produced proof tending to sustain his theory of the case, he is entitled to have such theory submitted to the jury by suitable instructions, without qualifying words calculated to mislead the jury into the belief that, although they may find the theory of such party to be true, they may return a verdict for the opposing party." Brownfield v. Union Pacific R. R. Co., 74 Neb. 440, 104 N. W. 876.

"An error in an instruction is not cured by the giving of other instructions, where such error consists, not of an omission of some material fact, but of an affirmative statement by the court which, when considered

with the other instructions, tends to confuse the jury." Wilch v. Western Asphalt Paving Corp., 124 Neb. 177, 245 N. W. 605.

In the light of such rules aforesaid relating to instructions, we turn to the question of whether or not instructions Nos. 11 and 13 were prejudicially erroneous. We conclude that they were.

Instruction No. 11 first recited six alphabetically-designated circumstances which should have applied to and been considered by reasonably prudent drivers in the same position as the drivers here involved. All of the instruction except the last paragraph simply stated a rule of law which could and did have application to the duties of both drivers with respect to such circumstances. Defendants' first contention is that such instruction as it related to both drivers failed to give defendants the benefit of the rule that: "A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highway will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption." Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701. In that respect, we believe that in the light of the language of the instruction, which is too voluminous to recite here, such portion of the instruction was not prejudicial to defendants.

On the other hand, the last paragraph of instruction No. 11 read: "If you find that the defendant failed to exercise the judgment of a reasonable prudent man in controlling the position and course of the power wagon and trailer in view of the circumstances and conditions shown by the evidence, you may find the defendant negligent and find that the plaintiff's first proposition has been established." No precautionary language appears in the instruction with relation to the important factors of "preponderance of evidence as related to defendants" or to "proximate cause" with relation to

either driver, and, in that connection, the jury was not told alternatively what its findings should be if it found from the evidence that plaintiff's driver failed to exercise the judgment of a reasonably prudent man. The instruction, having application to both drivers and being simply the statement of a rule of law, the last paragraph should have been either omitted or the instruction should have been clarified by setting forth the obligation of each driver and the consequences to each resulting from a violation thereof.

Also, the jury was confronted with and requested to apply the language, "and find that the plaintiff's *first proposition* has been established." (Italics supplied.) The question presented was: Did such language refer to defendants' failure to take into consideration the six alphabetical circumstances theretofore set forth and thus fail to exercise the judgment of a reasonably prudent man, or did it refer back to paragraph 1 of instruction No. 5 which set forth defendants' alleged negligence? If it referred to the former, the instruction erroneously conflicted with instruction No. 5. If it referred to the latter, as we think after careful examination the court intended, no language was used referring back to paragraph 1 of instruction No. 5 or pointing out and defining such "first proposition" or telling the jury what it could find by use of clarifying language. The language used was so conflicting, incomplete, and misleading that we fail to observe how jurors, however intelligent as laymen, could discern its relation to paragraph 1 of instruction No. 5.

Instruction No. 13 first informed the jury that if it found that negligence by a defendant was a proximate cause of the injury, "such defendant may be held responsible for the entire result even though his negligence alone would not have brought about the entire result, and even though the evidence might show another to have been negligent." It then went on to say: "The burden upon the plaintiff to show that negligence of the

defendant was a proximate cause is not changed by the contention of the defendants that the conduct of Joe Tetro was the sole proximate cause of plaintiff's injuries. *You are not required to decide whteher* (sic) *Joe Tetro was negligent in any way.*" (Italics supplied.) Without qualifying such italicized language, by adding thereto "if you find that defendant was negligent in one or more particulars as alleged and that such negligence was a proximate cause of the accident," the instruction was incomplete, conflicting, and misleading. The italicized language should have been either omitted or qualified as aforesaid. Also, a double reference in the instruction respectively to, "you may find for the plaintiff upon the second proposition," and "you will find for the defendant upon the second proposition," without referring back to paragraph 2 of instruction No. 5 or without pointing out and defining such "second proposition" or telling the jury what it could find by use of clarifying language, was incomplete, confusing, and misleading.

In our discussion and disposition of defendants' assignments of error with relation to instructions, we have not overlooked the rule that: "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." Granger v. Byrne, *supra*. We have simply concluded that such rule is not controlling in the case at bar.

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

REVERSED AND REMANDED.

JOHN PEW, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

83 N.W. 2d 377

Filed May 31, 1957. No. 34174.

1. **Rape.** The exertion of force by the accused or resistance by the female is not essential to the commission of assault with intent to commit rape if the latter is incapable of giving consent because of her age and the accused is at least 18 years of age.
2. ———. In a prosecution for assault with intent to commit rape, if the prosecutrix testifies to facts constituting the offense and the accused denies the commission of the crime, the testimony of the prosecutrix must be corroborated on material points by other evidence to justify or sustain a conviction of the accused.
3. ———. It is not essential in such a case that the prosecutrix be corroborated by other evidence as to the principal act constituting the offense but it is indispensable that she be corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue.
4. ———. In a prosecution for an assault with intent to commit rape of a chaste female less than 18 years of age, proof of facts and circumstances justifying a finding, independent of her testimony, that accused had opportunity and inclination to assault her with intent to ravish her, may be sufficient corroboration of direct and positive evidence by her that he did so.
5. ———. If an accused, at least 18 years of age and capable of completing the indulgence he seeks, takes hold of or physically abuses or injures the person of a female prohibited because of her age from giving consent, with the intention of then having sexual intercourse with her, a finding is justified that he thereby committed the offense of assault with intent to rape.
6. **Criminal Law: Appeal and Error.** The credibility of witnesses and weight of evidence are for the jury to determine in a criminal case and the verdict of the jury may not be disturbed by this court unless it is clearly wrong.

ERROR to the district court for Hitchcock County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Charles M. Bosley, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for defendant in error.

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

BOSLAUGH, J.

The charge made by defendant in error against plaintiff in error, referred to as the accused, is that on or about July 28, 1956, in Hitchcock County the accused, a male person more than 18 years of age, unlawfully assaulted Irene Barnes, a chaste person who was less than 18 years of age, with the intent to rape and carnally know her. §§ 28-408 and 28-409, R. R. S. 1943. The plea thereto by the accused was not guilty. The result of the trial of the charge was a verdict of guilty. A new trial was denied and accused was adjudged to be confined in the Nebraska State Penitentiary. He contests the legality of the conviction and sentence by petition in error. The assignment of error relied upon and discussed in this court is that the evidence is insufficient to sustain the conviction and judgment.

The circumstances of this case as recited by the evidence were as follows:

Irene Barnes, herein called the prosecutrix, would have been 16 years of age December 6, 1956. She was a chaste person. She had been, since May 13, 1956, living with Luella Green and Donald Green, her sister and brother-in-law, respectively, on a farm about 8 miles from Trenton. She had on week ends, commencing with June 24, 1956, been employed and served as a baby sitter in the home of the accused without unusual incident until the experiences complained of in this case. The distance between the home of the sister of prosecutrix, herein designated the Green home, and the farm home of the accused, herein spoken of as the Pew home, was considerable and the prosecutrix remained over night in the home of the latter on each occasion she was there as a baby sitter. When the services of the prosecutrix were desired, usually the accused, but on some occasions his wife, Mary Lu, came for her at the Green home and later returned her to it. Luella Green and her husband had, before March 1, 1956, lived about one-half mile from where the accused

and his family resided. The two families were neighbors and friends and after the former moved to the Trenton vicinity the two families continued to visit each other occasionally.

The accused, 32 years of age, was married and lived with his wife and four children on a farm east of Palisade. The ages of the four children were 7 years, 5 years, 3 years, and 10 months. The nearest house to the Pew home was 2 or 3 miles. The wife of the accused and two of their children had gone to Colorado and the other children were with the mother of the wife of the accused in McCook on July 28, 1956. There was no member of the family except the accused at the Pew home on that date or the following day.

The accused came to the Green home in his automobile shortly before noon on July 28, 1956. He saw and talked with prosecutrix and her sister, Luella Green. He asked them if the prosecutrix could baby sit for him. The prosecutrix said she would. Her sister agreed if he would bring her back early the next morning because they intended to attend a club picnic that day. The 28th of July 1956 was a Saturday and the picnic was Sunday. The prosecutrix prepared to go with the accused. She took with her a change of clothing. While she was getting ready the accused and her sister visited. She had prepared dinner and asked the accused to stay and have dinner with them. He declined the invitation and gave as the reason that his wife, Mary Lu, would have dinner ready for them when they reached the Pew home. During the trip to the home of the accused he and prosecutrix talked of his wife and children and accused said he had to hurry home because his wife would have dinner ready and that "they were going out that night."

It was about 1 p. m. when the accused and the prosecutrix arrived at the Pew home. There was no one there and she asked accused where his wife and children were. He did not tell her. She asked him repeatedly and he

finally said: "* * * they went to the hills." He explained this meaning later saying that they had gone to the mountains of Colorado. She asked accused to return her to the Green home. He refused and caressed her breasts and attempted to make love to her. He made an effort to insert his hand inside her dress but she prevented him. He pushed her down in a chair and continued to molest her. She opposed his advances by hitting, kicking, and pushing him away and she demanded that he discontinue his wrongful behavior and treat her properly. He became angry and left about 2 p. m. He did not say where he was going or when he would return. The prosecutrix was alone at the Pew home until about 5:30 p. m. when the accused came home. He drank three or four beers before he went away and when he came back he brought a supply of beer and gin. He offered prosecutrix a drink of the latter. She declined and he forced her to drink it. He then put his arms around her and attempted to get her on a davenport. She made the best effort she could to prevent him but he got her arms behind her and forced her onto it. He then released her arms and she got away from him. He continued to follow and molest her. He had her on the davenport two or three times and indulged in conduct of such a character as to permit of no doubt of his intention and purpose to ravish her. He injured her neck. He struck her with his fist and injured her. He inflicted bruises on both of her legs above the knees and on one of her arms. He scratched the other arm. He broke one of the shoulder straps of her slip and otherwise tore it. On one occasion while she was on the davenport he attempted to remove her clothing. At one time the accused said to the prosecutrix during these experiences: "I ought to rape you." At another time he said: "I am going to rape you."

Don Follett, hereafter mentioned as Follett, an unmarried man about 32 years of age and a long-time acquaintance and friend of the accused, came to the

Pew home about 7 or 7:30 p. m. When he came to the house and knocked at the door the accused had the prosecutrix on the davenport. He released her and she admitted Follett. He came because of an understanding when he and the accused met while he was away from home that afternoon. The accused, sometime after Follett came to the house, renewed his conduct of molesting the prosecutrix. Follett interfered and demanded that the accused desist.

Two of the Pew children were with the mother of Mrs. Pew in McCook. The accused said the prosecutrix had to go with them to McCook to get the children. She declared she was not going to McCook and stated that she wanted to go home. The accused demanded that she go to McCook so that she could care for the children when they got back that night. The three of them went to McCook in the automobile of Follett who operated it. On the trip to McCook the accused acted improperly toward the prosecutrix in ways similar to his violations at his home during the afternoon and evening. He was displeased at the declination of the prosecutrix to his desires and he hit her on the head with his fist which caused a swelling to result. The accused and Follett, when they got to McCook, left prosecutrix in the parked automobile and entered a bar where they remained for a considerable time. They then proceeded to a dance at Indianola. They did not see or get the Pew children at McCook. They went from the dance to the Pew home and arrived there about 12:30 Sunday morning, July 29, 1956. They occupied separate rooms and there was no further unusual incident that night.

The prosecutrix awoke about 5:30 or 6 o'clock on Sunday morning. She got up and dressed. Later the accused was awake and he arose and drank some beer. The prosecutrix prepared breakfast and the accused ate. His conduct towards her for about an hour was very much the same as it was the preceding afternoon and

evening. She slapped him and pushed him away but he persisted. She repeatedly told him she wanted to go home and he said he was not going to take her home. The accused got his hands on her breasts and her legs and pulled up her dress. She was afraid of him. Follett was still asleep. She got out of the house and ran. She had decided to go to the vacant Crampton house about a half-mile away to see if there was anyone there. The accused followed her in an automobile, overtook her, drove in front of her, and made her get in the car and return to his home. She told him that she was going home because he would not take her. Follett was up when they got back and prosecutrix asked him if he would return her to the Green home. He said he would and he did in his automobile. The three of them left the Pew home about 8:30 or 9 a. m., went to the Green home, and met and talked with the sister of prosecutrix and her husband. Nothing was said about the happenings that had transpired in the interval between the time the prosecutrix left the Green home the day before until she returned there. Luella Green, hereafter spoken of as Mrs. Green, noticed that the prosecutrix did not act naturally. She seemed scared and unusually quiet. She said very little to her sister or any of them. She went to her room and stayed there much of the time. She did not speak when the conversation was directed to her. Mrs. Green said she was in McCook Saturday and that she met Mrs. Mihm who said that Mrs. Pew was away from home. The accused said in reference to this that they took the children back to McCook that morning. Mrs. Green asked him where Mary Lu was and he said she was up in the hills. Mrs. Green said that was what she had heard and the accused said the two little girls were with Mary Lu's mother. Mrs. Green asked him where they were then and he said they took them back to McCook.

The next day Mrs. Green asked prosecutrix if Mary Lu had been gone. Prosecutrix did not answer but she

commenced to cry. She made her sister promise not to tell anything that was told her. The prosecutrix said the accused had declared that if she told what had taken place, something terrible would happen to her. Prosecutrix told her sister all that had taken place, as she testified later in the trial of this case. Mrs. Green then saw the bruises on the right arm, on both legs above the knees, and the injured place on the neck of the prosecutrix. Mrs. Green went to the Pew home on Tuesday afternoon, found the accused there alone, and talked with him. She asked him what had happened and he at first denied that he had done anything improper but later he told her he had tried to rape prosecutrix but he did not accomplish it.

The testimony of Don Follett, produced on behalf of the accused, corroborates in some respects the version of the happenings as related by the prosecutrix. The accused did not testify in the case. He relied upon his plea of not guilty and the presumption of innocence.

The elements of the offense charged against the accused that he was a male person of more than 18 years of age at the time alleged; that the prosecutrix was a female less than 18 years of age and a virgin at that time; and that the offense was committed in Hitchcock County, Nebraska, were supported by substantial and uncontroverted evidence of probative force sufficient to support the verdict of conviction. The remaining element of the offense charged was that the accused at the time stated unlawfully made an assault on the prosecutrix with intent of the accused to have sexual intercourse with her. She was then more than 15 and less than 18 years of age and a virgin. It is unimportant whether accused intended to accomplish the act charged against him with the consent of the prosecutrix and without force exerted by him. She was incapable of consenting to the indulgence he sought or to an assault by him with an intent by him to secure such indulgence. The exertion of force by the accused or resistance by the

female is not essential to the commission of the crime of assault with intent to commit rape if the latter is more than 15 and less than 18 years of age and chaste and the accused is at least 18 years of age. Hughes v. State, 154 Neb. 86, 46 N. W. 2d 904.

In a prosecution for assault with intent to commit rape, if a prosecutrix testifies to facts constituting the offense and the accused denies the commission of the crime, the testimony of the prosecutrix must be corroborated on material points by other evidence to justify or sustain a conviction of the accused. Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380. However, it is not essential in such a case that the prosecutrix be corroborated by other evidence as to the principal act constituting the offense but it is indispensable that she be corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue. Onstott v. State, *supra;* Medley v. State, 156 Neb. 25, 54 N. W. 2d 233; State ex rel. Klostermeier v. Klostermeier, 161 Neb. 247, 72 N. W. 2d 848. The prosecutrix testified in detail of the facts constituting the offense as related herein in the recitation of the circumstances of the case. The accused by the plea of not guilty interposed by him denied all that was charged or proven against him. The prosecutrix was corroborated by undisputed evidence as to many of the material matters included in her testimony. In the circumstances of this case proof of facts justifying a finding, independent of the testimony of the prosecutrix, that accused had opportunity and inclination to assault her with intent to ravish her was sufficient corroboration of direct positive evidence by her that he did so. Whetstone v. State, 99 Neb. 469, 156 N. W. 1049; Stapleman v. State, 150 Neb. 460, 34 N. W. 2d 907.

The accused argues that intent is an essential element of the offense charged against him and that the evidence does not support a finding against him in this respect. The intent with which an act is done is generally a mat-

ter of inference from the nature of the act and the circumstances surrounding its commission. Intent, when important, may not be capable of and is not required by law to be shown by direct evidence. It may be established by or deduced from facts and circumstances which characterize the transaction and from which the existence of intent may reasonably be inferred. If intent is an essential element of a crime, as it is in this case, to justify a conviction, the circumstances must be of so conclusive a nature as to show intent beyond a reasonable doubt. Prichard v. State, 135 Neb. 522, 282 N. W. 529. If an accused is at least 18 years of age and capable of completing the indulgence he seeks, takes hold of or physically abuses or injures the person of a female incapable of consent because of her age, with the intention to then have sexual intercourse with her, a finding is justified that he thereby committed the offense of assault with intent to rape. Beer v. State, 129 Neb. 366, 261 N. W. 824; Prichard v. State, *supra*. The wrongful conduct of the accused toward prosecutrix included all of the acts above enumerated and many more. They were indicative of his degrading desires and lustful intention.

The assignment of insufficiency of evidence to justify the conviction is without foundation. The proof permitted a finding of guilt of the accused of the offense charged. The credibility of witnesses and weight of evidence are for the jury to determine in a criminal case and the verdict of the jury may not be disturbed by this court unless it is clearly wrong. Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701. The verdict in this case is not clearly wrong. The judgment should be and it is affirmed.

AFFIRMED.

WILLIAM A. ECKER, ADMINSTRATOR OF THE ESTATE OF MARGARET A. ECKER, DECEASED, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, ET AL., APPELLEES.

83 N. W. 2d 551

Filed June 7, 1957. No. 34099.

1. **Trial.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence 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.
2. **Negligence: Trial.** However, in a jury case where the evidence adduced to sustain issues of negligence and proximate cause are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the issues as a matter of law rather than submit them to a jury for determination.
3. **Witnesses.** As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion.
4. **Negligence.** Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributed to the injury complained of as a proximate cause.
5. ———. The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred.
6. ———. Ordinarily, where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident, the latter is the proximate cause.
7. **Husband and Wife: Negligence.** In an action by plaintiff for his own benefit to recover for pecuniary injury which he has suffered by reason of the death of his wife, wherein the evidence discloses that plaintiff was guilty of negligence more than slight as a matter of law which proximately contributed to or caused the accident and death, it is the duty of the court to direct a

verdict for defendant.

8. **Negligence.** Likewise, when in such an action the evidence discloses that plaintiff's decedent was guilty of negligence more than slight as a matter of law which proximately contributed to or caused the accident and death, it is the duty of the court to direct a verdict for defendant.

9. ———. A person who knowingly and of his own volition exposes himself to obvious danger cannot recover damages for any injury which he might have avoided by the use of reasonable care.

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

Bertrand V. Tibbels, Firmin Q. Feltz, and *Arthur R. Johnson,* for appellant.

F. J. Melia, George C. Holdrege, James H. Anderson, and *Frank J. Given,* for appellees.

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

CHAPPELL, J.

Plaintiff, William A. Ecker, as administrator of the estate of his wife, Margaret A. Ecker, deceased, and for his own benefit, brought this action against defendants, Union Pacific Railroad Company, a corporation, and Edward M. Jensen, its engineer, seeking to recover damages for the death of plaintiff's wife, which was alleged to have been proximately caused by negligence of defendants. Hereinafter, William A. Ecker will be called plaintiff and Margaret A. Ecker, deceased, will be called plaintiff's wife or decedent. Defendant Union Pacific Railroad Company will be called the railroad company, and defendant Edward M. Jensen will be called the engineer, but when speaking of both they will be called defendants.

Plaintiff alleged in his petition that his wife's death occurred at about 2:46 a. m. on May 11, 1952, when his 1940 Chevrolet automobile, operated by him in a northerly direction, became stalled upon a rough and pitted railroad crossing installed by defendant railroad com-

pany, whereat its engine and train, approaching from the west, collided therewith. The alleged negligence of defendants was in effect that the railroad company failed to maintain and keep in repair its crossing where the collision occurred, as required by section 75-220, R. R. S. 1943; and that defendant engineer approached the crossing at an excessive rate of speed without keeping a proper lookout or giving timely warning, and failed to have the railroad company's engine and train under reasonable control in order to timely avoid collision with plaintiff's car after it became stalled upon the crossing.

Defendants' joint answer admitted that its engine and train approaching from the west, and a car driven by plaintiff in a northerly direction, collided at or about the time and place alleged, which resulted in the death of plaintiff's wife, who was a passenger in plaintiff's car. Defendants admitted that the railroad company had maintained and repaired the crossing since its installation. They then denied generally and alleged that the proximate cause of the collision and death of plaintiff's wife was her contributory negligence and the contributory negligence of plaintiff, which negligence was respectively more than slight as a matter of law when compared with any negligence of defendants. Plaintiff's reply was a general denial.

Upon trial to a jury and at conclusion of plaintiff's evidence, defendants' motion to direct a verdict and dismiss for the reason that the evidence adduced by plaintiff was insufficient to support a verdict in favor of plaintiff and against defendants or either of them was sustained, and judgment was rendered dismissing plaintiff's action. Thereafter, plaintiff's motion for new trial was overruled and he appealed, assigning only: "That the court erred in sustaining defendants' motion, made at the close of plaintiff's case, for dismissal of the action." We conclude that the assignment has no merit.

Decision depends upon the undisputed evidence ad-

duced in plaintiff's behalf and rules of law applicable thereto. In arriving at the conclusions hereinafter set forth, we are mindful of the following well-established rules: " 'A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.' Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175. However, we must also bear in mind that where the facts adduced to sustain an issue are such that reasonable minds can drawn but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. Witthauer v. Paxton-Mitchell Co., ante p. 436, 19 N. W. 2d 865." Loudy v. Union P. R. R. Co., 146 Neb. 676, 21 N. W. 2d 431. See, also, McIntosh v. Union P. R. R. Co., 146 Neb. 844, 22 N. W. 2d 179.

In that connection, as held in Leach v. Treber, *ante* p. 419, 82 N. W. 2d 544: "As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion."

In Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870, this court held: "The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred.

"Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooper-

ating with actionable negligence for which defendant is responsible, contributed to the injury complained of as a proximate cause."

In Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673, this court held: "Although the question of proximate cause is ordinarily for the determination of the jury, where, upon the evidence produced, only one inference can be drawn, it is for the court to declare whether a given act or series of acts is the proximate cause of the injury."

In Loudy v. Union P. R. R. Co., *supra,* this court held: "Ordinarily where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident the latter is the proximate cause." See, also, Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683.

It is generally the rule that in an action by plaintiff for his own benefit to recover for the pecuniary injury which he has suffered by reason of the death of his wife, wherein the evidence discloses that plaintiff was guilty of negligence more than slight as a matter of law, which proximately contributed to or caused the accident and death, it is the duty of the court to direct a verdict for defendant. Jones v. Union P. R. R. Co., 141 Neb. 112, 2 N. W. 2d 624; Crandall v. Ladd, 142 Neb. 736, 7 N. W. 2d 642.

In Moreland v. Chicago & N. W. Ry. Co., 117 Neb. 456, 220 N. W. 692, cited with approval in Rogers v. Chicago, R. I. & P. Ry. Co., 39 F. 2d 601, we concluded that a motorist on a highway who is crossing a railroad track must use alertness and vigilance before he has taken or remains in a position exposing himself to peril or has come within the zone of danger, so that his precaution may be effectual, and a failure to do so will be held to be contributory negligence more than slight as a matter of law barring recovery.

In Goldman v. Grand Trunk Western Ry. Co., 287 Mich. 289, 283 N. W. 583, the court concluded that an

automobile driver who remained in his car that was stalled on a railroad crossing at night and was struck by a locomotive whose headlight was visible for a minute or two before the accident, was guilty of contributory negligence precluding any recovery.

Also, in Kraft v. Pere Marquette Ry. Co., 262 Mich. 494, 247 N. W. 727, plaintiff's car stalled on defendant's tracks where there was a clear view of approaching danger for about one-half mile. Plaintiff claimed that she looked when her car stalled, and saw no train. She then tried to start her motor and when she looked again the train was so close that she had no time to get out of her car. In the opinion the court said: "Due care required vigilance on the part of plaintiff while trying to start the motor. She knew she was in a place of danger if a train came along; she had time and opportunity to get to a place of safety, and, as long as she remained in the automobile, ordinary prudence required her to maintain such a watch as would enable her to escape. If the trainmen should have seen her peril she also should have sensed her peril, and availed herself of opportunity to avoid injury. * * * Defendant's motion for a directed verdict on the ground 'That plaintiff herself, as a matter of law, under the undisputed testimony, is guilty of contributory negligence,' should have been granted."

Also, in Gulf, Mobile & Ohio R. R. Co. v. Freund, 183 F. 2d 1005, 21 A. L. R. 2d 729, a case comparable in material and relevant respects with that at bar, the court, after citing numerous authorities, said: "The conclusion is inescapable that the proximate cause of appellee's unfortunate accident was his negligence in remaining in a position of known danger when, by the exercise of care commensurate with the danger which he was bound to know and understand, his injury would have been avoided.

"The judgment of the District Court is reversed, and this case is remanded with directions to dismiss the

action." See, also, Horsley v. Chesapeake & Ohio Ry. Co., 191 Va. 628, 61 S. E. 2d 868.

As said by this court in Craig v. Chicago, St. P., M. & O. R. R. Co., 97 Neb. 426, 150 N. W. 374, quoting with approval from Chicago, B. & Q. Ry. Co. v. Schwanenfeldt, 75 Neb. 80, 105 N. W. 1101: " 'Individuals are required to have some regard for their own safety. Every person of mature years and in the possession of his faculties is bound to make a proper use of them to avoid danger, and we are all required to take notice of the fact that a railway crossing is a dangerous place, and he who makes use of it must exercise that degree of caution commensurate with the danger.' See, Koester v. Chicago & N. W. R. Co., 106 Wis. 460."

Likewise, in actions like the one at bar wherein the evidence discloses that plaintiff's decedent was guilty of negligence more than slight as a matter of law, which proximately contributed to or caused the accident and death, it is the duty of the court to direct a verdict for defendant. In Seiffert v. Hines, 108 Neb. 62, 187 N. W. 108, we said: "Here the deceased knew that the automobile was approaching the crossing; he was in a position to look and listen for approaching trains; had he done so he could have warned the driver of the danger, or alighted from the moving automobile. Having failed to do this, his negligence contributed to his injury, and amounted to more than slight negligence in comparison with that of the defendant."

Also, in Gade v. Carlson, 154 Neb. 710, 48 N. W. 2d 727, we said, citing other authorities and quoting from Kerwin v. Thompson, Belden & Co., 110 Neb. 251, 192 N. W. 692: " '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.' "

In Krouse v. Southern Michigan Ry. Co., 215 Mich. 139, 183 N. W. 768, an action was brought by a husband to recover for the death of his wife who was a passenger

with him in an automobile struck by defendant's interurban car at a grade crossing upon which the automobile had stalled. Therein the court sustained direction of a verdict for defendant because the evidence disclosed that decedent, having notice and knowledge of an obvious approaching danger and ample time and opportunity with the exercise of reasonable care to get out of the automobile to a place of safety, had negligently failed to do so. See, also, Southern Railway Co. v. Jett, 49 Ga. App. 638, 176 S. E. 700.

We are required to apply such rules to the undisputed evidence in the record before us, which shows substantially as follows: On May 10, 1952, plaintiff and his wife went from their farm home to Paxton in plaintiff's Chevrolet sedan. Plaintiff drove his car at all times involved. They arrived at Paxton about 6 or 6:30 p. m. and went to a bar where they stayed about an hour. While there plaintiff had a drink of whiskey sour. They then went to a cafe where they had an evening meal. About 8 or 9 p. m. they went back to the bar and stayed until midnight visiting with friends. There plaintiff drank two more whiskey sours and his wife probably had some. At midnight they left the bar and went back to the cafe where they visited with friends while they had sandwiches and coffee. About 2 a. m. they left the cafe and drove west on a highway toward the farm home of friends about 1½ miles from Paxton. Such home was located on the south side of defendant railroad company's double parallel tracks running east and west, where a dirt road from north to south crossed over such tracks and went on to their friends' home. There were open wooden gates located respectively on both the north and south ends of such dirt road at the railroad company's right-of-way lines.

Plaintiff and his wife, who sat in the front seat at his right, approached the north end of the crossing as they drove west on the highway north of the railroad tracks, then turned left toward the south upon the dirt road

and drove over the railroad crossing to their friends' home without any difficulty. Plaintiff had driven over that railroad crossing many, many times, and was familiar with its location and condition. Upon arrival at their friends' home, they saw no light, so, without stopping, they turned around and drove back north toward the railroad crossing in order to recross it and go back out to the highway. It was a dark night without fog, but there was frost enough on the ground to leave car tracks. When plaintiff was about even with the south gate, or 200 feet from the tracks, and traveling at about 10 miles an hour, he looked west and saw the headlights of defendant's locomotive in open country approaching the crossing about a mile or 1¼ miles away. He then went up on the crossing while driving in about the middle of the road. Plaintiff testified that the train was then about one-half or three-fourths of a mile, or even a mile, away.

Plaintiff testified that as he drove over the south rail, one front wheel of his car, which one he didn't know, dropped "way down deep" in a hole which he never otherwise defined. There his motor died and plaintiff told his wife to get out and go back of the car. She then got out of the right side of the car and plaintiff shut the car door. When she got out, the train was still three-quarters of a mile away. Thus it will be noted that with full notice and knowledge of the obvious approaching danger she had ample time and opportunity to escape to a place of safety by the exercise of ordinary care, but she did not do so. After she got out, plaintiff looked again and saw the train about one-half mile away, so he started his motor twice and tried to go forward and then backward, but each time the motor died. He then turned off the ignition, took the key in his hand, looked up again and saw the train quite close, but he felt "it was far enough to get out of the way," so he opened the car door but couldn't get out of the way in time to avoid the accident, when the locomotive

hit the front end of his car and swung it around, whereupon the back end hit him and threw him into the train, from which he suffered serious injuries.

Plaintiff testified that when he looked up the last time he "saw the headlight of the locomotive and the locomotive itself of the train bearing down * * * just almost immediately before the accident happened"; that he "didn't know it was that close or I would have got out sooner." He heard no whistle or bell prior to the accident, but it is elementary that whether or not there was a whistle blown or bell rung was of no importance or consequence since both the plaintiff and his wife saw or could have seen the train at all times approaching in plain sight for at least one and a quarter miles, and knew of its approaching danger at all times. See Neusbaum v. Chicago & N. W. Ry. Co., 162 Neb. 754, 77 N. W. 2d 299. Thus, it will be noted that with full notice and knowledge of the danger approaching, plaintiff also had ample time and opportunity to escape to a place of safety by the exercise of ordinary care, but he did not do so.

The train was an extra freight traveling east at about 50 miles an hour, which makes applicable the rule that: "Beyond the limits of cities, villages, and towns no rate of speed of a train is generally in itself unlawful or evidence of negligence." Kennedy v. Chicago, R. I. & P. R. R. Co., 156 Neb. 345, 56 N. W. 2d 446.

The train was about four-fifths of a mile long and contained 74 loaded cars and 12 empties. Its engine was equipped with an electric headlight which would light the ground about 1,000 feet ahead and also project a light for about one-quarter of a mile in such manner that at that distance you might see a signal box or telephone pole. There was no evidence that plaintiff's car headlights were even lighted, much less that they were visible to the engineer. Also, there is no evidence that the engineer failed to keep a proper lookout or slacken his speed or that he could have done so in time to have

stopped the train and avoided the accident.

As a matter of fact, after the accident the train did stop with its rear car 10 or 12 car lengths, or about a block or more, east of the crossing. Right after the accident, plaintiff's car was lying on its top, 6 or 7 feet south of the south rail of the crossing, and 16 or 18 feet east thereof. When the highway patrolman arrived a short time after the accident, which occurred at 2:46 a. m., plaintiff's car was about 9 feet from the south rail, with its front end about 16 feet from the traveled portion of the crossing, and its back end about 25 feet therefrom. However, it had then been moved by rolling it over toward the southeast and upon its right side by part of the train crew and passengers, in order to remove the dead body of plaintiff's wife which was lying partially under plaintiff's car. Where she had gone or remained after leaving plaintiff's car, when she knew that the train was approaching three-quarters of a mile away, during which time she had ample time and opportunity to have escaped to a place of safety before the collision, is not shown by any evidence. The only inference or conclusion that can be drawn from the evidence is that she was in a place of known danger with ample time and opportunity to have avoided it by the exercise of ordinary care, but failed to do so, and was thus guilty of contributory negligence, as was plaintiff himself, and that such negligence was respectively more than slight as a matter of law when compared with any negligence of defendants, which barred plaintiff's right of recovery.

When the ambulance arrived shortly after the accident, it drove across the railroad crossing satisfactorily, then turned around and drove back across it again without any difficulty. The highway patrolman who inspected the accident drove over the crossing from both directions without any difficulty. His examination of the crossing disclosed that it was rough and bumpy when he hit the rails, but there were no places or holes on it deeper

than 3 inches from the top of the rail. The sheriff's examination disclosed no deep holes on the crossing. Plaintiff's friends who lived nearby used the crossing almost daily, and even drove over it and back again on May 10, 1952, without difficulty, but they noticed that it was rough, with a fall-away at the rails about as deep as the rails. Plaintiff's brother, who owned adjacent land and used the crossing regularly, testified that the fall-away from the rails was 6 or 8 inches, or maybe as much as 10 inches. In that connection, however, photographs of the crossing and rails, taken from different directions right after the accident, together with enlargements of some of them, appear in the record. Contrary to plaintiff's contention, they do not disclose any deep pits or holes on the crossing, but only verify the testimony of the patrolman and sheriff heretofore recited. Consequently, the condition of the crossing itself could not be reasonably said to have caused plaintiff's car to stall thereon. To hold otherwise would be entirely speculative.

We find no competent evidence from which it could be reasonably concluded that defendant engineer was negligent in the operation of the train, which could make the doctrine of respondeat superior applicable. Thus, we are required to determine whether or not there was any competent evidence that defendant railroad company was negligent in any manner, which proximately caused the accident and injuries to plaintiff and the death of his wife. In that connection, we may assume for purposes of argument only that defendant railroad company failed to properly maintain and repair the crossing, yet conclude that the contributory negligence of plaintiff himself and his wife barred any recovery as a matter of law. The crossing itself was no more than a condition and not a cause of the accident and death.

Further, contrary to plaintiff's contention, and in the light of the foregoing evidence, plaintiff and his wife were not entitled to the benefit of the emergency rule,

nor to the doctrine of last clear chance, nor to the rule that they exposed themselves to danger in a reasonable effort to save a third person or his chattels from harm, nor to the rule that the instinct of self-preservation and disposition of men to avoid personal harm may, in the absence of evidence, raise the presumption that a person killed or injured was in the exercise of ordinary care. The following authorities respectively so dispose of plaintiff's contention: Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491; Carter v. Zdan, 151 Neb. 185, 36 N. W. 2d 781; Wolfinger v. Shaw, 138 Neb. 229, 292 N. W. 731; Peake v Omaha Cold Storage Co., 158 Neb. 676, 64 N. W. 2d 470.

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

AFFIRMED.

LARRY BEAR, BY LAWRENCE F. BEAR, HIS FATHER AND NEXT FRIEND, APPELLEE, V. ROY ALBERT AUGUY, APPELLEE, IMPLEADED WITH CHECKER CAB COMPANY, APPELLANT.
83 N. W. 2d 559

Filed June 7, 1957. No. 34123.

1. **Trial.** A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence.** Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which it would not have occurred.
3. ———. A traveler on a highway is required to exercise reasonable care for the safety of others thereon.
4. ———. What is reasonable care does not permit of definitive

statement applicable to all cases but the presence or absence of reasonable care must be determined by the facts and circumstances of each case.

5. **Automobiles: Negligence.** 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.

6. ———: ———. The law requires a driver of a motor vehicle to have his car under such reasonable control as will enable him to avoid a collision with other vehicles, assuming that the drivers thereof will exercise due care.

7. ———: ———. The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance.

8. **Municipal Corporations: Negligence.** The violation of city ordinances or statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se, but evidence of negligence, which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby, and where the evidence is such that reasonable minds may draw different conclusions therefrom, the question of negligence is for the jury.

9. **Negligence: Trial.** Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury.

10. **Infants: Negligence.** Whether or not a minor between 14 and 15 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law.

11. ———: ———. The degree of care required of a minor is that which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation.

12. **Trial: Appeal and Error.** Where the excessive amount in a judgment is subject to exact determination, a remittitur may be required as a condition of affirmance for the correct amount.

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

Gross, Welch, Vinardi & Kauffman, for appellant.

Lyle Q. Hills, for appellee Bear.

Abrahams & Kaslow, for appellee Auguy.

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

MESSMORE, J.

The plaintiff brought this action by his father as next friend in the district court for Douglas County against Roy Albert Auguy and Checker Cab Company, defendants, to recover damages for personal injuries sustained by Larry Bear as a result of a collision between a motor bicycle he was riding and a taxicab owned by the defendant Checker Cab Company and driven by one of its employees. Defendant Roy Albert Auguy was made a defendant on the theory that he was the owner of a dog allegedly chasing Larry Bear at the time of the accident. The case was tried to a jury resulting in a verdict in favor of the defendant Roy Albert Auguy and the plaintiff, and against the defendant Checker Cab Company on two causes of action, fixing the amount of recovery on the plaintiff's first cause of action in the sum of $5,000 and on the second cause of action in the sum of $2,500. Judgment was entered on the verdict. The defendant Checker Cab Company filed a motion for judgment notwithstanding the verdict or, in the alternative, motion for a new trial on both causes of action, and for remittitur in the amount of $1,355.90 on the second cause of action. The motion for judgment notwithstanding the verdict was overruled and the plaintiff was ordered to remit $1,355.90 on the second cause of action. The remittitur was made by the plaintiff, and thereupon the motion for a new trial as to the plaintiff's second cause of action was overruled. From the orders overruling

the motion for judgment notwithstanding the verdict and motion for new trial, the defendant Checker Cab Company appealed. The plaintiff cross-appealed from the order of the trial court requiring him to file a remittitur.

For convenience we will refer to the parties as designated in the district court, to the plaintiff on occasions as Larry; to one of the plaintiff's witnesses, Leroy Christensen, as Leroy; and to the taxicab here involved as the cab.

The plaintiff's petition charged the defendant, whose employee was driving its cab, with negligence that constituted the proximate cause of the injuries sustained by Larry Bear as follows: (1) In failing to swerve or to stop his cab in time to avert a collision; (2) in driving at a speed in excess of what was reasonable and prudent under the conditions then existing; and (3) in failing to observe the plaintiff when he saw or in the exercise of ordinary care should have seen the plaintiff in time to have averted a collision.

In the second cause of action the plaintiff alleged that his father was required to expend money for medical and hospital expenses in order to attempt to cure him of injuries, and will in the future be required to go to further expense for the same; and that the father had assigned his claims for all such expenses to the plaintiff. The plaintiff asked for judgment on this cause of action in the amount of his father's loss and future medical and hospital expenses which will be necessary in order to attempt to cure the plaintiff's disability.

For answer to the plaintiff's petition the defendant Checker Cab Company denied all of the allegations contained therein which were not specifically admitted; admitted there was a collision between one of its cabs and a motor bicycle which was operated by the plaintiff; alleged that if the plaintiff suffered any injuries or damages as a result of such collision such injuries and damages were proximately caused by reason of the con-

tributory negligence of the plaintiff; and alleged that the plaintiff's negligence on such occasion was more than slight. The defendant prayed that the petition of the plaintiff be dismissed.

For reply to the answer of the defendant Checker Cab Company the plaintiff denied all allegations contained therein which were not admissions of the plaintiff's petition.

The defendant Checker Cab Company assigns as error the overruling of its motion made at the conclusion of the plaintiff's case for a directed verdict, and the overruling of the defendant's motion for directed verdict made at the conclusion of all of the evidence; that the trial court erred in failing to hold that the plaintiff was guilty of contributory negligence as a matter of law; and that the trial court erred in overruling the defendant's motion to set aside the verdict. No error is predicated on the instructions given by the trial court.

A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. 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. See Colvin v. Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900.

Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury. See, Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462; Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

The record discloses that I Street in South Omaha runs east and west and Twenty-third Street runs north and south. At the intersection, Twenty-third Street is

32 feet from curb to curb and I Street is likewise 32 feet from curb to curb. At the time of the accident there was a stop sign on I Street requiring traffic to stop before entering the intersection. Twenty-third Street was a favored street, and there was no stop sign requiring traffic to stop before entering the intersection. The stop sign referred to is located on the northeast corner of the intersection, 19 feet 8 inches east of the east curb of Twenty-third Street. There was a street light located on the northeast corner of the intersection, and the light was turned on at the time of the accident. The accident happened at approximately 9 p.m., on May 18, 1952. The weather was clear, it was dark, and the pavement was dry.

The plaintiff, Larry Bear, testified that on May 18, 1952, he was 14 years of age. He was a freshman at South High School. He participated in freshman football and was interested in all types of athletics. After 7 p.m., May 18, 1952, he went to the home of Leroy Christensen who had a motor bicycle, and the two of them decided to go for a ride. Larry did not have a motor bicycle but knew a friend who had one. He and Leroy went to the friend's home and Larry borrowed the motor bicycle and they both went riding around the neighborhood and through city parks. Larry testified further that he was having trouble with the motor bicycle and was unable to detect what was wrong with it. The motor was cutting out and not running as it should. He decided to take the machine to a filling station located at Twenty-fourth and I Streets, and told Leroy what he was going to do. There was an understanding that they would meet at the filling station. In taking this course, going west on I Street and approaching the alley between Twenty-second and Twenty-third Streets, he heard a noise and looked down and saw a big black dog which he described as a German shepherd. This dog was right at the back wheel of the motor bicycle and was trying to grab his leg. At

one time the dog did get hold of his trouser cuff, but Larry pulled away. He testified that he was "scared to death." The dog continued to pursue him, barking and snapping at his leg. Larry was wearing strollers which gave no protection to his legs. He further testified that as he approached the intersection of Twenty-third and I Streets the dog continued to follow him. As he passed the stop sign and got to the corner he glanced down, the dog was still there, and it chased him into the intersection. As he entered the intersection he glanced up the street and saw a car 60 to 80 feet from the intersection. He glanced again momentarily and saw another car passing the first car he had seen. When he was in the intersection he felt himself being hurled through the air. He felt a tremendous jolt as he landed on the west parking along Twenty-third Street. He was conscious, but dazed, and was taken to a hospital by a rescue squad.

On cross-examination Larry testified that the alley between Twenty-second and Twenty-third Streets runs north and south, and the dog was about 10 feet west of the alley. After he passed the stop sign he saw the dog, but he did not see it after he entered the intersection. It would take 2 or 3 seconds to cover the distance from where he first saw the dog to the intersection, which was approximately 110 feet. That was the length of time he observed the dog. When he was 10 feet from the intersection he looked north for the first time. He was traveling 15 miles an hour and maintained that speed all the way past the stop sign and into the intersection. He believed he swerved the motor bicycle to the left after he got into the intersection. The dog got hold of his pants cuff when he was at the street light. He pulled back, and that swayed the motor bicycle. He was endeavoring to avoid the dog. It made another pass at his leg after he entered the intersection. He believed he would be able to escape the dog without having a collision with the car that he saw. When

he looked to the north he saw a second pair of headlights coming south in his direction. These headlights were south of the first pair of headlights, and continued south. That was the car that came in contact with his motor bicycle.

Leroy Christensen, in his testimony, related the facts as testified to by Larry with reference to procuring the motor bicycle, taking a ride, and agreeing to meet at the filling station. He testified that as he approached Twenty-third and I Streets he could see to the east and saw Larry coming up the street about a block away. He could see him under the street light at Twenty-second and I Streets. At that time Leroy was on the west side of Twenty-third Street, on I Street, facing east. Larry was coming from Twenty-second Street at a rate of speed of 15 miles an hour. As Larry came toward Leroy, Leroy heard a dog barking. That was when Larry's motor bicycle was between Twenty-second and Twenty-third Streets. Leroy kept watching the motor bicycle, and as it approached the intersection and arrived at the stop sign, the street light was shining and he could see the dog. It was a German police dog. He estimated it to be 26 inches tall. The dog was to the right of the motor bicycle and a little to the rear, keeping up with the motor bicycle. At that time Leroy saw a car coming from the north, about 120 feet north of the intersection. He testified that he was at an angle and could see both Larry and the car. He saw another car pass the first car. When the second car was passing the first car, both cars were about 100 feet north of the intersection, or about even with the second house north on the west side of Twenty-third Street. Larry was just by the stop sign, about to enter the intersection. At that time the car nearest the intersection was about 80 or 85 feet north of it. He continued to watch this car until the time of the collision. The car did not swerve, but continued on straight down the street and collided with the motor bicycle Larry was riding. The

motor bicycle was more than half way across the intersection. The car was halfway into the intersection. The front end of this car struck the motor bicycle. The collision occurred under the street light and Leroy saw that a cab was involved. Larry was thrown into the air to the south and fell on the parking in front of the first house on the southwest corner of the intersection. The cab proceeded on down the street and stopped in front of the third house south of the intersection. The motor bicycle was lying alongside the curb a little south of where Larry was lying. The cab was going 40 or 45 miles an hour at the time of the impact. He heard no sound of a horn.

Sebastian Breci, a witness for the defendant, testified that on the evening of the accident he and his wife were traveling in their car on their own side of the street, followed by a Checker cab. When he was about a quarter of a block beyond H Street, the cab passed their car. It was going at a speed of 25 or 30 miles an hour. After the cab had passed their car it proceeded into its own lane down to the corner of Twenty-third and I Streets. This witness's car was traveling 20 miles an hour. This witness further testified that he saw a boy approaching the intersection when his car was 60 to 80 feet from the intersection. The boy was on a motor bicycle and was near the telephone pole under the street light on the corner. He estimated the speed of the motor bicycle to be 20 to 25 miles an hour. The cab struck the motor bicycle when it was right in the center of the intersection. The motor bicycle had traveled about 20 feet from the time he first saw the boy. He stopped his car 5 to 10 feet behind the cab. The cab was about 10 feet past the intersection. He backed his car up, went around the cab, and parked 90 feet farther down the street. He got out of his car and saw the boy lying between the curb and the sidewalk. Most of the witnesses testified that Larry was lying on the parking in front of the first house on the southwest corner of the

intersection. He further testified that he first saw the boy when he came beneath the light which is located on the northeast corner of the intersection of Twenty-third and I Streets. He saw no dog, nor did he hear a dog bark. He was able to see the boy as he was thrown through the air.

The driver of the Checker cab involved in the accident testified that the cab he was driving was a 1951 Plymouth four-door sedan. He was proceeding south on Twenty-third Street and passed a car in front of him after he had driven through the intersection of Twenty-third and H Streets. This car was going 20 to 25 miles an hour and he passed it at a rate of speed of 25 to 30 miles an hour. As he approached the intersection of Twenty-third and I Streets he glanced to the left and saw a "moving object which was more or less a flash," and then there was a collision. He further testified that he was about the length of the cab from the intersection when he first saw the flash. When the collision took place, the boy on the motor bicycle was thrown into the air from the impact, came down between the hood and fender of the cab, and rode in that position. This witness further testified that he stepped on the brakes momentarily, and when the boy came down on the cab he relaxed the brakes because if he applied them hard it would throw the boy to the pavement. He then coasted the cab until he got to the side of the curb, and the boy sort of "lunged" off the cab. The cab continued to coast south about 20 feet and was brought to a stop a distance of 90 to 100 feet south of the intersection. The front of the cab, when it came in contact with the boy, was approximately 8 feet beyond the north curbline of I Street and around 8 feet from the west curbline of Twenty-third Street.

On cross-examination this witness testified that the cab was equipped with excellent brakes; that he slowed down to 15 or 20 miles an hour after passing the other car; that he could stop the cab within a distance of 30

feet at the speed he was going; that the left window of the cab was down; and that his vision was unobstructed as he approached the intersection. He stated that he heard a dog bark, but he did not see the dog. The boy was in the intersection when he first saw him. He was not relying on the boy stopping at the stop sign, because the boy was already in the intersection. The cab at that time was 15 to 18 feet north of the intersection. The cab proceeded a distance of 150 feet before it came to a stop, and was not clear into the intersection at the time of the impact. The impact carried the boy 24 feet across the intersection and about 50 feet south of the intersection before the boy was thrown onto the parking. The motor bicycle still rested on the cab and was carried a distance of 20 feet farther south.

There is also evidence that there was a slight upgrade on I Street approaching the intersection of Twenty-third Street, and leveling off at the intersection. The speed limit at the scene of the accident was 25 miles an hour. There was a seal-beam light at the center of the handlebars of the motor bicycle Larry was riding, which was turned on.

There is evidence that there are a number of dogs in the neighborhood and several large black dogs. Just which dog was involved in this accident is not clearly shown by the record.

Before determining the assignments of error, we set forth certain rules of law applicable to this case.

Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which it would not have occurred. See Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683.

A traveler on a highway is required to exercise reasonable care for the safety of others thereon. See Barney v. Adcock, *supra*.

"What is reasonable care does not permit of definitive statement applicable to all cases but the presence or ab-

sence of reasonable care must be determined by the facts and circumstances of each case." Barney v. Adcock, *supra.*

"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." Davis v. Dennert, *supra.*

The law requires a driver of a motor vehicle to have his car under such reasonable control as will enable him to avoid a collision with other vehicles, assuming that the drivers thereof will exercise due care. Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578.

The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance. See Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250.

The violation of city ordinances or statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se, but evidence of negligence, which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby, and where the evidence is such that reasonable minds may draw different conclusions therefrom, the question of negligence is for the jury. See, Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612; Segebart v. Gregory, 156 Neb. 261, 55 N. W. 2d 678.

The standard of care required of a minor such as the plaintiff at the time of the accident is set forth in Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d

607. The plaintiff was 14 years and nearly 8 months of age at the time of the accident, and cannot be charged with the same degree of caution required of an adult in guarding against possible accidents while traveling upon and crossing a street in a city. There is no arbitrary rule fixing the time at which a child during his minority may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered while engaged in such an activity. Whether or not negligence may be attributed to a minor of the age of the plaintiff is usually a matter for a jury under the circumstances of each case. It is only in an extreme situation where the facts show plainly knowledge and appreciation of the danger that may be incurred, if certain action is had, that a court may decide as a matter of law that a minor of such an age was guilty of negligence, or that his act or omission was the proximate cause of the happening in question. See, Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499; Rule v. Claar Transfer & Storage Co., 102 Neb. 4, 165 N. W. 883; Chicago, B. & Q. R. R. Co. v. Russell, 72 Neb. 114, 100 N. W. 156; Kauffman v. Fundaburg, 123 Neb. 340, 242 N. W. 658; McKinney v. Wintersteen, 122 Neb. 679, 241 N. W. 112; Siedlik v. Schneider, 122 Neb. 763, 241 N. W. 535.

The conduct of the plaintiff as shown by this record should not, his age considered, conclusively bar his right of recovery, conceding that he was a bright and intelligent boy, had lived in Omaha, was acquainted with the use of bicycles as most boys of his age are, and was familiar with the operation of motor bicycles having ridden thereon with other boys although this was the first occasion upon which he had operated one.

What is required of a minor is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. Smith v. Smith-Peterson Co., 56 Nev. 79, 45 P. 2d 785, 100 A. L. R. 440; Sadlowski v. Meeron, 240 Mich. 306, 215 N. W. 422; Hackert v. Pres-

cott, 165 Minn. 134, 205 N. W. 893; Annotation, 107 A. L. R. 4; Annotation, 174 A. L. R. 1174; Collins v. Weise, 110 Neb. 552, 194 N. W. 450; 65 C. J. S., Negligence, § 146, p. 789; Locklin v. Fisher, 264 App. Div. 452, 36 N. Y. S. 2d 162.

The defendant argues that Johnston v. New Omaha Thomson-Houston Electric Light Co., 78 Neb. 24, 110 N. W. 711, on rehearing, 78 Neb. 27, 113 N. W. 526, 17 L. R. A. N. S. 435, is applicable and in justification of the defendant's contention that the negligence of the plaintiff was more than slight and barred recovery on his part. That case concerned an extreme situation, and the facts considered have no similarity to those of the instant case. That case was decided more than 40 years ago, and has not since been referred to or cited by this court as an authority. In Rule v. Claar Transfer & Storage Co., *supra,* the writer of the opinion considers it an exception to the general rule, and that its doctrine should not be further extended. The same would apply to Bixby v. Ayers, 139 Neb. 652, 298 N. W. 533.

The defendant argues that the plaintiff lived in the neighborhood where there were several dogs, was acquainted with the entire area, and knew the location of the stop sign; that he chose to ride this motor bicycle, which was equipped with dual exhausts and made a loud noise that would naturally attract dogs, at a rate of speed of 15 miles an hour at night; and that the plaintiff first heard the dog at the alley between Twenty-second and Twenty-third Streets and saw the dog 10 feet west of the alley which would be approximately 110 feet east of the intersection, therefore, the plaintiff was aware of the dog's presence for at least 120 feet before he entered the intersection, and the accident occurred slightly more than half way through the intersection. The defendant further argues that Twenty-third Street is 32 feet wide, consequently the total distance traveled by the plaintiff after he was aware of the presence of the dog was at least 136 feet; that accord-

ing to the evidence of an expert, a motor bicycle traveling at 15 miles an hour would travel 22 feet per second; that during this course of travel at least 6 seconds would elapse from the time the dog started chasing the plaintiff and the time of the impact with the Checker cab; that meanwhile the plaintiff passed a stop sign and a crosswalk and made no effort to turn in either direction; that he had observed the lights of approching vehicles, was hoping to cross the intersection ahead of traffic that he knew was approaching, and ignored the stop sign; and that under such circumstances the negligence of the plaintiff was more than slight and should bar recovery on his part.

The evidence adduced by the plaintiff shows that as he approached the corner of Twenty-third and I Streets, the dog was chasing him and he was frightened. As he arrived at the corner he looked down and the dog was still there. He was at all times endeavoring to get away from the dog, but it continued to chase him right up to the intersection, snapping at his leg. As he entered the intersection, he saw a car some distance up the street, and as he got into the intersection he glanced up and saw another car passing the car he had first seen. The second car collided with him. The dog was a large police dog and looked to the plaintiff like a German sheperd. It was about 26 inches tall, and it continued to bark and snap at the plaintiff's leg during the period it was chasing him. We will not repeat, but direct attention to, the evidence of Leroy Christensen heretofore set out wherein he details his version of the facts leading up to the accident and of the accident.

The defendant asserts that there is no evidence to show that the dog was a vicious or dangerous animal; and that it was identified as the Auguy dog which the plaintiff knew and which he testified had never bitten him. Apparently the jury found the evidence insufficient to identify the dog as the Auguy dog. Just which dog was chasing the plaintiff is not clear from the

record, nor do we know if the dog was vicious or dangerous. At any rate, the plaintiff was afraid of the dog and could not anticipate that the dog would not bite him.

In addition, the plaintiff points to the evidence of the defendant's witness Breci who testified that he saw the plaintiff before the plaintiff passed into the intersection. At that time this witness was a quarter of a block north of the intersection. The cab was 15 to 20 feet ahead of him, which would be 55 to 60 feet from the intersection. The driver of the cab did not swerve the cab, but continued in a straight course. Breci attempted to stop his car, and did stop it north of the intersection. An expert witness testified that if the cab was traveling 25 miles an hour, the speed limit in this residential district, the cab could be completely stopped within a distance of 55 or 60 feet. The cab was equipped with brakes more powerful than those used in the ordinary car. The cab driver testified that he could have stopped the cab within a distance of 30 feet; that his windshield was clear; and that there was nothing obstructing his view.

The evidence in the instant case is such that reasonable minds may draw different conclusions therefrom. This being true, the questions of negligence and contributory negligence are for the jury. See, Plumb v. Burnham, *supra;* Gleason v. Baack, 137 Neb. 272, 289 N. W. 349; Anderson v. Robbins Incubator Co., 143 Neb. 40, 8 N. W. 2d 446; Pierson v. Jensen, *supra;* and other authorities previously cited.

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

This brings us to the plaintiff's cross-appeal. The plaintiff contends that the trial court erred in requiring the plaintiff to file a remittitur in the amount of $1,355.90 as against the second cause of action wherein a verdict had been obtained by the plaintiff in the amount of $2,500. We fail to find any evidence to sustain an award exceeding $1,144.10.

The trial court instructed the jury with reference to the plaintiff's second cause of action in substance as follows: For his second cause of action the plaintiff alleged that his father was required to spend money for medical and hospital expense in order to attempt to cure him of his injuries and would in the future be required to go to further expense for the same. Then the plaintiff alleged that the father had assigned his claim for all such expense to the plaintiff. The plaintiff asked for a judgment on the second cause of action in the amount of his father's loss and future medical and hospital expense which would be necessary in order to attempt to cure the plaintiff's disability.

From an analysis of the trial court's instructions, the trial court limited the jury in its consideration of the second cause of action to making an award that would compensate for medical and hospital expenses previously incurred together with prospective expenses shown with reasonable certainty in the evidence. These expenses were shown by the evidence to total $1,144.10.

The plaintiff did not attack the court's instructions and does not seek a new trial. He seeks to avoid the remittitur. The remittitur is required under the evidence.

Where the excessive amount in a judgment is subject to exact determination, a remittitur may be required as a condition of affirmance for the correct amount. See, Colvin v. Powell & Co., *supra;* Moore v. Schank, 148 Neb. 228, 27 N. W. 2d 165; Roby v. Auker, 151 Neb. 421, 37 N. W. 2d 799.

We conclude that the assignment of error raised in the plaintiff's cross-appeal cannot be sustained.

For the reasons given in this opinion, we conclude that the verdict and judgment entered thereon by the trial court should be, and is hereby, affirmed.

AFFIRMED.

EDWARD SCHAFFER, APPELLEE, V. STRAUSS BROTHERS, APPELLANTS.
83 N. W. 2d 543

Filed June 7, 1957. No. 34144.

1. **Appeal and Error.** Under section 25-1919, R. R. S. 1943, and Revised Rules of the Supreme Court, Rule 8 a2(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.
2. **Trial.** In a law action where plaintiff offers evidence and rests and defendant moves for judgment in his favor and, the motion being overruled, defendant proceeds with the trial and introduces evidence in support of the defenses set up in his answer, he thereby waives the right to assign error in the ruling upon the motion.
3. **Attorney and Client.** An attorney's fee here, claimed under section 25-1801, R. S. Supp., 1955, is denied.

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

Healey, Davies, Wilson & Barlow and *Robert E. Johnson, Jr.*, for appellants.

Albert S. Johnston, for appellee.

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

SIMMONS, C. J.

This is an action on an oral contract seeking to recover a balance alleged to be due the plaintiff for services as a foreman rendered the defendants, who were large-scale residence builders. Issues were made. Trial was had to the court. Plaintiff recovered a judgment. Defendants appeal.

We affirm the judgment of the trial court.

Plaintiff alleged that on or about September 1, 1951, he entered into a contract with defendants whereby he was employed as a foreman by defendants and that defendants agreed to pay him wages on the then current basis and, in addition thereto, defendants agreed to

pay the plaintiff the sum of $20 "referred to as a bonus," for the completion of the cement work on each residential unit constructed by defendants. He alleged the performance of his contract on 287 residential units; that he had been paid the $20 per unit for 216 units; and that he had not been paid for the remaining 71 units. He prayed judgment for $1,420, together with interest, costs, and attorney's fees.

The defendants demurred to the petition for the reason that it did not state a cause of action. The demurrer was overruled.

Defendants answered and admitted a contract of employment and expressly denied the allegation as to the $20 per unit payment. They admitted the completion of 287 residential units on or before July 1, 1953. They alleged that the contract of employment called for the payment of $20 per completed unit payable on or about Christmas time "to the then employed foremen who faithfully performed their duties throughout the year." They alleged a payment to plaintiff of $1,400 on July 11, 1953, which was an advance on the amount "of bonus" to be due at Christmas of 1953. They further alleged that prior to Christmas of 1953, plaintiff wrongfully abandoned his employment to their damage in the sum of $3,359.42.

They prayed for a denial of plaintiff's petition and for judgment of $1,400 and $3,359.42.

At the opening of the trial the defendants abandoned their claim for damages for the breach of the contract.

The trial court found for the plaintiff on his cause of action, denied recovery of the $1,400 on defendants' cross-petition, and denied attorney's fees to the plaintiff.

Defendants do not here assign error in the denial of their cross-petition. Nor does plaintiff assign error by cross-appeal as to the denial of attorney's fees in the trial court, although he asks for an allowance of attorney's fees in this court.

Defendants' assignments of error are:

"1. The Court erred in failing to sustain the demurrer of defendant to the petition of the plaintiff.

"2. The Court erred in failing to sustain the demurrer of defendant to the plaintiff's evidence.

"3. The decree of the Trial Court is contrary to the evidence.

"4. The Court erred in sustaining plaintiff's objection to testimony by one of the parties to the agreement as to the general understanding of the terms of the contract."

The established rule is: "Under section 25-1919, R. S. 1943, and Revised Rules of the Supreme Court, Rule 8 a2(4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned." Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482. See, also, Okuda v. Hampton, 154 Neb. 886, 50 N. W. 2d 108; Trute v. Skeede, 162 Neb. 266, 75 N. W. 2d 672.

Defendants in their brief here do not discuss directly any of their assignments of error. They state three propositions of law which reduced down consist of the contention that a promise to pay a bonus must be based on a sufficient consideration; that such an agreement must have a definite time for payment or it is void for lack of consideration; and that to be enforceable nothing must be left open to future negotiations.

Defendants argue their propositions of law, making incidental reference to the pleadings and the evidence.

The question presented in the fourth assignment of error is not mentioned in the argument. No further attention will be given to it here.

The argument does not set out any basis for the contention that the petition failed to state a cause of action and hence was subject to demurrer for that reason. We see no reason for searching for possible defects that are not patent and not pointed out.

At the close of plaintiff's case-in-chief, defendants demurred to the evidence for failure of proof of the alle-

gations of the petition or a cause of action. The motion was overruled. Defendants then offered evidence. The defendants assign error for failure to sustain the demurrer to the evidence. The motion was equivalent to a motion for judgment for defendants.

The applicable rule is that in a law action where plaintiff offers evidence and rests and defendant moves for judgment in his favor and, the motion being overruled, defendant proceeds with the trial and introduces evidence in support of the defenses set up in his answer, he thereby waives the right to assign error in the ruling upon the motion. Bradstreet v. Grand Island Banking Co., 89 Neb. 590, 131 N. W. 956; Russell v. Electric Garage Co., 90 Neb. 719, 134 N. W. 253. The alleged error assigned is not sustained.

This brings us to the assignment that the judgment of the trial court is contrary to the evidence.

The evidence fully supports a finding as follows: Sometime in 1949 plaintiff went to work for the defendants at the agreed compensation of $2 per hour. About March 1, 1951, the compensation base was changed to a weekly wage of $88 a week and in addition $20 for each house completed to be paid to each foreman, including the plaintiff. A series of 118 houses was constructed under that compensation base, and payments were made of the weekly wage and the added compensation. Although the added compensation was referred to in the pleadings and the evidence as a bonus, it is patent that it was an integral part of the contract compensation.

About March 1, 1952, the weekly wage element of the compensation was changed to $100 a week. The $20 element remained unchanged. While that agreement was in full force and effect, a series of 287 units was completed. Plaintiff was paid his weekly wage and $20 for 216 units. He was not paid for the remaining 71 units.

In July 1953 defendants put a new wage scale into effect whereby its foremen, including plaintiff, were to be paid $125 a week and a share of the profits. Plaintiff

worked under that agreement until October 1953, when he quit his employment. Defendants were not pleased by his sudden termination of the employment and refused to pay the $20 per unit on the 71 houses completed prior to July 1, 1953.

Plaintiff's evidence is that the $20 was payable when each unit was completed. Defendants' answer admits that the 287 units were completed on or before July 1, 1953.

A defendant testified that the oral contract was that the foremen were to be paid $20 per unit at Christmas time provided they had done their work efficiently and in cooperation with the others. No complaint is made on that score.

Defendants' records, however, show that the foremen, including plaintiff, were paid part or all of the $20 per unit on request from time to time throughout the year.

This action was not commenced until March 1955, so that in any event the plaintiff's payment claimed was due and payable when this action was brought. A defendant, in explaining his refusal to pay the amount claimed, said that payment was refused because plaintiff had not shown "due consideration" for the job and that it was a part of the "intent" of the plan to have the job run smoothly through the year and "not quit in the middle of any job."

Obviously that "intent" was not expressed in the contract terms but is an afterthought. Just as obviously plaintiff did not quit in the middle of any job he was doing under the wage contract here involved.

The judgment of the trial court is amply sustained by the evidence.

Plaintiff claims an attorney's fee should be allowed here under the provisions of section 25-1801, R. S. Supp., 1955. He claims he pleaded 71 causes of action in the amount of $20 each. Obviously he did not. The request is denied.

AFFIRMED.

RAYMOND D. HAGGARD, APPELLEE, V. RALPH E. MISKO ET AL., APPELLEES, IMPLEADED WITH ROBERT KEEFE ET AL., APPELLANTS.
83 N. W. 2d 483

Filed June 7, 1957. No. 34149.

1. **Elections.** A statute conferring a right to vote upon absentee and disabled voters will be strictly construed, its provisions being mandatory as to a voter desiring to exercise such right.
2. ———. Statutory provisions regulating the conduct of elections are directory only when they are not essential to a fair election and they are not made mandatory by the statute itself.
3. ———. Irregularities by a city clerk in not keeping a poll book of disabled voters in the form provided by law does not deprive an elector of the right to have his vote counted where he has complied with all mandatory provisions of the statute applicable to him.
4. ———. The posting of a notice of the convening of a canvassing board is directory, and the failure to do so does not invalidate the votes of absentee and disabled voters.
5. ———. Irregularities of a canvassing board in conducting a canvass of votes cast at an election will not invalidate the votes of electors otherwise valid where there is no fraud and proper effect can be given to them.

APPEAL from the district court for York County: H. EMERSON KOKJER, JUDGE. *Reversed and remanded with directions.*

Roderick R. Perry and *Herman Ginsburg,* for appellants.

Gerald F. Beaver, for appellee Haggard.

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

CARTER, J.

This is an election contest to determine the validity of a bond election held by the school district of the City of York, Nebraska. The trial court found that there were 14 illegal ballots cast, that one mail ballot cast was not in accordance with law, and that the remaining 38 absentee and disabled voters' ballots were

invalid and should be rejected because of irregularities in the conduct of the election. These findings resulted in a decree to the effect that the bond election failed to receive the required vote and that the proposed bond issue should be declared lost. Three contestees and one elector whose ballot was rejected have appealed.

On May 16, 1956, the school district held an election to secure authorization for the issuance of bonds in the amount of $575,000 for the purpose of purchasing a site and constructing and furnishing additional school buildings for the district, and to authorize a special levy of taxes for the payment of such bonds. The board of education of the district, sitting as an election canvassing board, found and declared that 1,603 ballots had been cast for the proposition and that 1,305 ballots had been cast against it. The board thereupon declared the election had carried by 55 percent of the legal votes cast at the election, as required by section 10-702, R. R. S. 1943.

The appellee Haggard instituted a contest of the election under section 32-1001, R. R. S. 1943, the statutory grounds therein relied upon being as follows: "(5) when illegal votes have been received or legal votes rejected at the polls sufficient to change the result; (6) for any error in any board of canvassers in counting the votes, or in declaring the result of the election if the error would change the result; * * *."

The finding of the trial court that there were 14 illegal votes cast, 6 of which were cast for and 8 against the bond issue, is not questioned by this appeal. This has the effect of reducing the number of votes admittedly legal which were cast for the bond issue by 6 and those cast against it by 8. In view of the fact that the one mail ballot cast cannot change the result of the election, we shall not review the trial court's finding that it should be rejected. The only issue remaining is whether or not the trial court properly rejected the remaining 38 absentee and disabled voters' ballots. The record shows that of these 38 ballots, 32 voted for the

bond issue and 6 voted against it. If the absentee and disabled voters' ballots were properly rejected, the election failed of the required majority. If such votes were entitled to be counted, the election carried by the required majority.

Of the remaining 38 absentee and disabled voters' ballots, 11 were cast by disabled voters and 27 by voters who appeared in person and cast their ballots in the presence of the city clerk. As to the 11 disabled voters, the record shows that each disabled voter appointed an agent who appeared before the city clerk and procured an application, the identification envelope, and a ballot. The agent took the ballot to the disabled voter's home where it was voted in the presence of the agent without his being able to see how it was marked. The ballot was placed in the envelope, sealed, signed, and notorized. The ballot was then returned to the city clerk by the agent. All disabled voters' ballots were handled in substantially the same manner. No objection appears to have been made by the contestant to this manner of handling. The 27 absentee ballots cast in person were handled in the following manner: The voter appeared personally at the office of the city clerk, made application for an absentee ballot, voted in the presence of the city clerk, caused the ballot to be sealed in the proper envelope, and signed it and swore to it before the city clerk. Contestant does not appear to object to this method of handling.

The primary question is whether or not the failure of the city clerk and the school board to comply with statutory requirements in the handling of the 38 absentee and disabled voters' ballots has the effect of invalidating such ballots. It is contended that the city clerk failed to enter the names of absentee and disabled voters, together with their post-office addresses, residences, and voting precincts, in a poll book as required by section 32-807, R. R. S. 1943. It is contended also that the city clerk failed to give the 48-hour notice of the time

the school board would sit as a canvassing board to canvass absentee and disabled voters' ballots, as required by section 32-814, R. R. S. 1943. Many similar contentions are advanced as to claimed irregularities in conduct of the city clerk and the school board in the canvassing of the ballots, the certification of poll books, the custody of ballots cast, and the like. All are controlled by the same rules of law and will be considered together. We shall not determine whether or not all the statutes cited apply to a school bond election. We shall assume solely for the purpose of this case that they do.

The evidence shows that the city clerk made up a list of all absentee and disabled voters and gave written notice thereof to each election board. There is no contention that any fraud existed. It is not disputed that the city clerk failed to post the 48-hour notice required by section 32-814, R. R. S. 1943; nor is it disputed that the school board met on the evening of election day and counted the absentee and disabled voters' ballots. The evidence shows further that the school board convened on May 21, 1956, and canvassed the vote without a notice having been posted.

The right of absentee and disabled voters to cast their ballots at an election is purely statutory. A statute conferring such a right will be strictly construed and its provisions are mandatory as to a voter desiring to exercise such right. McMaster v. Wilkinson, 145 Neb. 39, 15 N. W. 2d 348, 155 A. L. R. 667; Miller v. Mersch, 152 Neb. 746, 42 N. W. 2d 652.

The provisions of statutes which affect the mode and manner of conducting the details of an election are directory only and not mandatory, and a departure from the prescribed method will not vitiate the ballot of a voter who has complied with the mandatory provisions of the statute applicable to him. State ex rel. School Dist. No. 2 v. Marsh, 108 Neb. 749, 189 N. W. 283; Wheelock v. Haney, 138 Neb. 547, 293 N. W. 418; McMaster v. Wilkinson, *supra*.

In order to give effect to the will of the majority and to avoid the disfranchising of legal voters, the courts have uniformly held statutory provisions regulating the conduct of elections to be formal and directory when they are not essential to a fair election, unless such provisions are made mandatory by the statute itself. The rules provided by statute for the conduct of elections are designed to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain the results with certainty. State ex rel. Waggoner v. Russell, 34 Neb. 116, 51 N. W. 465, 15 L. R. A. 740, 33 Am. S. R. 625. It is not the policy of the law to disfranchise voters who have complied with the mandatory provisions of the law because of the mistakes, negligence, or misconduct of election officials. It is firmly established in our law that votes will not be rejected where election officials have failed to comply with the directory provisions of the election laws, if there is no fraud. The rule is summarized in 18 Am. Jur., Elections, § 225, p. 332, as follows: "It may, therefore, be stated as a general rule that if ballots are cast by voters who are, at the time, qualified to cast them and who have done all on their part that the law requires of voters to make their voting effective, an erroneous or even unlawful handling of the ballots by the election officers charged with such responsibility will not be held to disfranchise such voters by throwing out their votes on account of erroneous procedure had solely by the election officers, provided the votes are legal votes in their inception and are still capable of being given proper effect as such."

The 38 absentee and disabled voters whose ballots are here questioned were legal voters of the district. They have complied with the mandatory provisions of the statute in the exercise of their right to vote. They have committed no fraud nor any other wrongful act. Their right to vote under such circumstances cannot be defeated by the mistakes of election officials, nor by the

latters' disregard for the directory provisions of the election laws.

The record shows that at least 32 of the absentee and disabled voters' ballots were cast in favor of the bond issue and that no more than 6 ballots were cast against it. We conclude, therefore, that, after deducting the 14 invalid ballots and the one rejected vote by mail, the final result is 1,596 votes for and 1,297 votes against the bond issue. Since the vote for the bonds was in excess of 55 percent of the total vote cast at the election, the proposition carried in the manner required by law.

The trial court was in error in not so finding. The judgment of the district court is reversed and the cause remanded with directions to enter a judgment finding that the election was valid and that the bond issue carried by the majority vote required by law.

REVERSED AND REMANDED WITH DIRECTIONS.

NATIONAL REEFER SERVICE, INC., APPELLANT, V. SOL FELMAN, APPELLEE.
83 N. W. 2d 547

Filed June 7, 1957. No. 34157.

1. **Attachment.** An attachment affidavit setting forth the nature of the plaintiff's claim, that the claim is just, the amount which the affiant believes the plaintiff ought to recover, and the existence of one or more statutory grounds for the writ in the language of the statute is sufficient as a basis for the issuance of the writ.
2. ———. Where an attachment is predicated on two or more claims one or more of which does not properly provide the basis for attachment, the defendant on motion is entitled to have the entire attachment dissolved.
3. ———. In a case where the facts stated in an affidavit for attachment are denied on a motion to dissolve, the burden is cast upon the plaintiff to sustain the charges contained in the affidavit by proof.
4. ———. Affidavits used at the hearing of a motion to dissolve an attachment will not be considered in this court on appeal

unless preserved in a bill of exceptions.

5. ———. An attachment may not be dissolved on the ground alone that the debt is not due at the time the action is started. If the plaintiff is entitled to prosecute the case to final judgment, he is entitled to the security afforded by the attachment in the absence of any other ground for dissolution.
6. **Indemnity.** An indemnitee may proceed against his indemnitor by an action ex contractu on the contract of indemnity.
7. **Attachment.** An action for damages for the breach of the terms of an agreement is an action on the contract within the meaning of section 25-1001, R. R. S. 1943.
8. ———. The merits of a cause of action will not be adjudicated on a motion to dissolve an attachment.

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

Fitzgerald, Hamer, Brown & Leahy, Daniel J. Monen, Jr., and *James L. Koley,* for appellant.

Viren, Emmert, Hilmes & Gunderson and *Frank L. Morrison,* for appellee.

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

YEAGER, J.

This is an action by National Reefer Service, Inc., plaintiff and appellant, against Sol Felman, defendant and appellee, to recover from the defendant separate amounts of $593.49 and $600, the total of which is $1,193.49, claimed to be due plaintiff pursuant to the terms of a brokerage agreement entered into on June 22, 1956. After the petition was filed the plaintiff filed an affidavit for attachment. The ground for attachment was that the defendant was a nonresident of the State of Nebraska. An order of attachment was issued which was levied on an International tractor belonging to the defendant.

After the order was levied the defendant filed a motion to dissolve the attachment. After hearing the attachment was dissolved. From the order dissolving the attachment the plaintiff has appealed. Two assignments

of error are presented as grounds for reversal. The first is that the order dissolving the attachment was not sustained by sufficient evidence. The second is that the order was contrary to law.

The grounds for dissolution of the attachment set forth in the motion are numerous. By the motion however it is not contended that the defendant is not a nonresident of the State of Nebraska. It is tacitly admitted that he is a nonresident.

The first ground is that the affidavit filed by the plaintiff was not sufficient to sustain the attachment. It is assumed that by the specification the defendant meant to say that no ground for attachment was sufficiently alleged.

The contention may not be sustained. The determination of whether or not an affidavit for attachment is sufficient depends upon whether or not there has been a compliance with the requirements of section 25-1002, R. R. S. 1943. The requirements are that it shall contain the nature of the claim, a declaration that the claim is just, the amount of the claim, and a declaration of the existence of some one of the grounds of attachment enumerated in section 25-1001, R. R. S. 1943. The affidavit fully complied with all of these requirements. One of the grounds enumerated in section 25-1001, R. R. S. 1943, is nonresidence of the defendant.

In McDonald v. Marquardt, 52 Neb. 820, 73 N. W. 288, it is said: "An attachment affidavit setting forth the nature of the plaintiff's claim, that it is just, the amount which the affiant believes plaintiff ought to recover, and the existence of one or more statutory grounds for the writ in the language of the Code of Civil Procedure is sufficient." See, also, Ellison v. Tallon, 2 Neb. 14; Tallon v. Ellison & Sons, 3 Neb. 63; Hilton v. Ross, 9 Neb. 406, 2 N. W. 862; Steele v. Dodd, 14 Neb. 496, 16 N. W. 909; Burnham v. Ramge, 47 Neb. 175, 66 N. W. 277.

The second ground is that the attachment was based

on two claims on at least one of which attachment could not be based. The substance of this contention is that one of the claims sounded in tort and that this being true it could not provide a basis or foundation for attachment. The rule which it is contended is applicable is that, where an attachment is predicated on two or more claims one or more of which does not properly provide the basis for attachment, the defendant becomes entitled to have the entire attachment dissolved.

The rule as such is one which is recognized by the decisions of this court. See, Mayer & Schurmann v. Zingre, 18 Neb. 458, 25 N. W. 727; Meyer v. Evans, 27 Neb. 367, 43 N. W. 109. The question therefore is that of whether or not this case falls within the purview of the rule.

As pointed out the ground for attachment is that the defendant is a nonresident of the State of Nebraska. Section 25-1001, R. R. S. 1943, contains the following provision: "An attachment shall not be granted on the ground that the defendant is * * * a nonresident of this state, for any claim other than a debt or demand arising upon contract, judgment or decree, unless the plaintiff shall have been a bona fide resident of this state for at least six months preceding the filing of the petition."

The plaintiff has not stated the length of its residence in this state, so reasonably the question to be considered is only that of whether or not the two claims are for debts or demands arising upon contract. There is no basis for consideration of whether or not they arise out of the judgment or decree.

The burden devolved upon the plaintiff to prove that the claims arose out of contract. The rule is as follows: "Where the facts stated in an affidavit for an attachment are denied on a motion to dissolve, the burden is cast upon the plaintiff to sustain his charges by proof." Geneva Nat. Bank v. Bailor, 48 Neb. 866, 67 N. W. 865. See, also, Steele v. Dodd, *supra;* Olds Wagon Co. v. Bene-

dict, 25 Neb. 372, 41 N. W. 254, on rehearing, 27 Neb. 344, 43 N. W. 108; Malcolm Savings Bank v. Cronin, on motion for rehearing, 80 Neb. 231, 116 N. W. 150.

The facts stated in the affidavit were denied by the motion to dissolve the attachment and it is clear, since there is a bill of exceptions, that a hearing was had on the motion pursuant to which the attachment was dissolved.

On the record which this court is permitted to examine on review it must be said that the plaintiff has sustained its burden. This is so since the bill of exceptions contains only evidence adduced by plaintiff and none by the defendant. The hearing was on affidavits. Three affidavits were adduced in evidence on behalf of the plaintiff all of which appear in the bill of exceptions. None on behalf of the defendant so appear. The three taken alone sustain the contention of the plaintiff.

It is true that affidavits on behalf of defendant were submitted in the case to the district court but they may avail nothing in this court. In Olds Wagon Co. v. Benedict, *supra,* it was said: "Affidavits used at the hearing of a motion to dissolve an attachment will not be considered in this court on error, unless preserved by a bill of exceptions." See, also, Tessier v. Crowley, 16 Neb. 369, 20 N. W. 264, on rehearing, 17 Neb. 207, 22 N. W. 422. Therefore the second ground of the motion must in this court be resolved against the defendant.

The third ground advanced for dissolution of the attachment must be resolved against the defendant for the same reason as the second since it also depends upon the sufficiency of the record in support of the right to attachment.

By the fourth ground in substance the theory is advanced that attachment will not lie unless an obligation is due. As authority for this theory the case of Dayton Spice-Mills Co. v. Sloan, 49 Neb. 622, 68 N. W. 1040, is cited. The case does not sustain the theory. The ques-

tion was not considered or decided. In that case an attachment was dissolved. The ground of the action of the court dissolving the attachment does not clearly appear. The court dismissed the action because the claim was not due, but it did not dissolve the attachment for that reason.

The true rule is that an attachment may not be dissolved on the ground alone that the debt is not due at the time the action is started. If the plaintiff is entitled to prosecute the case to final judgment, he is entitled to the security afforded by the attachment in the absence of any other ground for dissolution. See, Reed v. Maben, 21 Neb. 696, 33 N. W. 252; Caulfield v. Bittenger, 37 Neb. 542, 56 N. W. 302. The theory therefore is without merit.

Exhibit A attached to the petition, which is the contract out of which the action and the attachment flow, and the violation of its provisions by the defendant provide the basis of the action and of the attachment. By the fifth ground for dissolution of the attachment the defendant contends substantially that at least one of the claims does not flow from the exhibit.

The plaintiff claims nothing except from rights and obligations declared by and incidental to the exhibit. An examination of the exhibit indicates that the claims may reasonably flow therefrom. The exhibit as to one claim imposes strictly contractual obligations. This phase requires no further consideration.

As to the other it appears to be in the nature of an indemnity agreement. The general rule under such circumstances, as stated in 42 C. J. S., Indemnity, § 28, p. 609, is: "An indemnitee may proceed against his indemnitor by an action ex contractu, on the contract or bond of indemnity, * * *; or, where he seeks to recover for damages paid for injuries caused by the negligent or wrongful acts, he may proceed by action ex delicto, * * *."

The apparent position of this court conforms to this

statement of principle. This court has said that an action for damages for breach of warranty is ex contractu. In Cheney v. Straube, 35 Neb. 521, 53 N. W. 479, it was said: "The action of covenant was in form and substance ex contractu, and in action under the code by a convenantee for damage on account of the breach of a covenant of warranty, after eviction under a paramount title, is a debt arising under a contract, which may be recovered by attachment."

The conclusion reached is that the plaintiff chose its remedial action as it had the right to do, and therefore the fifth point of the motion is without merit.

The sixth and last stated ground for dissolution of the attachment was that the value of the property attached was greatly in excess of any possible recovery in the action. No authority has been cited the effect of which is to say that the fact that more property has been attached than an amount sufficient to satisfy the recovery in an action shall be ground for dissolving an attachment.

Also on another ground this contention may not be sustained. The determination of what may be recovered is ascertainable of course by a trial on the merits in the action. The question of the right of recovery and the amount thereof is not a matter for consideration on a motion to dissolve an attachment. This court said in McDonald v. Marquardt, *supra*: "The merits of a cause will not be adjudicated on a motion to dissolve an attachment." See, also, Olmstead v. Rivers, 9 Neb. 234, 2 N. W. 366.

The conclusion, in the light of the observations herein, is that the order dissolving the attachment and exonerating the redelivery bond was erroneous. It is accordingly reversed.

REVERSED.

JAMES ELLIOTT, APPELLANT, V. WILLIAM BRANDT, JR., APPELLEE.

83 N. W. 2d 767

Filed June 14, 1957. No. 34117.

1. **Assault and Battery.** Evidence of previous threats to commit an assault and battery are admissible on a trial involving an assault or assault and battery, provided the threats were made in such a manner and at such a time as to have a direct bearing on the assault in question.
2. ———. In an action for assault and battery it is not error to allow plaintiff to be cross-examined fully in regard to his former relations with the defendant.
3. **Evidence.** Where a plaintiff is permitted to give evidence on a specific issue, defendant's evidence to the contrary is admissible on the same issue.
4. **Trial.** The instruction set out in the opinion taken together with other instructions given by the trial court states the law correctly.

APPEAL from the district court for Cass County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Francis M. Casey, Healey, Davies, Wilson & Barlow, and *Kenneth Cobb,* for appellant.

Smith & Lebens, Emory P. Burnett, and *Van Pelt, Marti & O'Gara,* for appellee.

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

MESSMORE, J.

This is an action for damages brought in the district court for Cass County by James Elliott, plaintiff, for injuries alleged to have been sustained by him as the result of an assault and battery committed upon his body by William Brandt, Jr., defendant. The case was tried to a jury resulting in a verdict for the defendant. The plaintiff filed a motion for new trial. From the order overruling the motion for new trial, the plaintiff appealed.

The plaintiff's petition alleged in substance that on

or about the evening of September 18, 1953, the defendant unlawfully and without sufficient provocation committed assault and battery upon the body and person of the plaintiff resulting in injuries to him.

The defendant's answer alleged in substance that the plaintiff, without provocation, did unlawfully assault and willfully and maliciously strike and wound the defendant with his fist, and unlawfully threatened the defendant with serious injury with a club; that whatever injuries the plaintiff received were by reason of necessary defense made by the defendant while he was lawfully defending himself from said assault and while he was lawfully upon his own property; that in November 1949, in the city of Plattsmouth near the public library in said city, the plaintiff, without provocation unlawfully, willfully, and maliciously struck the defendant in the face and threatened to beat the defendant; and that on other occasions the plaintiff, without provocation, abused the defendant and attempted to provoke an assault, which assault and threats had all been made prior to September 18, 1953, and which had been communicated to the defendant. The answer further alleged that at the time of the unlawful assaults and threats made by the plaintiff on September 18, 1953, the defendant used only such force in repelling the assaults as he believed to be necessary to resist the same and for his protection and defense. The answer denied all other allegations pleaded in the plaintiff's petition.

The plaintiff's reply to the defendant's answer was a general denial.

For convenience we will refer to the parties as they were designated in the district court and on occasions to the plaintiff, James Elliott, as Elliott, and the defendant, William Brandt, Jr., as Brandt.

The record discloses that Elliott lives on a farm 5 miles northeast of Avoca and has resided there since 1942. His farm is located north across the road from

the farm of Brandt. There is a county road extending east and west between these farms. The east-west county road was newly graded but not rocked at the time of the fight on September 18, 1953, and the fences on both sides of the road were down. Brandt has lived on his present farm since 1944. At the time of the fight Elliott was 59 years of age, was nearly 6 feet tall, and weighed 210 pounds. Brandt weighed 180 pounds, was 5 feet 8 inches tall, and was 40 years of age.

About 6 p.m., Elliott drove west on the county road which divides his farm and the Brandt farm for the purpose of putting in some fence. He stopped his truck 30 rods west of his driveway where the fence was out. This was at a point near a fill and culvert that runs into the Brandt land. The road had been freshly graded, there was but a single track, and the surface was of soft dirt. He also wanted to inquire of Brandt about putting rock on the road. He got out of the truck close to the center of the fill about where the culvert that leads into Brandt's farm was located. Brandt was putting a wire on the second brace post from the east. He talked to Brandt about putting rock on the road. They both knew it would cost $150 to do so. Brandt told him that he was "hard up," did not have any money, and was not interested in putting rock on the road except from his mail box to the highway which did not include the county road in question. Elliott testified that about that time Brandt came out into the road after him and acted as though he was going to strike him. Elliott did not know if Brandt hit at him. He testified that Brandt turned around and went back to the post upon which he was working; that he came back and "hit me or something"; and that then the fight really started. Elliott testified that the next he remembered he was down on the ground but still on the culvert. Brandt was trying to throw dirt in his face and eyes and trying to twist Elliott's arm behind him.

The next thing Elliott remembered was that he was back in the middle of the road behind the truck. His upper plate was broken and he was bleeding at the mouth. He took his plate out and put it in his pocket, and Brandt started at him again. The truck had gone down the hill a distance of about 30 feet and stopped. Elliott was having difficulty seeing at that time as he had a cut across his eye, on the side of his head, and across one of his ears, and was bleeding badly. The truck was stuck in the loose dirt. Brandt was unable to back it up. He offered to get the tractor to pull the truck out. Elliott got in the truck and started the motor. Brandt got hold of him around the neck and tried to pull him out of the truck. Brandt finally let loose and told Elliott to get over, that he would drive. Brandt drove the truck to his home over Elliott's protest. A doctor was called to attend him. Elliott also testified that while he was at Brandt's home, Brandt's wife accused him of lying; and Brandt took hold of him, shook him, and he fell to the ground.

The evidence adduced in behalf of Brandt was to the effect that before September 18, 1953, Elliott threatened and attacked him in front of the library at Plattsmouth in November 1949. There was a meeting at the library with reference to selecting a committee for redistricting schools. After the meeting, Brandt came out of the basement of the library and Elliott was standing on the sidewalk. Brandt was talking to a Mr. Althouse who was inquiring about the difficulty in Brandt's school district. At that time Elliott struck him in the face. Brandt said: "Well, * * * if you feel better, why, go ahead and hit me again, if you want to." Elliott struck Brandt again. Brandt told Elliott to "go ahead and get it all out of your system," and started down the street. Elliott said: "No, * * * you goddam little runt, * * * we are going to catch you at home sometime and we are going to beat all the hell out of you then." At that time Brandt was walking toward

his car. On September 18, 1953, Brandt was building a fence on the north side of his farm. About 6 p.m., he saw Elliott coming from the east down to where he was working. Elliott stopped his truck just north of where he was, with the back of the truck about even with the west end of the culvert. There was a ditch approximately 3 to 3½ feet deep on both sides of the culvert. Elliott got out of the truck. At that time Brandt was working on the south side of two fence posts on his own land. Elliott came across the fill, and when he got within 6 or 7 feet of Brandt he said: "I see you are getting your fence back in, * * *." Brandt said "Yes." Then something was said about fixing a hole down at the bridge. Then Elliott told Brandt the road was ready to rock, and asked him what he was going to do about it. Brandt said he was "hard up," didn't have much money, and asked Elliott which road he meant. Elliott pointed out the county road to him. Brandt told Elliott that he was interested in paying for putting rock on the road only from his driveway to the highway. Elliott came closer to where Brandt was working on the fence and said: "That's just the kind of a goddamn son-of-a-bitch you always have been, * * * the only one you ever think of is Bill Brandt." Brandt told him that was not true, and he should take it back. Elliott said he would not take it back. Elliott told Brandt to come out where he was and he would show him what was going to happen to him. Brandt told Elliott to go home and mind his own business, that he was tending to his. Elliott told Brandt he was out in the road and did not have to go home. Elliott then struck Brandt in the face and started around the fence after him. They met and exchanged three or four blows apiece. Then Elliott left and went back across the fill. Brandt believed the fight was over and Elliott was going back home. Elliott walked rapidly across the fill, reached into the back of his truck, and got out two boards. As he started back across the

fill, he dropped one of them. He had the other in his right hand, raised it, and struck at Brandt. As he did so, Brandt grabbed the board, jerked it out of Elliott's hand, and threw it down beside the fence. Brandt told Elliott if they were going to have to fight "let's fight it fair." Then Elliott made a dive for Brandt's wagon which was near where he was working and where he had the tools and equipment. Brandt grabbed Elliott around the neck and held onto the brace fence post until Elliott overpowered him. Elliott pushed Brandt into the ditch, and while he was in the ditch threw big chunks of dirt 7 or 8 inches in diameter at him. One chunk of dirt hit Brandt and peeled the skin off one side of his face. Elliott left and was trying to get back to his truck. They engaged in more fighting. Brandt struck Elliott in the face, trying to keep him from getting to the back end of his truck. One time Elliott asked Brandt to stop and rest. Brandt said "let's stop the thing altogether," but Elliott kept hitting Brandt. Shortly after that Elliott said he had broken his upper plate. The fight stopped until Elliott had removed his denture and put it in his pocket. The fight continued with Elliott trying to kick Brandt in the groin. Brandt struck Elliott in the jaw and he went down on his hands and knees. Brandt said to Elliott: "Let's stop," but Elliott got up and "just bulled" into Brandt, shoved him against the back end of the truck, and overpowered him. There were two hammers in the back of the truck which Brandt thought Elliott was trying to reach. During the time Brandt was trying to get his footing, he was pushed against the back of the truck causing it to roll down the road on the soft ground where it stopped near the ditch. Elliott said: "Well, I am just so sick, * * * I've just got to sit down and rest." Brandt said that suited him fine, he wanted to quit too. That was the end of the fight. Brandt further testified that Elliott struck the first blow, hitting him in the face; that neither of them were knocked out or knocked down

during the fight; and that the fight lasted about 15 to 20 minutes, until the truck rolled down the hill. Brandt further testified that Elliott did not hit him with a club, but attempted to do so; that during the fight he had in mind and believed that Elliott was attempting to carry out the threat he made in November 1949; and that he was afraid of Elliott and afraid for his life.

The plaintiff's wife testified by deposition in his behalf as a part of the plaintiff's case-in-chief. She testified that prior to September 18, 1953, the time of the fight in question, her husband had difficulty with Brandt about the road. Her husband claimed that Brandt's fence was located beyond his land and on the road. It appears that this trouble occurred some years prior to September 18, 1953. She further testified about her husband and Brandt having difficulty over school matters.

The sheriff of Cass County testified that after the attack made on Brandt by Elliott near the public library in Plattsmouth, Brandt came to see him and they discussed the attack. Brandt told the sheriff he would go home and talk to his wife about the matter and contact the sheriff later. Two days thereafter Brandt called the sheriff and informed him that the matter had not been settled, and requested the sheriff to come to his place. The sheriff went to Elliott's house and got Elliott, then drove to Brandt's home where they had a discussion about the occurrence at the library. Elliott denied that he had struck Brandt or threatened him. Brandt then told the sheriff again about the blows and about fearing Elliott, and there was a discussion about having Elliott put under a peace bond. The next day Elliott and his attorney, the county attorney, and Brandt were all present at the sheriff's office. At that time Elliott admitted striking Brandt twice when he was in front of the library and threatening him near the library. Brandt then agreed not to file charges against Elliott or put

him under peace bond. There is some testimony that plaintiff's counsel, as well as the county attorney and the sheriff, endeavored to bring Elliott and Brandt together, and after the admissions were made by Elliott, Brandt did shake hands with him, but thereafter neither Brandt nor Elliott had anything to do with each other.

The plaintiff's assignments of error necessary for a determination of this appeal may be stated as follows: (1) The trial court erred in submitting to the jury the issue of the plaintiff's violent disposition when the same was not pleaded, nor was any evidence introduced to support this issue; (2) the trial court erred in allowing the introduction in evidence of a threat of physical violence of the plaintiff to the defendant when the same was made at an unreasonable length of time before this incident; and (3) the trial court erred in permitting the defendant to testify over objection that he used no more force than was necessary to defend himself.

Before determining the plaintiff's assignments of error, we consider the following.

The defendant contends that the failure of the plaintiff to predicate error on the trial court overruling his motion for new trial presents nothing on which a reversal could be based. The defendant's contention is that the plaintiff has abandoned the appeal from such order and as a consequence there are no assignments of error to be considered by this court.

The function of a motion for new trial is to call the trial court's attention to alleged errors committed during the course of the trial. The trial court considers the separate assignments of error contained in the motion for new trial, which are generally in accordance with the statute, and determines whether or not, in its judgment, error was committed, and rules accordingly. From this final order an appeal may be taken to this court. The party appealing sets forth in appellant's brief the assignments of error alleged to have been committed by the trial court during the course of the

trial. This court reviews such assignments of error to determine whether they, or any of them, are meritorious and require a reversal of the trial court's judgment. There is no requirement in this jurisdiction that the party appealing predicate error on the overruling of the motion for new trial. The defendant's contention is without merit.

We consider the plaintiff's first two assignments of error together. In this connection, the plaintiff makes reference to the defendant's answer dealing with the allegation as to the assault made on the defendant by the plaintiff in November 1949. The plaintiff asserts that the evidence shows that from and after November 1949, the plaintiff and defendant were still neighbors, lived across the road from each other and saw each other frequently, and no blows were exchanged between them from the time of the incident in 1949 up to the time of the fight in 1953; and that on several occasions the plaintiff and defendant would be working in their respective fields alone, and there were no threats, blows, or threats of violence during this period of time. There is a conflict in the evidence as to the assertion made by the plaintiff as will appear later in the opinion.

The plaintiff also directs attention to instruction No. 11 given by the trial court as being prejudicially erroneous for the reason that it raises two issues, the violent disposition of the plaintiff toward the defendant and the general violent disposition of the plaintiff, which were not raised in the pleadings; that there is no evidence of the general character for violence of the plaintiff, or any evidence in regard to the plaintiff's character; and that in considering the conduct of the parties toward each other since the incident in 1949, the plaintiff contends that one specific act of violence is not sufficient to sustain an instruction on the general violent disposition of the plaintiff.

Instruction No. 11 reads as follows: "In determining the question of the reasonableness of the action or actions

of the defendant in the premises, you should take into consideration the excitement of the occasion, if any such is proved by the evidence, the previous violent conduct of the plaintiff towards the defendant, if any such is proved, *the information of the defendant touching the violent disposition of the plaintiff*, if any such is proved, and whether the defendant in good faith believed and acted upon such information, and, from a full, fair and candid consideration of all the evidence and facts and circumstances proved on the trial, determine whether the defendant acted as a reasonable man would under the same circumstances." (Emphasis supplied.)

The plaintiff cites Trousil v. Bayer, 85 Neb. 431, 123 N. W. 445, as follows: "Defendant also complains of the refusal of the court to admit testimony as to specific acts of the plaintiff for the purpose of proving that he was of a quarrelsome and contentious disposition. But proof of this nature must be as to general reputation, and not as to specific acts. Golder v. Lund, 50 Neb. 867."

The plaintiff also cites Carleton v. State, 43 Neb. 373, 61 N. W. 699. This was a first degree murder case. The general rule was stated, in substance, as follows: When character is in issue the proof must be of general reputation, not of specific acts, and not by proving the opinion of the witness based on his own observation as to the general character of the person in question. See, also, Daggs v. St. Louis-San Francisco Ry. Co. (Mo. App.), 51 S. W. 2d 164; Cummins v. Crawford, 88 Ill. 312, 30 Am. R. 558.

We are not in accord with the plaintiff's contention insofar as the instant case is concerned. The pleadings in the instant case put in issue the question as to who started the fight. In the light of the pleadings, any competent evidence offered by the defendant is admissible to prove his claim that the plaintiff started the fight and that the defendant acted only in self-defense. There were no witnesses to this fight. We believe, under the cir-

cumstances, the authorities favor the right of the defendant to offer evidence of previous threats and acts of aggression against him by the plaintiff to prove that the plaintiff was the aggressor.

The defendant testified that after the assault made on him by the plaintiff in Plattsmouth in 1949, the plaintiff's conduct toward him was of a disagreeable and hostile nature, and that he was afraid of the plaintiff, that is, afraid that he might carry out the threat that he made at that time, and that the plaintiff, while both were working in their respective fields, showed a disposition to start trouble during the intervening years up to the time of the assault.

As stated in 4 Am. Jur., Assault and Battery, § 153, p. 198: "Evidence of previous threats to commit an assault and battery are admissible on a trial involving an assault or assault and battery, provided the threats were made in such a manner and at such a time as to have a direct bearing on the assault in question. * * *

"Where the defendant pleads self-defense, he may show that the prosecutor had made threats against him, for the purpose of proving that he committed the assault and battery under the reasonable belief that unless he acted promptly the prosecutor would inflict grievous injury on him. But before a person is justified in making an attack or inflicting bodily harm upon a person who has made threats against him, however well grounded his apprehension may be, there must be some overt act from which may be reasonably inferred an intention to carry into effect his threats of personal violence. Hence, the only effect that previous remote threats can have is to give character to an overt act on the part of the person who made the threats and to justify the other in acting more promptly in self-defense than would have been permitted had no threats been made."

In Galbraith v. Fleming, 60 Mich. 403, 27 N. W. 581, the court said: "He (defendant) had a right to place before the jury the character of the plaintiff as he knew

it to be; to show him to be a high-tempered, quarrelsome, fighting man, whose anger and spite towards defendant had before led him to do exactly what defendant then feared he was about to do. The defendant had a right to act upon his honest belief, and upon the circumstances as they appeared to him. His actions were to be judged from the transaction as it appeared to him, and the jury could only determine this by knowing of the plaintiff what the defendant knew as to his disposition and temper towards him. * * * The jury were instructed that this evidence could not be used in mitigation of damages, but might be considered in determining whether the plaintiff was the attacking party, or whether the defendant believed that he was in danger of an attack from the plaintiff."

In Peterson v. Toner, 80 Mich. 350, 45 N. W. 346, it was held that for the purpose of showing plaintiff's malice toward defendant and in making an assault on the defendant, the defendant may introduce evidence of threats made against him by the plaintiff 3 or 4 years before the assault. It was apparent in this case that the plaintiff and defendant had had difficulty on different occasions running back over a period of 3 years and more. As to the former acts, the court said that the record offered two classes of proof on the subject. Evidence was offered to show by a witness the circumstances of a difficulty that occurred between the parties 3 years prior to the assault. This evidence was excluded. The court said that the circumstance inquired about was not more remote than had been allowed by the court, citing cases.

In Lambrecht v. Schreyer, 129 Minn. 271, 152 N. W. 645, L. R. A. 1915E 812, it was said: "The court received in evidence threats of violence made by defendant toward plaintiff two years and four months before the occurrence out of which this cause of action arose. Such evidence was admissible. The lapse of time was such that the probative force of the testimony may have

been little, but this goes to the weight of the testimony, not to its admissibility. State v. Hoyt, 46 Conn. 330; Keener v. State, 18 Ga. 194, 63 Am. Dec. 269; Commonwealth v. Quinn, 150 Mass. 401, 23 N. E. 54; Peterson v. Toner, 80 Mich. 350, 45 N. W. 346." See, also, Marshall v. Glover, 190 Ky. 113, 226 S. W. 398.

Instruction No. 11 presented to the jury issues solely concerned with matters within the actual knowledge of the defendant, that is, the previous violent conduct of the plaintiff toward the defendant and the information of the defendant touching the violent disposition of the plaintiff, and relates to previous conduct between the plaintiff and defendant and their relationship with each other, upon which there is a great amount of testimony.

The evidence offered by the defendant did not attempt to prove the general character of the plaintiff. What the defendant endeavored to prove was the plaintiff's violent conduct toward him and the continuing exhibition of a violent disposition toward him. This evidence was for the purpose of establishing the plaintiff as the aggressor in the fight in which the plaintiff received his injuries, and also to establish the defendant's state of mind, to disclose that he had good cause to be apprehensive of the plaintiff, and the force used by him to defend himself.

In McClure v. Shelton, 29 Neb. 370, 45 N. W. 689, the action was one of assault. The defendant's answer was a plea of justification. The assault occurred in 1887. In 1886, the plaintiff and defendant had an altercation in which the court was led to infer that the plaintiff was the aggressor. The court stated that this difficulty seemed to have been the source of the quarrel in the case at bar. Instruction No. 11 given by the trial court in the instant case is taken verbatim from McClure v. Shelton, *supra,* wherein it was approved. See, also, Miller v. Olander, 133 Neb. 762, 277 N. W. 72.

The plaintiff also contends that evidence of the specific act of assault and battery made upon the defendant

by the plaintiff in November 1949 and of the threat made by the plaintiff to the defendant was inadmissible. If prejudice could have resulted, it was cured when the plaintiff put the question of previous difficulties between himself and the defendant into evidence by the deposition of his deceased wife. We have heretofore related a part of this evidence. The trial court permitted this evidence to be introduced under the rule that when one party gives evidence on a specific issue, the opposing party's evidence to the contrary is admissible on the same issue. See, Falkinburg v. Prudential Ins. Co., 132 Neb. 831, 273 N. W. 478; Scott v. Prudential Ins. Co., 203 Minn. 547, 282 N. W. 467.

In Albertson v. Chicago, M., St. P. & P. R. R. Co., 242 Minn. 50, 64 N. W. 2d 175, 42 A. L. R. 2d 1044, it was held error to exclude defendant's testimony on an issue as to which plaintiff had introduced evidence. The court held: "Where a plaintiff is permitted to give evidence on a specific issue, defendant's evidence to the contrary is admissible on the same issue."

The assignments of error made by the plaintiff which are discussed above cannot be sustained.

This brings us to the plaintiff's contention that the trial court erred in permitting the defendant to testify to a conclusion, which invaded the province of the jury.

This is the question propounded to the defendant: "During this fight did you use any more force than you thought was necessary to defend yourself?" To which there was an objection as calling for a conclusion of the witness and invading the province of the jury, not a statement of fact. This objection was overruled. The answer was: "No, I did not."

One of the ultimate facts to be determined by the jury, when the defense in an assault and battery case is self-defense, is whether the defendant used more force than was reasonably necessary to defend himself. In the instant case the defendant was not asked whether he used more force than was necessary to defend him-

self or whether he used more force than was reasonably necessary. The question asked was whether the defendant used more force than he "thought" was necessary. The question was directed to the defendant's state of mind during the fight. The record discloses other statements made therein by the defendant that he tried to keep the plaintiff from doing him harm was all; that he struck the plaintiff so that he could not get the tools he was trying to get with which to beat the defendant; and that defendant was fighting to keep the plaintiff from hurting him, and when he quit, the defendant was glad to quit. Considering these statements, it is testimony to the effect that the defendant thought he was using only such force as was necessary to defend himself. These statements were brought out on cross-examination of the defendant. The record also discloses that the defendant, during the fight, wanted to stop it, but the plaintiff refused. When the plaintiff indicated that he wanted to stop the fight, the defendant agreed and then the fight was over. Some of these statements were made by the defendant before and some after the asking and answering of the single question heretofore referred to. In view of all of the evidence on this point, on the numerous times the defendant said indirectly that he thought he used no more force than was necessary to repel the plaintiff, we find no prejudicial error in permitting the defendant to testify as he did. It was for the jury to believe the defendant or disbelieve him, and to determine whether or not the defendant had used more force than was reasonably necessary to defend himself under the circumstances.

For the reasons given in this opinion the verdict of the jury and the judgment entered thereon by the court should be, and are hereby, affirmed.

AFFIRMED.

IN RE APPLICATION OF SCHAUB.
HARRY SCHAUB, APPELLEE, V. CITY OF SCOTTSBLUFF, APPELLANT.

83 N. W. 2d 775

Filed June 14, 1957. No. 34153.

1. **Pensions.** The right to a fireman's pension in this state is statutory and the Legislature has authority to attach any condition to the existence of the right it desires.
2. **Pensions: Municipal Corporations.** Section 35-203, R. R. S. 1943, contemplates a hearing before proper municipal authorities and a decision based upon evidence presented at the hearing as a condition to the right therein provided.
3. ———: ———. The requirement of that section that it be ascertained by proper municipal authorities within 12 months of the date of the accident that the disability of the fireman has become permanent is mandatory and a condition of the right of recovery of benefits after the expiration of the designated period.
4. **Pensions.** The Legislature intended the language "in case of partial disability of a fireman" as used in section 35-203, R. R. S. 1943, to describe and mean the identical condition that is expressed by the words "in case of temporary total disability of a fireman" as contained in section 35-211, R. R. S. 1943.
5. ———. A fireman is permanently and totally disabled under the Firemen's Pension Act when the disability from which he suffers renders him permanently unable to obtain, hold, or do any substantial amount of remunerative work, either in his previous occupation or in any other established and recognized field of employment for which he is fitted.
6. ———. Total disability contemplates the loss of earning power and in measuring such loss consideration will be given to the ability to earn wages, eligibility to procure employment generally, ability to hold a job obtained, and the capacity to perform the tasks of the work in which a person is engaged.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Reversed and remanded with directions.*

Loren G. Olsson, for appellant.

Wright, Simmons & Harris, for appellee.

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

BOSLAUGH, J.

The subject of this litigation is a claim of appellee for benefits provided by the Firemen's Pension Act from the city of Scottsbluff. It is a city of the first class without a home rule charter. It has a paid fire department but does not have a board of fire and police commissioners. Appellee submitted to the city council of appellant a written statement which he asked should be considered as a petition. It contains the following:

Appellee was, on September 11, 1953, a fireman on the paid fire department of the appellant and has continued in that capacity since that date. He received an injury on that date while in the performance of his duties as a fireman. The injury did not result in total temporary disability of appellee until April 4, 1954, when surgery was performed because of it. Appellee was totally temporarily disabled from that date until August 19, 1954. Thereafter he was partially disabled but returned to his duties as a fireman and continued to perform them until November 15, 1954, on which date he again became totally temporarily disabled as a result of the accident in which he was injured. Appellee had a partial disability since the date of the accident and his disability has become permanent. Appellee, by his petition, asked the city council of appellant to conduct a hearing and to ascertain that such partial disability has become permanent and that he was entitled to benefits of the Firemen's Pension Act applicable to appellant.

The city council held a hearing as appellee requested and it concluded that he was not entitled to a pension because he was not suffering from any disability that did not permit him to perform the duties of a fireman of the city of Scottsbluff, Nebraska. The city council did not ascertain that any partial disability suffered by appellee had become permanent.

Appellee contested the action of the city council by petition in error in the district court. It alleged in sub-

stance the matters above recited and asserted error in the proceedings of the city council because it failed to find that appellee was entitled to a pension as provided in the Firemen's Pension Act applicable to appellant, it failed to take action necessary to assure appellee such a pension, and it found that appellee was not suffering from any disability that did not permit him to perform the duties of a fireman of appellant. A transcript of the proceedings before the city council was made part of the petition in error.

The district court found that appellee was entitled to a pension as provided in section 35-203, R. R. S. 1943, that he became disabled from the accident, that such disability became permanent within 12 months of the date, and that there was error in the proceedings of the city council. The finding and order of the city council were reversed and it was ordered to provide appellee with a pension of at least one-half of the salary received by him and other benefits provided by the Firemen's Pension Act applicable to appellant commencing with July 1, 1955. This appeal is from that adjudication.

Appellee became a member of the fire department of appellant on June 20, 1949. He was serving in that capacity September 11, 1953, when he was injured while assisting in fighting a fire in the performance of his duties as a fireman. He was at that time the driver of a truck of the department. He drove it to the location of the fire and was in the act of engaging a gear so that the pump on the truck would operate. Appellee had his left hand on the handle or lever provided to engage the gear when it was forcibly kicked back and the wrist of appellee was injured. His left wrist immediately felt like it was sprained. It was swollen and painful for about a month before appellee sought medical aid. During that time he carried on his duties as a fireman. Thereafter for about 2 months the wrist was in a cast. Improvement of the member was not obtained and appellee consulted another practitioner

who examined appellee and concluded that he had a torn capsule of the left wrist joint. The doctor referred appellee to an orthopedic surgeon of Casper, Wyoming, who operated on appellee April 7, 1954, for the purpose of fusing or stabilizing the wrist. Appellee returned to his work as a fireman August 19, 1954, and continued to work until November 15, 1954. During this period his wrist caused him agonizing pain but he performed his assignments as best he could. He consulted a doctor in Cheyenne, Wyoming, who had been recommended to him. The first attempt to fuse or stabilize the wrist was not accomplished and a second operation was performed in Cheyenne on November 15, 1954, as a further effort to stabilize the wrist. There was surgery on the wrist a third time in April 1955 for the removal of a piece of bone from it. Appellee was under treatment with the Cheyenne, Wyoming, doctor from November 15, 1954, to the time of the hearing before the city council July 12, 1955.

The petition of appellee to the city council alleged that he was then, June 13, 1955, a fireman of the paid fire department of appellant. He testified at the hearing July 12, 1955, that he was then a member of that fire department. He said in his petition in error that he was a fireman of appellant. It was verified by appellee August 10, 1955. Appellant did not challenge these assertions of appellee by any proof. They must be accepted as true in this litigation. Barkalow Bros. Co. v. English, 159 Neb. 407, 67 N. W. 2d 336. Appellee has not attempted to do any work since November 15, 1954. He said the doctor advised him not to engage in any effort which would involve lifting or working with his left wrist. He has no disabling defect or condition other than his left wrist. Appellee was paid his regular salary from the time he was injured September 11, 1953, for 12 months. In fact, the record shows that he was paid salary to July 1, 1955, which was 11 days prior to the hearing before the city council.

The accident in which appellee was injured, and from which any disability he suffers resulted, happened September 11, 1953. The request made to the city council in reference to his injury and disability was his petition to it of June 13, 1955. This was more than 21 months after the accident involved in this cause. The relevant parts of section 35-203, R. R. S. 1943, the statute applicable to cities of the first class that do not have a home rule charter, are: "In case any fireman in a paid fire department in any city of the first class * * * shall become permanently and totally disabled from accident or other cause, while in the line of his duty, such fireman shall forthwith be placed upon the roll of pensioned firemen, at the rate provided for retired firemen in section 35-201; * * * in case of partial disability of a fireman received while in the line of duty, he shall receive his salary during the continuance of such disability for a period not to exceed twelve months; and provided further, if it shall be ascertained by the board of fire and police commissioners or other proper municipal authorities within twelve months that such disability has become permanent, then his salary shall cease and he shall be entitled to the benefits of the provisions with reference to pensions referred to in sections 35-201 to 35-205." The rate provided for retired firemen in section 35-201, R. R. S. 1943, referred to in the above quotation is expressed by this language: "Such pension shall be at least fifty per cent of the amount of salary such retiring fireman is receiving at the time he goes upon such pension list; Provided, in no case shall the amount of such pension be less than fifty dollars per month."

The right of a fireman to any of the benefits specified is statutory and the Legislature had authority to attach any condition to the existence of the right it desired. In the instance of the right claimed in this cause the condition of it is that the proper municipal authorities ascertain within 12 months of the accident

that the disability resulting therefrom has become permanent. This requirement as a condition of the right implies an obligation of the city council, if there is no board of fire and police commissioners in the municipality concerned, upon demand of the fireman claiming the benefits of the statute, to hold a hearing, take evidence, and ascertain and declare whether or not the disability of the fireman has become permanent. The proper municipal authorities may of their own volition perform this function but the statute does not require this of them.

In State ex rel. Gaddis v. Bryan, 102 Neb. 506, 167 N. W. 783, the court said concerning section 2518, Rev. St. 1913, which is now section 35-203, R. R. S. 1943: "The section of the statute under which this action is brought contemplates a hearing, the presentation of proof, and a decision based thereon by a board of city officials as a condition precedent to right of pension."

In Cox v. Dunn, 243 Ala. 176, 9 So. 2d 1, it is said: "The right to a pension is purely statutory and does not arise until an application and proof is made as the statute requires."

In 70 C. J. S., Pensions, § 7, p. 430, it is declared: "The legislature may establish the procedure under which pensions are to be granted, and the right to a pension does not arise except where the procedure prescribed by statute is followed."

The court stated in Linaka v. Firemen's Pension Fund, 346 Pa. 459, 31 A. 2d 122: "When claimant's husband was killed 'in the discharge of his duty', her right to the pension thus provided for in the by-laws became a vested right. Before she could obtain that pension she had to apply for it and to establish facts which brought her claim within the prescriptions of the by-laws. The quoted phrase 'entitled to apply for a pension' simply meant that if the widow wished to receive the pension provided for in such cases, the duty of acting was upon her. The 'door' to a pension

was opened by her husband's death but she had to enter that door and prove certain facts before the pension would be put in her grasp."

The following appears in Badger v. Homan, 45 Cal. App. 2d 235, 113 P. 2d 925: "The respondent further argues that section 5 of the ordinance is self-executing, that nothing was required of him in the way of procedure, and that when he became disabled it was the duty of the pension board to order him placed upon the pension list. * * * Section 5, while it permits retirement on pension for disability caused by service injury, provides that it shall be allowed only when the injury is such as to render necessary such retirement from active service, and that the pension board shall then order the pension paid to 'such person retired thereafter'. This indicates that the suffering of the injury is not to automatically retire the person and that some hearing or determination is to be had. The precise amount of injury which would necessitate a retirement from active service is not fixed and from the very language used a question of fact is necessarily left for the decision of some fact-finding body. * * * The sections just referred to show that section 5 is not self-executing. In any event, a hearing and action by the pension board is required and certain minimum requirements must be complied with before the pension board has authority to order the retirement on pension of a member of the department."

The Missouri court said in State ex rel. Lambert v. Flynn, 348 Mo. 525, 154 S. W. 2d 52: "If the members of either the board of trustees, the board of police commissioners or the medical board had wrongfully refused to perform a statutory duty, the claimant would have a remedy. But the police retirement pension system is entirely statutory, and the statutes provide an administrative tribunal and certain prerequisites to action by it. The courts are not authorized to intrude * * * unless and until the statutory conditions have been

complied with and administrative remedies have been exhausted."

Broadhurst v. City of Fall River, 278 Mass. 167, 179 N. E. 586, expresses the following: "The question presented for decision is whether a pension granted by the mayor under St. 1924, c. 278, is a binding obligation upon the defendant unless and until approved by the Fall River board of finance * * *. Said c. 278 relates to the pensioning of laborers in the city of Fall River. * * * It provides in § 1 that a laborer in the employ of that city in the position of the plaintiff 'may, at his request and with the approval of the mayor, be retired from service, and if so retired he shall receive from said city for the remainder of his life an annual pension' of a stated amount. If that statute alone be considered, the plaintiff is entitled to receive payments on the pension. * * * But in this connection the scope and effect of St. 1931, c. 44, must be considered. * * * The design of that chapter, as disclosed by all its provisions, is to create a board of finance * * * and to vest in that board complete control over all the financial affairs of that city. * * * It follows that, as matter of statutory construction, the granting of the pension to the plaintiff by the mayor, without approval by the board of finance, imposed no liability upon the defendant."

State ex rel. Lynch v. Board of Trustees of Fireman's Pension & Relief Fund, 117 La. 1071, 42 So. 506, contains these expressions: "It will be seen that the law itself has fixed the class of persons to whom the pension shall be paid and does not leave the determination of that question to the board. * * * So far as that is concerned, the law itself controls the situation. The law has, however, left to the board the decision whether as a matter of fact the person applying for a pension has brought herself into and under the class provided for under the terms and conditions fixed in the statute."

The author says in 3 McQuillin, Municipal Corporations (3d Ed.), § 12.161, p. 554: "The procedure for the

granting of pensions is generally prescribed by statute or other appropriate law, which should be complied with in order to warrant the granting of a pension."

The statute granting the right claimed by appellee prescribed ascertainment, within a limited period by proper authorities of the municipality, of a fact as a condition precedent to the right. § 35-203, R. R. S. 1943; State ex rel. Gaddis v. Bryan, *supra*. Appellee made no attempt to secure such ascertainment of the designated fact within the time limited. He had no right to the benefit he sought when he initiated the proceeding eventuating in this appeal. If he had made his petition to the city council within 12 months of the accident and if the city had refused or failed to act thereon until after the expiration of the period limited by the statute, appellee could not have been prejudiced by such delay. He also in that event could have compelled action on his petition by the city. Appellee could not, however, extend the time within which he was required to make request to or demand upon the city for action by postponing the time of his demand or request. Dillon v. Board of Pension Commissioners, 18 Cal. 2d 427, 116 P. 2d 37, 136 A. L. R. 800; State ex rel. Lambert v. Flynn, *supra*.

The original Firemen's Pension Act of Nebraska provided that a fireman of a paid fire department of a metropolitan city or city of the first class who became permanently and totally disabled from any cause while in the line of duty should be placed upon the roll of pensioned firemen at 25 percent of his then salary. It provided no compensation for any disability less than total and permanent. Laws 1895, c. 39, § 3, p. 169.

The amendment of 1909 provided that the firemen of a paid fire department of a metropolitan city or a city of the first class who became permanently and totally disabled from any cause while in the line of duty should be placed upon the roll of pensioned firemen at the rate of 50 percent of the then salary of the

fireman but in no case less than $50 per month; that in case of partial disability of a fireman received while in the line of duty, he should receive his salary during the continuance of such disability for a period not to exceed 12 months; and that if it was ascertained by proper municipal authorities within 12 months that such disability had become permanent, then his salary should cease and he should be entitled to "the benefits of the provisions with reference to pensions referred to in this act." Laws 1909, c. 60, § 3, p. 291.

The act of 1923 on this subject, Laws 1923, c. 151, p. 367, was adjudged invalid by this court. Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894.

The act of 1943 provided the identical benefits for a fireman of a paid fire department in a metropolitan city or a city of the first class which did not have a home rule charter who became permanently and totally disabled or who suffered partial disability as were provided in the act of 1909 as detailed above. Laws 1943, c. 92, p. 313.

The act of 1943 also contained provisions affecting any city of the first class having a home rule charter. One of these was that such a city was authorized to establish by its charter pensions for the members of its fire department provided a minimum requirement in favor of such fire department should consist of provisions identical with all of those contained in section 5 of the act (now sections 35-205 to 35-214, R. R. S. 1943) except that at the option of any such city more liberal provisions for such firemen might be made. It also provided that any fireman who was permanently and totally disabled from any cause while in the line of duty should be placed on the roll of pensioned firemen and should be paid 50 percent of the salary of the fireman but in no case less than $50 per month. The foregoing was followed by this provision: "In case of temporary total disability of a fireman received while in line of duty,

he shall receive his salary during the continuance of such disability for a period not to exceed twelve months: Provided, if it shall be ascertained by the city council or other proper municipal authorities within twelve months that such disability has become permanent, then his salary shall cease and he shall be entitled to the benefits of the foregoing provisions with reference to pensions in case of total and permanent disability." Laws 1943, c. 92, § 5(6), p. 317. The provisions last referred to are now contained in sections 35-204 and 35-211, R. R. S. 1943.

The interpretation of the language "partial disability" which has been contained in the Firemen's Pension Act applicable to any city of the first class that did not have a home rule charter since 1909 presents a problem of importance and some difficulty. There is no specific language in any of the acts mentioned above which attempts to define the terms used in this respect. The original legislation provided compensation for permanent total disability of a fireman which resulted from some cause while he was performing his duties as fireman. Disability of that degree has been a primary concern of all subsequent legislation on this subject. If the words of section 35-203, R. R. S. 1943, "in case of partial disability" are to be interpreted literally, then any disability suffered by a fireman because of something that occurred while he was in the line of duty, without regard to the degree of disability, entitles him to his then salary while his disability continues, not to exceed 12 months; and if it is ascertained, as the statute permits, that such a disability has become permanent, without regard to its degree, then he is entitled, according to the literal terms of the legislation, to the same amount of benefits as if he had been totally and permanently disabled at the precise time he became victim of the accident or other cause that affected him. It cannot reasonably be said the Legislature intended that a fireman who suffered only a small degree of permanent disability

should have the same benefits and recovery as a fireman who from some cause is immediately rendered totally and permanently disabled. It is not probable that the Legislature intended that a city of the first class without a home rule charter should be compelled to compensate a fireman for any degree of disability he suffered less than total and permanent disability but that the minimum disability of a fireman for which a home rule city of the first class should be liable was temporary total disability.

The legislation of 1923 on this subject attempted to classify cities of the first class which were not home rule cities as one class and cities of the first class which were home rule cities as another class. It was in 1942 adjudged invalid on the basis that it did not operate in the same manner on all members of the class, that is, on all cities of the first class of the state. Axberg v. City of Lincoln, *supra*. The Legislature the following year attempted to put all cities of the first class of the state on the same basis as to at least minimum benefits for disabled paid firemen. A part of this effort is represented in the legislation it adopted applicable to cities of the first class having a home rule charter which provides: "In case of temporary total disability of a fireman * * * he shall receive his salary during the continuance of such disability for a period not to exceed twelve months: Provided, if it shall be ascertained by the city council * * * within twelve months that such disability has become permanent, then his salary shall cease and he shall be entitled to the benefits of the foregoing provisions with reference to pensions in case of total and permanent disability." Laws 1943, c. 92, § 5(6), p. 317; § 35-211, R. R. S. 1943. The Legislature, of course, knew that the language in another part of the same legislation applicable to cities of the first class that were not home rule cities was: "in case of partial disability of a fireman." Laws 1943, c. 92, § 3, p. 314; § 35-203, R. R. S. 1943. These considerations are con-

vincing that the Legislature understood and intended the language "in case of partial disability of a fireman," § 35-203, R. R. S. 1943, to describe and mean precisely the same condition expressed by the words "in case of temporary total disability of a fireman." § 35-211, R. R. S. 1943. The interpretation and meaning of the words in the former section "partial disability" are that they were intended to and do mean temporary total disability.

Appellee did not suffer temporary total disability because of and at the time of the accident on September 11, 1953. He continued to perform his regular duties as a fireman until April 4, 1954. During the period commencing with that date and continuing through August 18, 1954, he did no work as a fireman because of the first operation performed on his wrist. He returned to his work as a fireman August 19, 1954, and performed all the duties assigned to him or requirements made of him in that capacity through November 14, 1954. He was disappointed when he returned to work as a fireman on August 19, 1954, that another fireman had been assigned to drive the truck appellee had previously operated for the fire department of the city. Appellee testified that he could have driven the truck all right at that time. He thought that he should have been reinstated as driver of the fire truck he had previously operated. There was a second operation on the wrist November 15, 1954. Appellee did not do or offer to do any work as a fireman for the city during the period from November 15, 1954, to the date of the hearing before the city council July 12, 1955. He was paid his salary as fireman through the month of June 1955. During the hearing appellee said he was a member of the fire department of appellant. The record is silent of any attempt of the city to dispense with the services of appellee as a fireman of the city. The city council found he was able to perform his duties as a fireman.

Appellee, before and at the time of the hearing, oper-

ated his automobile when he was alone wherever he desired to go within or without the city of Scottsbluff. He testified that he was then able to operate a fire truck and the pumps on the truck without difficulty at a fire. He said he could handle the hydrants at a fire and that there was always one fireman assigned to that operation during a fire. He testified he could perform the duties of a fireman except he could not handle the hoses, set up or erect the ladders, or ride the tailboard of a truck. The left wrist of appellee was injured. It had been by surgery stabilized. He has lost movement of the wrist joint and the left arm has been slightly shortened. He is otherwise, so far as the record indicates, sound of body. He has the use of it and all of its members except as the use of the left wrist is limited. Its use, however, is still considerable. The record does not contain any estimate of any degree of disability of appellee. Evans v. City of Lincoln, 147 Neb. 163, 22 N. W. 2d 565, speaks of what constitutes permanent total disability as contemplated by the Firemen's Pension Act: "A fireman is permanently and totally disabled under the Firemen's Pension Act when the disability from which he suffers renders him permanently unable to obtain, hold, or do any substantial amount of remunerative work, either in his previous occupation or in any other established and recognized field of employment for which he is fitted. * * * Total disability contemplates the loss of earning power and in measuring such loss consideration will be given to the ability to earn wages, eligibility to procure employment generally, ability to hold a job obtained, and the capacity to perform the tasks of the work in which a person is engaged." The record does not justify a conclusion that appellee is totally and permanently disabled.

The legislative plan is that temporary total disability of a fireman that is not ascertained to have become permanent within 12 months after the accident shall be wholly compensated by payment by the city to him of

his salary during the continuance of the disability not to exceed 12 months. If the temporary total disability is ascertained within 12 months to have become permanent, then the fireman is entitled at the end of 12 months after the accident to be placed upon the roll of pensioned firemen of the city and to receive and enjoy the benefits provided for totally and permanently disabled firemen. §§ 35-203 and 35-211, R. R. S. 1943.

The judgment should be and it is reversed and the cause is remanded with directions to the district court for Scotts Bluff County to dismiss the petition in error.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, District Judge, participating on briefs.

CITY OF BAYARD, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. NORTH CENTRAL GAS COMPANY, A CORPORATION, APPELLANT.
83 N. W. 2d 861

Filed June 14, 1957. No. 34191.

1. **Public Service Commissions.** Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights.
2. **Public Service Commissions: Appeal and Error.** On an appeal to the Supreme Court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
3. **Carriers.** A private carrier is one who, without making it a vocation, or holding himself out to the public as ready to act for all who desire his services, undertakes, by special agreement in a particular instance only, to transport property from one place to another either gratuitously or for hire.
4. **Public Service Commissions: Carriers.** Any person, corporation, or association holding itself out to the public as offering its services to all persons similarly situated and performing as its public vocation the services of transporting passengers, freight, messages, or commodities for a consideration or hire,

is a common carrier in the particular spheres of such employment, and such operation for hire is a jurisdictional prerequisite to the general control and regulation of its rates and services as a common carrier by the state railway commission.

APPEAL from the Nebraska State Railway Commission. *Reversed and dismissed.*

Wright, Simmons & Harris, for appellant.

Kenneth F. Williams and *Perry, Perry & Nuernberger,* for appellee.

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

CHAPPELL, J.

Plaintiff, City of Bayard, same being a city of the second class, filed a complaint with the Nebraska State Railway Commission, hereinafter called the commission, alleging that defendant, North Central Gas Company, a Wyoming corporation, was an intrastate common carrier of natural gas, subject to regulation of its rates, services, and general control by the commission. Plaintiff sought an order directed to defendant, requiring it to show cause why it should not be so determined by the commission and be required to serve plaintiff with and sell it natural gas at wholesale rates fixed by the commission in the event plaintiff city, by eminent domain or otherwise, acquired title to defendant's natural gas distribution system located within plaintiff city and its environs.

Such a show cause order was duly issued and served, whereupon defendant filed an answer denying that it was a common carrier and denying that the commission had any jurisdiction over or authority to regulate and control defendant's rates and services. After admitting certain allegations in plaintiff's complaint, which need no repetition here, defendant alleged that it owns and maintains pipe lines for the transportation of its own natural gas to supply its own distribution systems for

the sale of natural gas at retail to ultimate consumers; that defendant is not now and never has been a common carrier of natural gas or other petroleum products; that it is not now and never has been engaged in the sale of natural gas or other petroleum products at wholesale for resale by others; and that an order of the commission requiring defendant to sell natural gas to plaintiff city at wholesale in event it acquires defendant's local natural gas distribution system therein would deprive defendant of its property for public use without just compensation and without due process of law, contrary to the Constitution of the State of Nebraska and the Constitution of the United States.

After a hearing by the commission, it entered an order finding that plaintiff's complaint should be sustained; that the commission had jurisdiction of the parties and subject matter with authority to prescribe rates, regulate sevices, and exercise general control over defendant as a common carrier, and ordered: "* * * that in event complainant acquires, by lawful means, title to the gas distribution system of defendant, now owned and operated in said city, that said defendant shall provide sufficient supplies of natural gas to said city, at rates which shall hereinafter be established by the Commission, after full and complete hearing, whereat the parties of interest may appear and present evidence." Thereafter, defendant's motion for rehearing was overruled, and it appealed to this court, assigning that the commission erred: (1) In entering an order upon a state of facts which had not yet arisen but which were contingent and uncertain; (2) in finding that it had jurisdiction of the subject matter of plaintiff's complaint, and had jurisdiction and authority to prescribe rates, regulate services, and exercise general control over defendant; and (3) in rendering the order aforesaid. We sustain assignments Nos. 2 and 3, which requires no discussion of assignment No. 1.

As stated in In re Application of Richling, 154 Neb.

108, 47 N. W. 2d 413: "The powers of the railway commission are derived from the Constitution. It is provided in part in Article IV, section 20, Constitution of Nebraska: '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 powers of the railway commission under this section are plenary in character and self-executing. But when the Legislature acts within the scope of the constitutional provision, the railway commission is subjected to the provisions of such legislation. Rodgers v. Nebraska State Railway Commission, 134 Neb. 832, 279 N. W. 800."

In State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502, we held that: "The State Railway Commission is authorized by the Constitution to regulate rates and service and to have general control of common carriers, within the state, as the Legislature may provide by law, and in the absence of specific legislation its powers and duties are unqualified.

"The powers and duties of the State Railway Commission are derived from and an independent part of the Constitution, and are administrative, legislative, and judicial.

"The authority of the State Railway Commission to regulate and control common carriers as the Legislature may provide by law, means in the manner in which the Legislature provides by specific legislation."

In Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756, we held: "Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights.

"On an appeal to the supreme court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made." See, also, Chicago, B. & Q. R. R. Co. v. Herman Bros., Inc., *ante* p. 247, 82 N. W. 2d 395; Hooper Telephone Co. v. Nebraska Telephone Co., 96 Neb. 245, 147 N. W. 674.

In the light of such rules and authorities hereinafter cited, we have examined the record. The material and relevant evidence, which is not disputed, is summarized as follows: Plaintiff's mayor testified as a witness for plaintiff that the question of acquiring defendant's local gas distribution system by eminent domain had been submitted to the electors of plaintiff city and carried; and that thereafter a certificate of the result was submitted to this court and a three-judge condemnation court was organized at Bridgeport. He testified that at the present time defendant supplies natural gas at retail to users thereof in plaintiff city; that no other natural gas company was furnishing natural gas in plaintiff city; that the nearest other natural gas pipe line was that of the Kansas-Nebraska Natural Gas Company located 9 miles east of plaintiff city; and that upon inquiry that company advised that it would not be interested in supplying plaintiff with natural gas. A consulting engineer testified as a witness for plaintiff, but his testimony dealt almost entirely with rates, which, as we view it, is unimportant here.

Defendant's secretary since 1946 testified as a witness for defendant that he was entirely familiar with defendant's operations since that time. The first time defendant was able to purchase intrastate gas from Nebraska fields for sale to ultimate consumers in plaintiff city was in 1951. Prior thereto defendant served such ultimate consumers with interstate gas purchased by defendant from Sand Drew Field in Wyoming, but

since 1951 defendant has acquired natural gas intrastate out of Huntsman Field in Nebraska with which it has served plaintiff city and its inhabitants. Defendant's pipe lines run from Sidney up to Northport, east to Lewellen, from Northport to Mitchell, and coming the other way from Glenrock, Wyoming, down to the state line. Defendant carries only gas purchased by it and sold only at retail by delivery to ultimate consumers through its own distribution systems. Defendant so serves Sidney, Dalton, and Gurley in the north part, then east to Broadwater, Northport, Lisco, Oshkosh, and Lewellen, then west to Bayard, Minatare, Scottsbluff, Gering, Mitchell, Morrill, and Henry. Defendant owns the distribution system in each of those cities and towns, and all gas transported by defendant is supplied to ultimate users at retail through those distribution systems. Defendant has never sold gas at wholesale or to others for resale, and its directors have never authorized the sale of gas at wholesale. Defendant's articles provide that it will conduct a "natural gas business." Defendant does not sell gas at wholesale in any cities or towns in any state. It now has a sufficient supply of gas from Nebraska to supply all inhabitants in all of the cities and towns that it now serves in Nebraska. There possibly could be interstate gas to serve some of those cities from time to time, but by and large all of the supply comes from Nebraska fields. Although unimportant here, he testified that the Wyoming Public Service Commission regulates defendant's retail rates, but has never fixed any wholesale rates, and the Federal Power Commission does not regulate defendant although its pipe line starts at Glenrock, Wyoming, and follows down the Platte River into Nebraska near Henry, which territory is supplied with gas at retail from Wyoming. No other municipality served by defendant has ever condemned its property for the purpose of making it municipally owned.

Defendant's manager for 26 years of that part of its

system from Douglas, Wyoming, to Lewellen, Nebraska, testified as a witness for defendant. He testified that gas from Huntsman Field, being routed from Huntsman to Northport and west, has supplied plaintiff city since 1951. Defendant's pipe line from Huntsman Field to plaintiff city is about 47 miles long. Gas from that field supplies gas intrastate for all the east end of defendant's own distribution systems, from Scottsbluff east, including Sidney, Gurley, Dalton, Minatare, Bridgeport, Northport, Broadwater, Lisco, Oshkosh, Scottsbluff, and Lewellen, but Mitchell and towns west are supplied interstate from Wyoming. In that connection, however, defendant has a junction station whereby it can if necessary supply the east end with Wyoming gas and the west end with Nebraska gas. In addition to users in the foregoing cities and towns, defendant sells gas at retail to some alfalfa mills and industrial plants, but otherwise defendant has never sold gas to anyone or any town or city either in Wyoming or Nebraska except at retail through its own distribution systems. He testified that to serve customers, a gas distributor must have reserves and potential customers in order to acquire it, and normally, as far as he knows, there is only one gas supplier for each city or town because the nature of the business is such that it operates better and more efficiently if the business has a monopoly in a local area.

Defendant's 25-year franchise in plaintiff city expired in March, and the governing body of the city did not want to renew it. In that connection, section 17-125, R. R. S. 1943, provides in part that: "* * * such city may, after such period, make any reasonable regulation with reference to any person, firm or corporation holding such franchise either as to charges for such gas or electricity or otherwise." Such section was construed in Kansas-Nebraska Natural Gas Co. v. City of St. Edward, 234 F. 2d 436, and City of University Place

v. Lincoln Gas & Electric Light Co., 109 Neb. 370, 191 N. W. 432.

Although defendant's franchise has expired, it has continued to distribute and sell gas at retail in plaintiff city, and there is no evidence that defendant has refused to continue to do so. Such witness testified that defendant's franchise with cities and villages served by it regulates the retail rate by agreement and approval by the city council. Defendant builds its own line to the source of supply, carries its own gas therein, and then distributes and sells it to ultimate consumers as a matter of contract between defendant and the city. Defendant has never at any time sold at wholesale and does not want to get into the wholesale business as plaintiff city desires it to do.

By stipulation, exhibit No. 3, a private reciprocal standby service contract entered into between defendant and Kansas-Nebraska Natural Gas Company, Inc., was received in evidence. As disclosed thereby, its primary purpose was to provide for the establishment of an interconnection between their pipe line systems in the vicinity of the Huntsman plant, which would enable either party to deliver gas to the other if required in order to meet an emergency situation on the other party's pipe line system. Also in that connection, the Kansas-Nebraska Natural Gas Company purchases natural gas from the oil field near Sidney, and has a gas distribution system in Alliance. That company has a pipe line from near Sidney north to Alliance, which passes through Northport and parallels defendant's line from Northport to Huntsman Field near Sidney. Their contract provides for operation of both lines from near Sidney to Northport by defendant. The Kansas-Nebraska Natural Gas Company puts its gas into its line near Sidney and withdraws at Northport the same volume of gas as required by it to provide gas service north of Northport. Defendant operates both such lines, although one is owned by Kansas-Nebraska Natural Gas

Company and defendant is paid for such operation 1½ cents per 1,000 cubic feet of natural gas carried in the line for Kansas-Nebraska Natural Gas Company.

Contrary to plaintiff's contention, such single contract would not make defendant a common carrier of natural gas and require it to carry such gas for any one applying for such service. It does not bring defendant within the definition of a common carrier as hereinafter defined. It does not constitute a holding of itself out to the public as engaged in the business of transporting gas from place to place for a consideration or hire, nor offer itself to the public generally as such. In that connection, defendant was simply a private carrier as defined in 13 C. J. S., Carriers, § 4, p. 31, wherein it is said, citing authorities: "A private carrier is one who undertakes by special agreement in a particular instance to transport property without being bound to serve every person who may apply. A private carrier of goods has been defined as one who, without being engaged in the business of carrying as a public employment, undertakes to deliver goods in a particular case for hire or reward; but this definition is not strictly correct in so far as it implies that one who does not carry for hire or reward is not a private carrier; and more accurately stated, a private carrier is one who, without making it a vocation, or holding himself out to the public as ready to act for all who desire his services, undertakes, by special agreement in a particular instance only, to transport property from one place to another either gratuitously or for hire."

We turn then to certain statutes and other applicable authorities to ultimately determine whether or not plaintiff was a common carrier with its rates and services subject to general regulation and control by the commission. In doing so, we conclude that it was not.

Section 75-201, R. R. S. 1943, provides: "The State Railway Commission shall have the power to regulate the rates and services of, and to exercise a general con-

trol over, all railroads, express companies, car companies, sleeping car companies, freight and freight-line companies, and all other common carriers engaged in the transportation of freight or passengers within this state."

Section 75-301, R. R. S. 1943, provides in part: "The term 'common carriers' as used in said sections (75-101 to 75-512) shall be taken to include all corporations, companies, individuals and associations of individuals, * * * that may now or hereafter own, operate, manage or control any railroad, interurban or street railway line, * * * or part thereof, or any express company, car company, sleeping car company, freight and freight line company, telegraph and telephone companies, and any other carrier engaged in the transmission of messages or transportation of passengers or freight *for hire*." (Italics supplied.)

Section 75-601, R. R. S. 1943, provides: "Any company, corporation or association, formed or created for the purpose of transporting, transmitting or conveying crude oil, petroleum, or the products thereof, or gases, from one point in the State of Nebraska to another point in the State of Nebraska *for a consideration*, are hereby declared to be common carriers. Any such company, corporation or association desiring or requiring a right-of-way or rights-of-way for the laying and maintaining of any pipe line or lines for such purpose within the State of Nebraska, and being unable to agree with the owner or lessee of any land, lot, real estate or right-of-way on the amount of compensation for the use and occupancy of so much of any lot, land, real estate or right-of-way as may reasonably be necessary for the laying, relaying and maintenance of any such pipe line, shall have the right to acquire the same for such purpose, as hereinafter provided. *Such company, corporation or association* is hereby placed under the control and subject to regulation by the State Railway Commission, and subject to Chapter 75, so far as the provisions thereof are applicable to pipe lines *as common carriers*."

(Italics supplied.) Such section was amended, effective May 21, 1951, but only for the purpose of providing procedure for exercising the power of eminent domain as provided in sections 76-704 to 76-724, R. S. Supp., 1951. In that connection, it will be noted that the italicized words, "Such company, corporation or association" appearing in the last sentence of the section, refer back to those "formed or created for the purpose of transporting, transmitting or conveying * * * gases, from one point in the State of Nebraska to another point in the State of Nebraska *for a consideration,* * * *." (Italics supplied.)

Plaintiff's contention that defendant was a common carrier because it had exercised the right of eminent domain under section 75-601, R. R. S. 1943, has no merit for two reasons. First, defendant does not render the service of transporting gas for a consideration. Second, as shown by exhibit A, attached to and made a part of plaintiff's complaint, defendant in 1950 exercised the right of eminent domain as an interstate pipe line, as distinguished from an intrastate pipe line, under the provisions of section 75-609, R. R. S. 1943, in the manner provided therein, which it concededly had a right to do.

Section 75-609, R. R. S. 1943, provides: "Any company, corporation or association formed or created for the purpose of transporting or conveying crude oil, petroleum or other products thereof in *interstate commerce* through or across the State of Nebraska, and desiring or requiring a right-of-way, and being unable to agree with the owner or lessee of any land, lot or right-of-way for the amount of compensation for the use and occupancy of so much of any lot, land, real estate or right-of-way as may be reasonably necessary for the laying, relaying and maintenance of any such pipe line, shall have the right to acquire the same for such purpose in the manner provided in sections 75-601 to 75-607 as to companies formed or created for transporting or conveying crude oil, petroleum or the products there-

of within the State of Nebraska." (Italics supplied.) Such section was amended effective May 21, 1951, by adding thereto, "or intrastate within the State of Nebraska," after the word "Nebraska," and providing procedure for the exercise of eminent domain under sections 76-704 to 76-724, R. S. Supp., 1951. Such section in neither event contained any provision that such interstate pipe line companies were common carriers and thereby "placed under the control and subject to regulation by the State Railway Commission * * * as common carriers." Assuming herein, for purpose of argument, that defendant would be a common carrier if it held itself out to the public generally as engaged in transporting, transmitting, or conveying of gases "for a consideration," or "for hire," defendant did not do so and would not be a common carrier then or now. Defendant simply supplies and sells its own gas to ultimate consumers at retail. It renders no transportation services for hire.

In that connection, this court and other authorities have specifically defined a common carrier. In State ex rel. Winnett v. Union Stock Yards Co., 81 Neb. 67, 115 N. W. 627, this court concluded that any person, corporation, or association holding itself out to the public as offering its services to all persons similarly situated and performing as its public vocation the services of transporting passengers, freight, messages, or commodities for a consideration or hire, is a common carrier in the particular spheres of such employment. In the opinion it is said: "The statute, we think, has reference to all companies or persons who hold themselves out to the public as engaged in those things which characterize it as a common carrier. It has been said that a common carrier is one who holds itself 'out as ready "to carry at reasonable rates such commodities as are in his line of business for all persons who offer them, as early as his means will allow."' Faucher v. Wilson, 68 N. H. 338, 39 L. R. A. 431, and cases cited."

In State v. Southern Elkhorn Telephone Co., 106 Neb. 342, 183 N. W. 562, this court said: "In order that a company be a common carrier, it is essential, in view of this statutory definition, as well as by the generally recognized meaning of the term 'common carrier,' that the service rendered by it must be a service that is rendered for hire. It was said by Justice Story in Citizens Bank v. Nantucket Steamboat Co., 5 Fed. Cas. (No. 2730) 719, 725: 'I take it to be exceedingly clear that no person is a common carrier in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier, in all our books, fully establishes this result.' If no compensation is received, 'he is not in the sense of the law a common carrier; but he is a mere mandatory, or gratuitous bailee; and of course his rights, duties and liabilities are of a very different nature and character from those of a common carrier.'

"As pointed out in 10 C. J. 41, sec. 10: 'The law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have neither expressly assumed that character nor by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it.'" Thereafter, quoting with approval from State ex rel. Buffum Telephone Co. v. Public Service Commission, 272 Mo. 627, 199 S. W. 962, L. R. A. 1918C 820, it is said: "'Operation for hire is a prerequisite to supervision by the commission. The reason is plain.'"

As stated in 9 Am. Jur., Carriers, § 4, p. 430, citing numerous authorities: "Subject to the qualifications and elaborations hereinafter noted, a common carrier may be defined, very generally, as one who holds himself out to the public as engaged in the business of transporting persons or property from place to place, for compensation, offering his services to the public generally." Also, as said in § 9, p. 435: "No person is

a common carrier who does not carry for hire; that is, who does not receive, or is not entitled to receive, any compensation for his services." Further, as said in § 15, p. 437, citing numerous authorities: "It is well established that the state cannot, consistent with constitutional guaranties against infringement upon private property rights, by legislative fiat or edict or by the orders of an administrative commission, arbitrarily impose the character or status of a common carrier upon a mere private carrier or other person who has not devoted his property to such a public use."

In the light of the evidence and foregoing rules of law, we conclude that defendant is not a common carrier for hire or a consideration, and is not subject to regulation and control by the commission as a common carrier. Thus, we conclude that the state railway commission had no jurisdiction or authority to render the order involved herein. We find no constitutional or statutory provisions which would authorize us to hold otherwise. Authorities cited by plaintiff are distinguishable upon the facts or constitutional and statutory provisions.

Other issues were raised and discussed in briefs of counsel, but in view of our conclusion that defendant is not a common carrier subject to regulation of its rates and services or under the general control of the commission, we do not deem it necessary to discuss them.

For reasons heretofore stated, we conclude that the order of the Nebraska State Railway Commission should be and hereby is reversed and the cause is dismissed. All costs are taxed to plaintiff.

REVERSED AND DISMISSED.

S. S. KRESGE COMPANY, APPELLANT, V. CARL W. JENSEN, TREASURER, DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES.

83 N. W. 2d 569

Filed June 14, 1957. No. 34193.

1. **Declaratory Judgments: Parties.** The state is not a necessary party in an action by a taxpayer for a declaratory judgment attacking the validity of an assessment brought against the county treasurer and the county in which the property was assessed.
2. **Taxation.** The assessment of property is not final until acted upon by the county and state boards of equalization, and not until the action of the latter is certified to the county clerks of the different counties and by them extended upon the tax rolls.
3. ———. Individual discrepancies and inequalities must be corrected and equalized by the county board of equalization.
4. **Taxation: Judgments.** One aggrieved by the action of a county board of equalization may appeal to the district court. One who fails to pursue this remedy is precluded from objecting to the valuation of his separate property for taxation purposes and a collateral attack may not be made thereon except where the assessment is void, willfully discriminatory, or the result of fraud.
5. **Taxation: Constitutional Law.** It is the function of the county board of equalization to determine the actual value of property for tax purposes and give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property.
6. ———: ———. The right of a taxpayer, whose property alone is taxed at 100 percent of its actual value, is to apply to the county board of equalization to have his assessment reduced to the percentage of that value at which others are assessed, even though this is a departure from the requirements of the statute. Uniform and proportionate taxation is a constitutional requirement and consequently the prime consideration.
7. **Taxation.** The State Board of Equalization and Assessment cannot deal with individual assessments, nor take into consideration inequalities as between individual taxpayers. It deals only with the values of the taxable property of a county in the aggregate.
8. **Taxation: Judgments.** When a taxpayer fails to exercise his right to a hearing before the county board of equalization regarding his individual property valuation for tax purposes, or to appeal therefrom if he is dissatisfied, he is precluded

from attacking the amount of the valuation collaterally because of a valid order of the State Board of Equalization and Assessment raising the valuation in the aggregate of all property in the county to secure uniform and proportionate assessments. This is so even if it results in the assessment of his individual property in excess of its actual value.

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

Young, Holm & Miller and *John E. North,* for appellant.

Eugene F. Fitzgerald, George C. Pardee, John C. Burke, Edward F. Fogarty, Bernard E. Vinardi, and *William R. King,* for appellees.

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

CARTER, J.

This is an action for a declaratory judgment determining the rights and obligations of appellant with reference to its liabilities for personal property taxes for 1953. The parties defendant are Carl W. Jensen, treasurer for Douglas County, Nebraska; Metropolitan Utilities District of Omaha; the Municipal University of Omaha; the School District of Omaha; the City of Omaha; the County of Douglas; and the State of Nebraska. The trial court found against the appellant and dismissed the action. The appellant has appealed.

The appellant, whom we shall hereafter refer to as the company, is a Michigan corporation duly qualified to transact business in this state. It operates two retail stores in the city of Omaha. On April 20, 1953, the company filed its personal property tax return on its two stores covering the value of its stock inventories and the furniture and fixtures. The evidence is stipulated and consequently there is no question of fact to be here determined.

The company calculated the valuation of its inventory in its downtown store in the following manner: A physical inventory of all goods, wares, and merchan-

dise in the store was taken as of the close of business on December 31, 1952. This inventory was extended to show its cost value in the amount of $134,699. The amount of merchandise purchased in January and February 1953, amounting to $127,959, was added thereto, making a total of $262,658. The sales for the months of January and February 1953, amounted to $173,835. The percent of gross profit for these 2 months was shown to be $65,119. This latter item was deducted from the gross sales for January and February 1953, leaving a cost inventory for those months of $108,716. This item was deducted from the total cost of purchases made, leaving a cost inventory of $153,942, which it returned for assessment purposes. The company also reported the cost price of all furniture and fixtures at $117,994. It returned this item for taxation purposes at 50% of its cost, the same being $58,997. The total valuation of inventory and furniture and fixtures for tax purposes amounted to $212,939. By a similar method of calculation the inventory and furniture and fixtures at the South Omaha store were reported at $43,146 and $19,014 respectively. The total taxable value of the South Omaha store was therefore returned at $62,160.

The record shows that on July 28, 1953, the State Board of Equalization and Assessment increased the valuation of business schedules in Douglas County by 40 percent. On November 3, 1953, the county treasurer demanded a personal property tax on the downtown store on taxable valuation of $149,060 and an actual valuation of $298,120 instead of the total valuation of $212,939 as reported by the company. On the same day taxes were demanded on the personal property of the South Omaha store upon a taxable valuation of $43,510 based upon an actual valuation of $87,020, instead of the total valuation of $62,160 as reported by the company. On December 10, 1953, the company tendered $4,717.78 in payment of all taxes due on the

downtown store and $1,376.26 for all taxes due on the South Omaha store. The tendered payments were the amounts due on the 100 percent actual valuation fixed by the county board of equalization before the State Board of Equalization and Assessment made its order increasing the valuation of business schedules in Douglas County by 40 percent. The tenders were refused and this action commenced to compel their acceptance.

It will be noted that the company reported its inventories at its actual cost and the furniture and fixtures at 50 percent of cost. There is no evidence of any depreciated value of the furniture and fixtures. Assuming that the stipulated facts are sufficient to find that the furniture and fixtures were reported for assessment purposes at their actual value, the result would necessarily be the same as in the case of the stock inventories.

The State of Nebraska filed a special appearance by which it was asserted that it was subject to suit only in Lancaster County and that the district court for Douglas County was without jurisdiction. The special appearance was sustained. It is now contended that the State of Nebraska is a necessary party and that the district court for Douglas County was without jurisdiction to hear the action. This issue was determined in Offutt Housing Co. v. County of Sarpy, 160 Neb. 320, 70 N. W. 2d 382, wherein we said: "Relying solely upon section 25-21,159, R. R. S. 1943, defendants also argued that the state was a necessary party defendant, thus there was a defect of parties. We conclude that the contention has no merit. * * * This court has uniformly entertained jurisdiction in cases brought to enjoin the collection of void taxes wherein only the county in which the property is located and the county treasurer thereof have been made parties defendant. Rothwell v. Knox County, 62 Neb. 50, 86 N. W. 903; Y. M. C. A. of Omaha v. Douglas County, 60 Neb. 642, 83 N. W. 924, 52 L. R. A. 123. See, also, 28 Am. Jur., Injunc-

tions, § 275, p. 450." The State of Nebraska is not a necessary party in an action by a taxpayer for a declaratory judgment attacking the validity of an assessment brought against the county treasurer and the county in which the property was assessed.

It is the contention of the company that it reported its stock inventories and furniture and fixtures to the assessor of Douglas County at actual value and that the 40 percent increase ordered by the State Board of Equalization and Assessment had the effect of taxing the property included in its business schedules at 140 percent of actual value. It contends that this is unlawful under section 77-201, R. S. Supp., 1953, which in part provides: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value which shall be entered opposite each item and shall be assessed at fifty per cent of such actual value." It will be observed that in the instant case the company assumes that the cost of its stock inventory is its actual value. This, of course, is not so. The statute defines actual value as the value in the market in the ordinary course of trade. § 77-112, R. R. S. 1943. The cost of a stock of merchandise is not its actual value although it may be evidence properly to be considered in determining actual value. Actual value is largely a matter of opinion. There are no yardsticks by which it can be determined with complete accuracy.

The Constitution of this state provides that necessary revenue shall be raised by taxation in such manner as the Legislature may direct. It provides also that taxes shall be levied uniformly and proportionately upon all tangible property and franchises with one exception not material here. It further provides that the Legislature may prescribe standards and methods for the determination of the value of real and other tangible property at uniform and proportionate values. Art VIII, § 1, Constitution. Pursuant to these provisions

the Legislature has provided the method of determining the value of tangible property for tax purposes. The principal ground relied on here is the alleged fact that the stocks of merchandise and furniture and fixtures of the company were valued by the county board of equalization at their full and actual value, and that the proposed increase ordered by the State Board of Equalization and Assessment will result in the overvaluation of the property and operate to compel it to pay taxes on property in excess of its actual value contrary to section 77-201, R. S. Supp., 1953.

We point out that the company listed its stock of merchandise and furniture and fixtures and placed its own value thereon. This value was accepted by the county board of equalization and the company took no exception thereto, nor did it appeal therefrom. It is therefore a finding by the county board of equalization, acting quasi-judicially, of the actual value of the property for tax purposes. But it is only one step in determining the value of the property for taxation purposes. After the county board of equalization has fairly and impartially equalized the valuations and heard grievances and complaints regarding the assessments made, and acted to review and correct the same, it is the duty of the State Board of Equalization and Assessment to equalize assessments between the different counties to effectuate the uniformity and proportionate value provisions of the Constitution. In accomplishing this purpose the State Board of Equalization and Assessment is empowered to increase or decrease the aggregate valuation of any county by a percentum. Upon certification of such increase or decrease to the county clerk, it is mandatory upon such clerk to put the order in effect. As has been stated, such an order was made in the instant case increasing the value of property listed as business schedules by 40 percent. The company did not appeal from this order. Consequently, the method of attaining the taxable value

of the company's property as prescribed by the Legislature was followed and no appeals taken therefrom.

It is the function of the county board of equalization to determine the actual value of the property for taxation purposes. While the county board of equalization acts in a quasi-judicial capacity and its valuations are final as to individual taxpayers unless appealed from, such valuations are subject to the powers of the State Board of Equalization and Assessment, which powers have been described by this court as being purely incidental to a proper equalization of the assessment of the different counties of the state as returned to that body. Hacker v. Howe, 72 Neb. 385, 101 N. W. 255. Both the county board of equalization and the State Board of Equalization and Assessment, however, must give effect to the constitutional requirement that taxes must be levied uniformly and proportionately upon all tangible property. It is evident that actual value and a uniform and proportionate value may not always result in identical results. In dealing with such a situation arising in this state, the Supreme Court of the United States said: "This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979. It could well be added that the application of this principle to the findings of the county board of equalization makes it possible for the State Board of Equalization and Assessment to fairly equalize between counties without doing injustice to individual taxpayers. We necessarily con-

clude that as to an individual taxpayer the remedy for overvaluation or a failure to receive a uniform and proportionate valuation of his property at the hands of the county board of equalization is by direct appeal to the courts and not by a collateral attack. Hacker v. Howe, *supra;* Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489; County of Howard v. State Board of Equalization & Assessment, 158 Neb. 339, 63 N. W. 2d 441; LeDioyt v. County of Keith, 161 Neb. 615, 74 N. W. 2d 455. There is no contention here made that the assessment made by the county board of equalization is void, or that it resulted from willful discrimination or other fraudulent conduct on the part of the assessment or equalization officers. The assessments fixed by the county board of equalization are therefore valid and not subject to collateral attack.

It is contended that the action of the State Board of Equalization and Assessment in raising the value of all business schedules in Douglas County by 40 percent, including the property here in question, has increased the taxable value of the property to 140 percent of actual value. No appeal was taken from the order of the state board by the company and, in fact, the validity of its order is not questioned. The company is now in no position to question the validity of the order of the State Board of Equalization and Assessment. LeDioyt v. County of Keith, *supra;* Hess v. Board of Equalization of Boone County, 141 Neb. 405, 3 N. W. 2d 653; Homan v. Board of Equalization of Boone County, 141 Neb. 400, 3 N. W. 2d 650.

The contention that the order of the State Board of Equalization and Assessment had the effect of raising the taxable value of the company's property in excess of its actual value has no merit. In County of Howard v. State Board of Equalization & Assessment, *supra,* this court said: "The cited case pointed out that any taxpayer who deemed his property not fairly assessed with respect to other property in the county was privileged

to resort to the county board of equalization for correction of such inequity. If the taxpayer failed to avail himself of such a remedy, then he had no ground for complaint of the subsequent action of the State Board in raising or lowering valuations of the county even though the result thereof might be the assessment of his individual property on a basis in excess of actual value." See, also, Bunten v. Rock Springs Grazing Assn., 29 Wyo. 461, 215 P. 244; Columbia Terminals Co. v. Koeln, 319 Mo. 445, 3 S. W. 2d 1021; First Nat. Bank of Greeley v. Patterson, 65 Colo. 166, 176 P. 498.

The company relies on Webb & Jones v. Renfrew, 7 Okl. 198, 54 P. 448. This case appears to sustain the position taken by the appellant. We do not concur in the views expressed therein. An assessed valuation over and above actual value appears to be violative of the Oklahoma Constitution and is construed as being void as to the excess. In this state, overvaluation is an irregularity only which must be appealed to the courts if relief is desired, except where it involves a void, a willfully discriminatory, or a fraudulent assessment in which event a collateral attack may properly be made.

We conclude that the company is not entitled to the relief here sought. Its proper remedy was by appeal to the district court from the valuations fixed by the county board of equalization. Since it has failed to pursue this remedy, the company is now precluded from objecting to the valuation of its property for taxation purposes.

The judgment of the trial court is correct and its order dismissing the action is affirmed.

AFFIRMED.

WILLIAM NIKLAUS, FOR THE BENEFIT AND ON THE BEHALF OF THE CITY OF LINCOLN, NEBRASKA, A BODY POLITIC, AND THE TAXPAYERS AND RESIDENTS OF SAID CITY, APPELLANT, V. ABEL CONSTRUCTION COMPANY, A DOMESTICATED FOREIGN CORPORATION, ET AL., APPELLEES.

83 N. W. 2d 904

Filed June 28, 1957. No. 34145.

1. **Actions.** The expression "in their proper persons" contained in section 7-110, R. R. S. 1943, patently is derived from the Latin "in propria persona" and means in their own persons.
2. **Taxation: Municipal Corporations.** Although taxpayers have an interest which entitles them to protect the interest of a municipal corporation, the cause of action remains in the corporation, and final relief is for its benefit.
3. **Taxation.** If a taxpayer is permitted to maintain a taxpayer's suit, it is not in his individual right, but as the representative of the district whose interests are alleged to be jeopardized by the inefficiency or maladministration of its officers.
4. ———. In a taxpayer's action potentially all of the taxpayers and citizens are parties.
5. **Actions.** As a general rule a plaintiff cannot join an individual cause of action and a representative cause of action.
6. **Taxation: Municipal Corporations.** Section 15-322, R. R. S. 1943, clearly recognizes that the cause of action is that of the city and not that of the citizen or taxpayer.
7. ———: ———. Where the officers of a public corporation refuse to put the necessary judicial machinery in motion upon demand being made therefor and failure to so act, a taxpayer may bring suit on behalf of himself and others similarly situated. The direct injury to be remedied where the taxpayer intervenes and sets the judicial machinery in motion for that purpose is not personal and direct to himself, but to the corporation.
8. **Attorney and Client: Courts.** Courts will not permit laymen to appear in court in a representative capacity and such a rule may not be circumvented by subterfuge.
9. ———: ———. While a layman may represent himself in court, he cannot, even on a single occasion, represent another, whether for a consideration or not.
10. **Attorney and Client: Actions.** Proceedings in a suit by a person not entitled to practice are a nullity, and the suit may be dismissed.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

Herbert W. Baird, for appellant.

Woods, Aitken & Aitken, for appellees.

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

SIMMONS, C. J.

This is an action brought by William Niklaus "for the benefit and in behalf of the City of Lincoln, Nebraska, a body politic," as recited in the caption of the petition and as recited in the body of the petition "for benefit of city of Lincoln." The defendants are Abel Construction Company, a corporation, and "Universal Surety Company."

The petition recited that plaintiff is a citizen and taxpayer and that the city of Lincoln is a municipal corporation operating under a Home Rule charter. It recited that a demand upon the mayor and city council to bring the action would be useless and that immediate action was necessary to protect the citizens and taxpayers.

The petition then, in nine separate causes of action, alleged that the city of Lincoln entered into paving contracts with the Abel Contruction Company; that the Universal Surety Company provided the performance bond; and that the contracts are illegal and void. It further alleged that payments by the city had been made under the contracts in amounts unknown to the plaintiff and that future payments would be made unless enjoined. It prayed for judgment "for benefit of city of Lincoln, Nebraska," in the sum of $1,000,000 and for a permanent injunction to prevent future payments.

The petition was filed May 2, 1953. On May 29, 1953, an "Amended and Supplemental Petition at Law" was filed. This petition in its caption recited, "William

Niklaus, for the benefit and on the behalf of the City of Lincoln, Nebraska, a body politic and the tax-payers and residents of said City, Plaintiff." The amended petition begins, "* * * plaintiff for the benefit of the City of Lincoln, * * *."

Among other things it alleged that on May 14, 1953, demand was made on the mayor and council to refrain from further performance of all contracts referred to in the amended petition and to bring action to recover monies "illegally paid" thereunder and that the demand had not been complied with. Although not stated in the petition, it appears from the briefs that this allegation as to a demand is based on section 15-322, R. R. S. 1943. Petitioner then in 24 separate causes of action made allegation about 24 paving contracts between the city and Abel Construction Company wherein the Universal Surety Company furnished the performance bond. It alleged that the contracts were "corrupt, fraudulent, illegal and void." It sought a recovery of judgment on the 24 causes of action in the sum of $740,948.60, "for the benefit and on behalf of the City of Lincoln, Nebraska, a body politic and the tax-payers and residents of said City."

Issues were made and trial was had. At the close of all the evidence defendants moved for a dismissal and judgment for each of them on three grounds: (1) The amended petition did not state facts sufficient to constitute a cause of action; (2) the evidence was insufficient to sustain a judgment in favor of the plaintiff; and (3) "The record now shows that William Niklaus, plaintiff herein, has engaged in illegal and unauthorized practice of law in connection with the institution and prosecution of this action and the various proceedings therein. And said unlawful and unauthorized conduct has nullified the entire proceedings."

The trial court made findings of fact, dismissed the action, and taxed costs to the plaintiff.

Plaintiff appeals. Defendants here ask for affirmance

urging, among other reasons, that above quoted from their motion in the trial court.

Mr. Niklaus was admitted to the practice of the law at the bar of this court on the 1st day of July 1914.

By opinion filed June 29, 1948, Mr. Niklaus' license to practice law was revoked and he was disbarred from the further practice in this state. That order has not been modified or set aside. State ex rel. Nebraska State Bar Assn. v. Niklaus, 149 Neb. 859, 33 N. W. 2d 145.

We are then at the outset confronted with questions that go directly to the integrity of judicial proceedings and the administration of justice in this state.

The first question is: Was Mr. Niklaus practicing law in this case contrary to the order of disbarment? If that question is answered in the affirmative, then the next question is: What is its effect on the litigation here involved?

The evidence is that the petition in this action was drafted by Herbert Baird, a member of the bar of this state. It is signed by Mr. Niklaus as plaintiff and beneath that, "Herbert Baird Atty for Pff." The amended petition bears Mr. Niklaus' personal signature and beneath that, "By Herbert Baird Atty for Pff." It is obvious that Mr. Niklaus' signature was not signed "by" Mr. Baird. Mr. Niklaus filed the original petition with the clerk of the district court.

The praecipe for the issuance of summons filed with the original petition bears the personal signature of Mr. Niklaus. Mr. Baird did not sign the praecipe.

Section 25-501, R. R. S. 1943, provides: "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

It is obvious that Mr. Niklaus, and not Mr. Baird, caused the summons to be issued.

Section 7-112, R. R. S. 1943, provides: "Upon filing original papers in any case, it shall be the duty of an attorney to endorse thereon his name."

During the progress of this case Mr. Niklaus prepared and filed praecipes for subpoenas duces tecum to witnesses. These are signed, "William Niklaus per se." Mr. Baird's signature does not appear on these instruments.

During the progress of this case plaintiff filed some 72 interrogatories. These interrogatories were framed in collaboration with Mr. Baird, and in part contained questions suggested by Mr. Niklaus. Mr. Niklaus typed the interrogatories. He argued to the court the questions presented by the defendants' objections to the interrogatories.

A number of motions were filed in the case and argued to the court before Judges Polk and Spencer. Mr. Niklaus denied arguing these motions to Judge Polk. He did argue motions before Judge Spencer and at times when Mr. Baird was not in the courtroom. Mr. Niklaus made research of the legal questions that were involved in these motions. Mr. Niklaus argued a motion for the inspection of records.

He was asked and answered this question: "Q Now in connection with your preparation of this case have you made extensive research of law? A I have." Mr. Niklaus looked up the law and prepared several briefs. He prepared and submitted to the court a "brief in support of plaintiff's motion to strike." This contained a statement of issues, law, and an extensive argument. He likewise prepared a "brief of plaintiff on *discovery* under statutory conditions." This contains citations of decisions and argument. This brief was presented to the court by Mr. Niklaus in connection with oral argument.

Likewise before trial Mr. Niklaus submitted to the trial court a volume which he elected to call a "compilation" of authorities on municipal contracts, many of which he related to the issues involved in this litigation. Mr. Niklaus made the research involved in the compilation and denominated it as his "private property."

Likewise, by oral motion to the court made by him-

self, Mr. Niklaus dismissed two of the 24 causes of action contained in the amended petition.

When the case came on for trial Mr. Baird appeared for the plaintiff and conducted the trial during the presentation of the case-in-chief.

During the defendants' case-in-chief Mr. Niklaus objected to the admission of certain exhibits "as already in. Encumbering the record." Again on two occasions when exhibits were offered he advised the court, "No objection."

The defendants offered a witness for cross-examination and Mr. Niklaus started to conduct the examination. Objection was made that he was not licensed to practice law. Mr. Niklaus then "relinquished any right" he had to examine the witness, and Mr. Baird then proceeded to conduct the examination. This is the first time that such objection was made.

The receipt for the bill of exceptions in this case is signed "Herbert W. Baird William Niklaus" over the typewritten words "Counsel for Plaintiff." The William Niklaus signature is obviously the personal signature of Mr. Niklaus. The signature "Herbert W. Baird" bears no similarity to the admitted signatures of Mr. Baird. It does not appear that Mr. Baird participated in the settling of the bill of exceptions.

Plaintiff's briefs here bear the name of Mr. Baird as attorney for the plaintiff.

The case was put on the final call and set for oral argument to be had on May 7, 1957. On April 29, 1957, Mr. Niklaus filed in this court, over his own signature, a motion for an order permitting him to present the oral argument. This was based on the serious illness of Mr. Baird and plaintiff's "clear right to present such argument" under the provisions of sections 7-101 and 7-110, R. R. S. 1943.

The notice of the motion was served on defendants May 1, 1957. Defendants resisted the motion on the ground that this action was a representative and class

action and that Mr. Niklaus was without authority to argue it.

On May 6, 1957, Mr. Niklaus appeared in court, addressed the court, and submitted the motion without argument. We denied the motion. Thereafter and on the same day Mr. Niklaus filed here a motion for a continuance so as to obtain the service of counsel. We denied the motion.

On May 7, 1957, the case was called for oral argument. Mr. Niklaus addressed the court and submitted the cause on the record and the briefs.

There can be no question but that Mr. Niklaus was here engaged in the practice of the law. Beginning with the preparation and filing of the praecipe for summons down to the submission of this cause to this court, he was actively, openly, and persistently performing the duties and exercising the powers of a member of the bar of this state. See State v. Fisher, 103 Neb. 736, 174 N. W. 320.

Patently he was directing the conduct of this litigation, at times in collaboration with Mr. Baird and at times independently of him. The professional ethics of Mr. Baird's conduct in this matter is not here presented and is not determined.

The question here is not that of Mr. Niklaus' right to bring this action as a taxpayer. The question is his right to appear in this action and perform the duties and exercise the powers of a member of the bar of this state.

Mr. Niklaus contends that he has not engaged in the illegal practice of the law. He relies here upon the provisions of sections 7-101 and 7-110, R. R. S. 1943. Section 7-101, R. R. S. 1943, provides: "No person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and

filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state. No such paper shall be received or filed in any action or proceeding unless the same bears the endorsement of some admitted attorney, or is drawn, signed, and presented by a party to the action or proceeding. It is hereby made the duty of the judges of such courts to enforce this prohibition. Any person who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days; but this section shall not apply to persons admitted to the bar under preexisting laws."

Section 7-110, R. R. S. 1943, provides: "Plaintiffs shall have the liberty of prosecuting, and defendants shall have the liberty of defending, in their proper persons."

The expression "in their proper persons" contained in section 7-110, R. R. S. 1943, patently is derived from the Latin "in propria persona" and means in their own persons. See Tayler's Law Glossary, pages 249 and 400. The question, then, is whether or not this action is one in which Mr. Niklaus may appear and prosecute in his own person without the services of a member of the bar of this state.

The action is one brought for the benefit of the city of Lincoln, a municipal corporation. The causes of action are alleged to be its causes of action. The judgment sought, if recovered on the causes of action, would be the judgment of the city of Lincoln and no part thereof would be the judgment of Mr. Niklaus in his own person. It is axiomatic that a corporation cannot appear in its own person. It must appear by a member of the bar.

It is obvious that Mr. Niklaus is without authority to appear and represent the city of Lincoln as its lawyer

in this litigation. That, however, is exactly the effect of what he did here.

The rule is stated as follows: "Although taxpayers have an interest which entitles them to protect the interest of the municipal corporation, the cause of action remains in the corporation, and final relief is for its benefit." 64 C. J. S., Municipal Corporations, § 2138, p. 951.

Mr. Niklaus in his petition herein alleged that he brought this action as a citizen and taxpayer for the benefit of the city of Lincoln. He signed the amended petition "for the benefit and on behalf of the City of Lincoln, Nebraska, a body politic and the taxpayers and residents of said City."

The rule is stated as follows: "If a taxpayer is permitted to maintain a taxpayer's suit, it is not in his individual right, but as the representative of the district whose interests are alleged to be jeopardized by the inefficiency or maladministration of its officers, and he has no other or higher right than the district or municipality itself could claim if the action were prosecuted in its name, and hence he can maintain the action only in cases where the district or municipality itself could do so. The derivative nature of the action is brought out forcibly in the rationale of the theory by which taxpayers' suits are maintainable as being analogous to stockholders' suits, and by the usual requirement that antecedent demand be made upon the prosecuting official of the public body to enforce the claim of such public body." 52 Am. Jur., Taxpayers' Actions, § 10, p. 7.

In a taxpayer's action potentially all of the taxpayers and citizens are parties. See Hawarden v. Youghiogheny & L. Coal Co., 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828.

As a general rule a plaintiff cannot join an individual cause of action and a representative cause of action. See, 1 C. J. S., Actions, § 97, p. 1282; Tyre v. Krug, 159 Wis. 39, 149 N. W. 718, L. R. A. 1915C 624; Archer v. City of Grand Rapids, 255 Mich. 485, 238 N. W. 267; Paradise v.

Nowlin, 86 Cal. App. 2d 897, 195 P. 2d 867; Nelson v. Smith, 107 Utah 382, 154 P. 2d 634, 157 A. L. R. 512. See, also, §§ 25-701, 25-702, R. R. S. 1943.

Section 15-322, R. R. S. 1943, contains a requirement of an antecedent demand as a condition of commencing an action of this nature for and on behalf of the city of Lincoln. If the demand is not complied with, the section authorizes a citizen to "begin and prosecute such action *in the name* of and for the benefit of the city, * * *." (Emphasis supplied.) Plaintiff alleged in his petition that such a demand would be useless. In his amended petition he alleged the demand and a failure to comply therewith.

Whether an action such as this must be brought in the name of the city by the taxpayer rather than in the name of the taxpayer is not presented for determination.

Section 15-322, R. R. S. 1943, clearly recognizes that the cause of action is that of the city and not that of the citizen or taxpayer. In Madison Metropolitan Sewerage Dist. v. Committee on Water Pollution, 260 Wis. 229, 50 N. W. 2d 424, it was held: "* * * where the officers of a public corporation refuse to put the necessary judicial machinery in motion upon demand being made therefor and failure to so act, a taxpayer may bring suit on behalf of himself and others similarly situated. * * * 'The direct injury to be remedied where the taxpayer intervenes and sets the judicial machinery in motion for that purpose, is not personal and direct to himself, but to the corporation.'"

Mr. Niklaus cannot, by the device of naming himself as a party plaintiff, convert this action into anything other than an action for the benefit of the city. Mr. Niklaus was without right to act as a member of the bar in this case. See Bay County Bar Assn. v. Finance System, Inc., 345 Mich. 434, 76 N. W. 2d 23, holding in effect that courts will not permit laymen to appear in court in a representative capacity and such a rule may not be circumvented by subterfuge.

Sections 7-101 and 7-110, R. R. S. 1943, do not apply here. On this phase of the case we adopt the language of the Supreme Court of Missouri in Liberty Mutual Ins. Co. v. Jones, 344 Mo. 932, 130 S. W. 2d 945, 125 A. L. R. 1149: "While a layman may represent himself in court he cannot even on a single occasion represent another, whether for a consideration or not."

The question then comes: What is the effect of the unlawful practice of the law by Mr. Niklaus on this litigation?

It is patent from the record that Mr. Niklaus conceived these alleged actions and admittedly made the investigations that preceded the drafting of the petitions. He has been the moving spirit in it throughout. His participation in the proceedings was not casual but persistent and continuous.

The rule is: "Proceedings in a suit by a person not entitled to practice are a nullity, and the suit may be dismissed." 7 C. J. S., Attorney and Client, § 16, p. 725.

The dismissal of a proceeding for such a cause is a drastic remedy and may not be required in all cases. The extent of the unlawful practice by Mr. Niklaus in this case requires that it be done.

This action is not taken for the benefit of lawyers who are duly admitted to the practice of the law in this state. As was said by the Supreme Court of Colorado in Bennie v. Triangle Ranch Co., 73 Colo. 586, 216 P. 718, it is "for the protection of citizens and litigants in the administration of justice, against the mistakes of the ignorant on the one hand, and the machinations of unscrupulous persons on the other, * * *." See, New Jersey Photo Engraving Co. v. Carl Schonert & Sons, 95 N. J. Eq. 12, 122 A. 307; Yount v. Zarbell, 17 Wash. 2d 278, 135 P. 2d 309; Stevens v. Jas. A. Smith Lumber Co., 54 S. D. 170, 222 N. W. 665; Jacobs v. Queen Ins. Co. of America, 51 S. D. 249, 213 N. W. 14.

The flagrant and persistent unlawful practice of law in this case by Mr. Niklaus requires that the proceedings

be held to be a nullity and the action dismissed.

The trial court properly dismissed the action. For the reasons here given, the judgment of the trial court is affirmed.

AFFIRMED.

RAYMOND FARRELL ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 54, LINCOLN COUNTY, NEBRASKA, ET AL., APPELLANTS.
84 N. W. 2d 126

Filed June 28, 1957. No. 34165.

1. **Constitutional Law: Schools and School Districts.** Article VII, section 6, of the Constitution of this state vests all matters pertaining to schools and school districts, their creation, dissolution, government, and control in the Legislature. In all such matters the state is supreme.
2. **Schools and School Districts.** Section 79-481, R. R. S. 1943, provides for the procedure to be followed at the time an original transfer is made of pupils from the school district of their residence in one county to an adjoining school district of another county for educational purposes.
3. ———. Section 79-481, R. R. S. 1943, does not provide for a renewal of a transfer of pupils from the school district of their residence in one county to an adjoining school district of another county, but authorizes the parents or guardians of such pupils to recall a request for an original transfer within 15 days after the county clerk has received the certificate of transfer.
4. ———. Section 79-482, R. R. S. 1943, provides in part that when such transfer shall have been made the children shall enjoy school privileges in the adjoining school district for only one year, unless the parents or guardians of such children shall give notice in writing to the county superintendent not less than 15 days before each annual meeting or election, asking that the transfer be continued for one year. A transfer once granted ceases to exist unless a renewal is made as required by this section. When a transfer is once renewed, it is in existence for a period of one year and may not in the interim be recalled, revoked, or canceled.
5. ———. The procedure for a recall of an original transfer as provided in section 79-481, R. R. S. 1943, cannot apply so as

to provide for a recall of a renewal of a transfer as provided for in section 79-482, R. R. S. 1943.

6. **Statutes.** The fundamental principle of statutory construction is ascertainment of the intent of the Legislature. The court will not read into a statute exceptions not made by the Legislature. Where a statute is clear and unambiguous in its terms, it is the duty of the court, in construing a statute, to give the language used by the Legislature its plain and ordinary meaning.

7. **Schools and School Districts.** Section 79-486, R. S. Supp., 1955, authorizes the governing board of any public school district in this state to contract with the district board of any neighboring public school district or districts for the instruction of pupils residing in the first-named district in the school or schools maintained by the neighboring district or districts for a period not exceeding 3 years, when a majority of the votes cast at the annual or special meeting of a school board favor such a proposition.

8. ———. School boards of Class II districts are creatures of statute with power to bind the district only within the limits fixed by the Legislature.

9. ———. A Class II school district is a creature of statute possessing no powers to contract beyond those granted by the Legislature.

10. ———. In case a Class II school district enters into a contract without the power granted by the Legislature such contract must be declared void and invalidated in an appropriate action.

11. ———. The Legislature intended, by enacting section 79-483, R. R. S. 1943, that parents or guardians of children transferred to a school district in an adjoining county, while such transfers are in effect, are not entitled to vote and are not considered legal voters in their home school district.

12. **Statutes.** When the Legislature reenacts a law, it thereby adopts the judicial construction which has theretofore been placed upon it.

13. ———. The Legislature is presumed to have known the effect which such statute originally had, and by its reenactment to have intended that that same effect should again be had.

14. **Elections.** Section 32-1001, R. R. S. 1943, which deals with election contests, does not include a school district election held for the purpose of contracting for the instruction of pupils.

15. **Injunctions: Taxation.** In an action instituted by a resident taxpayer, a court of equity will restrain public officers from illegally creating a debt or obligation which must be paid by taxation.

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

Maupin, Dent, Kay & Satterfield and *William E. Morrow, Jr.*, for appellants.

Baskins & Baskins, for appellees.

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

MESSMORE, J.

This is an action in equity brought by Raymond Farrell, Hans L. Johnson, Jr., Z. A. Russell, C. O. Shadonix, and Frank Kramer, legal voters and taxpayers of school district No. 54, Lincoln County, Nebraska, plaintiffs and appellees, against School District No. 54, Lincoln County, Nebraska, School Board of school district No. 54, Lincoln County, Nebraska, Archie Konruff, president of the school board of school district No. 54, and Lloyd Lovitt, secretary of the school board of school district No. 54, defendants and appellants, to enjoin the defendants from performing or carrying out a contract with school district No. 2, Logan County, Nebraska, for the instruction of school children of school district No. 54.

It is agreed by the parties that school district No. 54 and school district No. 2 are Class II schools. We will not repeat that school district No. 54 is in Lincoln County, Nebraska, and school district No. 2 is in Logan County, Nebraska, but refer to such school districts as school district No. 54 and school district No. 2.

The trial court entered judgment to the effect that each of the said defendants should be permanently enjoined from expending any money of school district No. 54 under and by virtue of the terms and conditions of said contract, from causing the pupils of school district No. 54 to be instructed in school district No. 2 for the 1956-1957 school year for the period of one year, and from in any other manner performing any of the terms and conditions of said contract.

The defendants filed a motion for new trial which was overruled. From the overruling of the motion for new trial, the defendants appealed.

The facts are stipulated and agreed to as set forth in the appellants' brief, and are as follows: On June 11, 1956, at 2 p.m., the annual meeting of the legal voters of school district No. 54 was held in the schoolhouse of school district No. 54, and at that time there was submitted to the legal voters of school district No. 54 for their determination the following proposition: "Should the School Board of School District No. 54, Lincoln County, Nebraska, contract with the School Board of School District No. 2, Logan County, Nebraska, for the instruction of pupils residing in School District No. 54, for the 1956-1957 school year, for the period of one year?" The vote upon said proposition by the legal voters of school district No. 54 was by ballot and resulted in a tally of 15 in favor of said proposition and 12 against said proposition. Since there was a majority in favor of the proposition, Archie Konruff, the president of the school board of school district No. 54, and Lloyd Lovitt, secretary of the school board of school district No. 54, in their official capacities as such officers, immediately executed a contract with the school board of school district No. 2 for the instruction of the pupils of school district No. 54.

It was stipulated for purposes of the trial of the action that Raymond Farrell, Mary E. Farrell, C. O. Shadonix, Twyla Shadonix, Catherine Shadonix, Hans L. Johnson, Jr., Maudie Johnson, Z. A. Russell, Emma Russell, Alfred Russell, Frank Kramer, and Robert Kramer were legal voters of school district No. 54, were present at the school meeting of school district No. 54, and voted against said proposition. It was further stipulated that Joseph P. Dolan, Kathryn Dolan, Harry W. Frey, Mildred M. Frey, Alice Hutchens, Charles A. Hutchens, Lloyd Lovitt, and Maxine Lovitt were also present and voted upon said proposition.

Prior to the holding of the annual meeting of the legal voters of school district No. 54, the Dolan, Frey, Hutchens, and Lovitt families had either requested continuances of their transfers or had made original requests for transfers from school district No. 54 to school district No. 2, as follows: Joseph P. Dolan made original request for transfer from school district No. 54 to school district No. 2 on June 19, 1954, then was granted a continuance of his transfer for the 1955-1956 school year, and on May 4, 1956, again requested and was granted a continuance of his transfer for the 1956-1957 school year. Harry W. Frey made original request for transfer from school district No. 54 to school district No. 2 on May 12, 1953, then was granted continuance of his transfer for the school years 1954-1955 and 1955-1956, and on May 22, 1956, again requested and was granted a continuance of his transfer for the 1956-1957 school year. Mrs. Charles A. Hutchens made an original request for transfer from school district No. 54 to school district No. 2 on May 31, 1956, which request was granted. Lloyd Lovitt made an original request for transfer from school district No. 54 to school district No. 2 on May 22, 1956, which request was likewise granted.

Subsequent to the time Joseph P. Dolan, Harry W. Frey, Mrs. Charles A. Hutchens, and Lloyd Lovitt made their respective requests for either continuances of transfer or original requests for transfers and on June 8, 1956, the four named individuals caused to be filed in the office of the county superintendent of Lincoln County, Nebraska, and in the office of the county superintendent of Logan County, Nebraska, a notice requesting that their individual temporary transfers from school district No. 54 to school district No. 2 for the 1956-1957 school year be canceled and such a cancellation be made effective immediately.

The appellants' assignments of error may be stated as follows: (1) The trial court erred in failing to hold that Joseph P. Dolan, Kathryn Dolan, Harry W. Frey,

and Mildred M. Frey were legal voters of school district No. 54 on June 11, 1956, and entitled to vote upon the proposition of the school board of school district No. 54 contracting with the school board of school district No. 2 for the instruction of the school children of school district No. 54 for the 1956-1957 school year; (2) the trial court erred in failing to find that the vote on said proposition was 15 in favor and 12 against the proposition; and (3) the trial court erred in failing to find that the plaintiffs had an adequate remedy at law under the provisions of Chapter 32, article 10, R. R. S. 1943.

The appellants assert and contend that the Dolans and Freys possessed a right guaranteed by the Constitution and statutes of this state to vote at the annual school meeting in the district of their residence on the proposition above mentioned. In support of this contention, the appellants cite Article I, section 22, of the Constitution of the State of Nebraska, as follows: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."

Article VII, section 6, of this state's Constitution provides: "The legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." This provision of the Constitution leaves all matters pertaining to schools and school districts, their creation, dissolution, government, and control with the Legislature. In all such matters the state is supreme. See, Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566; School District No. 49 v. School District No. 65-R, 159 Neb. 262, 66 N. W. 2d 561. The Legislature is authorized to and has established different qualifications for voters in a school district election than those for voters voting in a general election. The appellants concede this to be true. See, Cunningham v. Ilg, 118 Neb. 682, 226 N. W. 333; State ex rel. Crosby

v. Cones, 15 Neb. 444, 19 N. W. 682. We find no merit to the appellants' contention.

The appellants contend that a request for a continuance of transfer under the provisions of section 79-482, R. R. S. 1943, is subject to cancellation and revocation by the parent requesting the transfer; that the trial court found the Dolans and Freys did not have a right to cancel and revoke their respective requests for transfers from school district No. 54 to school district No. 2 and as a consequence they were not legal voters of school district No. 54 on June 11, 1956, when the election was held at the annual meeting of school district No. 54; and that as a result of the trial court's holding, the vote was changed showing 11 votes for the proposition heretofore set out and 12 votes against it. The appellants' contention is that the Dolans and Freys had the legal right to revoke and cancel their respective requests for transfers, and the trial court erred in finding that they did not possess such rights. The following sections of the statute are pertinent to a determination of the appellants' contention.

Section 79-481, R. R. S. 1943, provides: "When the transfer of children from a school district located in one county to a school district located in another county is involved, the county superintendent of each such county shall notify the county clerk, of the county in which the county superintendent has jurisdiction, of each transfer granted, using such forms of notice as the Superintendent of Public Instruction shall prescribe. The county clerk of the county to which the transfer for school purposes is made shall certify to the county clerk of the county in which the applicant for such transfer resides the number of mills of school taxes then voted in the district to which the transfer is made. It shall then be the duty of the county clerk of the county in which the applicant resides to levy, within fifteen days after the receipt of the certificate of transfer, unless it be recalled at the request of the parent or guardian of

such children in the meantime, under the authority of the county board of said county, upon all taxable property belonging to such applicant, real or personal, situated on lands thus transferred, an amount equal to and not exceeding the number of mills of school taxes being voted in the district to which the transfer is made. All such tax money derived from such levy shall be collected by the county treasurer of the county in which the property to be taxed is located and shall be paid by him to the county treasurer of the county to which transfer has been made. A proper receipt for such taxes shall be executed and drawn to the favor of the county treasurer from whom such taxes are received. The receipt shall set forth the purposes of such taxes and shall designate the school district entitled to receive all such taxes. The county treasurer of the county to which transfer was made shall place such taxes to the credit of the district."

It will be noted that section 79-481, R. R. S. 1943, provides for the procedure to be followed at the time the original request for transfer is made. It does not provide the procedure for a renewal of a transfer. This section authorizes the parents and guardians to recall a request for an original transfer within 15 days after the county clerk has received the certificate of transfer. At that time the county clerk has made no change in his official records, and makes no change therein until the expiration of 15 days from the date of receipt of the transfer. Once the county clerk changes his records to reflect the transfer, the records remain the same until he is notified that the transfer ceases to exist.

Section 79-482, R. R. S. 1943, provides: "When such transfer shall have been made the children shall enjoy school privileges in the adjoining district for only one year, unless the parent or guardian of such children shall give notice in writing to the county superintendent not less than fifteen days before each annual meeting or election, asking that the transfer be continued for one

year, using such form of notice as the Superintendent of Public Instruction shall prescribe. The notice shall state that such parent or guardian has children of school age who have not yet completed the eighth grade. A continuation of the transfer shall be granted only with the approval of the school board of the district to which such children are transferred. When the transfer shall cease to exist, the county superintendent shall notify the county clerk who shall thereupon retransfer, and the taxes of the parent or guardian and the real estate shall again be placed in the district of their residence."

It will be observed that section 79-482, R. R. S. 1943, does not provide for a recall or revocation of a renewal of a transfer. It is apparent that the legislative intent was that there should be no recall or revocation of a renewal of a transfer. This section contains the language: "When the transfer shall cease to exist," it is then the duty of the county superintendent to notify the county clerk who then is to change the records accordingly. As we read the above section of the statute, a transfer once granted ceases to exist unless a renewal is made as required by said section. Once renewed, the transfer is in existence for a period of one year and may not in the interim be recalled, revoked, or canceled.

The procedure for a recall of an original transfer, as provided in section 79-481, R. R. S. 1943, cannot apply so as to provide for a recall of a renewal of a transfer as provided for in section 79-482, R. R. S. 1943. Section 79-482, R. R. S. 1943, makes no requirement for a certificate of renewal of a transfer to be given to the county clerk. It makes no provision for the county clerk changing his records, except when notified that the transfer ceases to exist. The acts required to be done by the county superintendent and the county clerk, which determine the time limit within which a recall of an original transfer may be made (section 79-481, R. R. S. 1943), are not required to be done upon a renewal of a transfer (section 79-482, R. R. S. 1943). Thus the procedure

contained in section 79-481, R. R. S. 1943, for recall of an original transfer cannot be applied so as to recall a renewal of a transfer made under section 79-482, R. R. S. 1943. The provisions contained in section 79-481, R. R. S. 1943, deal with original transfers to adjoining school districts to which pupils are transferred. Section 79-482, R. R. S. 1943, deals with renewals of such transfers. It is obvious that the provisions of the respective sections cannot be incorporated so that each section is included within the purview of the other.

The fundamental principle of statutory construction is ascertainment of the intent of the legislature. The court will not read into a statute exceptions not made by the legislature. Where a statute is clear and unambiguous in its terms, it is the duty of the court, in construing it, to give the language used by the legislature its plain and ordinary meaning. See State ex rel. Thayer v. School District, 99 Neb. 338, 156 N. W. 641.

We conclude that the appellants' contention above stated cannot be sustained.

With reference to the right to contract, as set forth in the proposition voted upon at the annual meeting of school district No. 54, section 79-486, R. S. Supp., 1955, is pertinent. It provides in part: "The governing board of any public school district in this state, when authorized by a majority of the votes cast at any annual or special meeting, is empowered to (a) contract with the district board of any neighboring public school district or districts for the instruction of pupils residing in the first-named district in the school or schools maintained by the neighboring district or districts for a period of time not to exceed three years, and (b) make provision for the transportation of such pupils to the school or schools of the neighboring district or districts."

By the language of section 79-486, R. S. Supp., 1955, before a school board is authorized to enter into such a contract a majority of the votes cast at the annual or special meeting of the school board must be shown to

favor the proposition. This is a condition precedent. In the event a contract is entered into without compliance with this section of the statute, such contract is null and void.

School boards of Class II districts are creatures of statute with power to bind the district only within the limits fixed by the Legislature. A Class II school district is a creature of statute possessing no powers to contract beyond those granted by the Legislature. In case a Class II school district enters into a contract without the power granted by the Legislature such contract may be declared void and invalidated in an appropriate action. See Fulk v. School District, 155 Neb. 630, 53 N. W. 2d 56.

With reference to the right of parents to vote as applied to the instant case, section 79-483, R. R. S. 1943, is pertinent. This section provides: "The parents or guardians of the pupils so transferred shall have the right to vote in the district to which such pupils are transferred on all school matters except those of issuing bonds, levying a tax for building purposes, contracting for instruction, and closing the district. No parent or guardian of the pupils so transferred shall be eligible to hold office on the school board of the district to which the transfer was made."

In Cunningham v. Ilg, *supra,* this court construed section 6524, Comp. St. 1922, as amended by the Laws of 1925, c. 176, § 1, p. 459, which provided in part: "* * * the parents or guardians of the pupils so transferred shall have the right to vote in the district to which such pupils are transferred on all school matters except that of issuing bonds." It was held that by virtue of this section, parents and guardians of pupils who had been transferred to an adjoining school district were not, while such transfers were in force, legal voters of their home school district. Consequently, they were not entitled to vote on school matters in their home school district.

The history of this legislation contained in Cunningham v. Ilg, *supra,* decided July 2, 1929, shows that this section was reenacted by the Legislature. See, Laws 1927, c. 81, § 1, p. 246; Laws 1929, c. 91, § 1, p. 345; Laws 1931, c. 147, § 1, p. 401; Laws 1941, c. 162, § 1, p. 647; Laws 1941, c. 167, § 1, p. 663; Laws 1943, c. 194, § 1, p. 649; Laws 1949, c. 256, § 121, p. 733.

In Johnson v. Weborg, 142 Neb. 516, 7 N. W. 2d 65, it was held: "When the legislature reenacts a law, it thereby adopts the judicial construction which has theretofore been placed upon it. The legislature is presumed to have known the effect which such statute originally had, and by its reenactment to have intended that that same effect should again be had." See, also, Shandy v. City of Omaha, 127 Neb. 406, 255 N. W. 477.

The conclusion must be drawn, in the light of the above authorities, that the Legislature intended, relative to section 79-483, R. R. S. 1943, that parents or guardians of children transferred to a school district in an adjoining county, such as in the case at bar, while such transfers are in effect are not entitled to vote and are not considered legal voters in their home school district.

The appellants contend that the appellees had an adequate remedy at law by utilizing the law governing election contests; and that the appellees are not entitled to the relief granted them by the trial court in an injunction action.

Chapter 32, article 10, R. R. S. 1943, deals with elections and sets forth the general provisions with reference thereto. Section 32-1001, R. R. S. 1943, provides in part: "The provisions of sections 32-1001 to 32-1036 shall apply to contests on account of a general election. The election of any person to any public office, the location or relocation of a county seat, or any proposition submitted to a vote of the people may be contested: * * *." The different grounds for contest are then set forth in said section.

The appellants cite Scott v. McGuire, 15 Neb. 303, 18

N. W. 93. This case involves a relocation of a county seat. It was held that an injunction action would not lie. This type of election contest is specifically provided for in section 32-1001, R. R. S. 1943.

The appellants cite Mosiman v. Weber, 107 Neb. 737, 187 N. W. 109, wherein the court held: "Injunction is not the proper remedy to settle questions of the qualifications of election officers or whether legal votes have been rejected and illegal votes received sufficient to change the result of such election."

The appellants assert that the principle laid down in the cases cited above was reaffirmed in the case of School District No. 49 v. School District No. 65-R, *supra.* This was an injunction proceeding. The case involved an attack upon the legality of the formation of school district No. 65-R. The plaintiff, school district No. 49, sought to prevent school district No. 65-R from being put into operation insofar as it affected school district No. 49. Part of the proceedings was the submission of the question of reorganization to the electors of the school districts whose boundaries were in any manner changed by the plan of reorganization. Section 79-426.15, R. S. Supp., 1951, which provided for this election, designated it a special election and placed it in charge of the election officials charged with duties of holding general elections. The court held: "The statute has provided an adequate remedy for the settlement of the rights of parties in election cases by either contest or quo warranto and these remedies are exclusive."

The cases of Mosiman v. Weber, *supra,* and School District No. 49 v. School District No. 65-R, *supra,* are distinguishable from the case at bar. At the time the case of Mosiman v. Weber, *supra,* was decided by this court, on February 16, 1922, there was no statute in effect comparable to section 32-106, R. R. S. 1943, which provides: "Election shall mean any primary, special, municipal, or general election, except school election, at which the electors of the state or of any subdivision

thereof choose by ballot public officials or decide any public questions and propositions lawfully submitted to them." The source of this section is Laws 1951, c. 99, § 6, p. 271. It will be noted that the above-mentioned section of the statute excludes school district elections and voting from the definition of elections. There was in effect at the time Mosiman v. Weber, *supra,* was decided, a statute comparable to section 32-901, R. R. S. 1943, which provides as follows: "Election of members of governing body of school districts are excepted from the provisions of this chapter relating to the manner of voting and conduct of elections, except as otherwise provided in Chapter 79." Chapter 79 is titled "Schools." The comparable statute in effect at the time Mosiman v. Weber, *supra,* was decided was section 1946, Rev. St. 1913, which provided: "Elections for school district officers, except for members of the boards of education in cities, are excepted from the provisions of this chapter." The chapter referred to is Chapter 20, Elections, Rev. St. 1913. So, at the time of the decision in Mosiman v. Weber, *supra,* there was in effect no clear mandate of the Legislature excluding voting in school districts from the operation of the general election laws.

With reference to School District No. 49 v. School District No. 65-R, *supra,* it will be observed that the election, by legislative mandate in that case, was not a school election, but was subject to the general election laws and, of course, to an election contest.

Section 32-1001, R. R. S. 1943, must be read in conformity with sections 32-106 and 32-901, R. R. S. 1943.

We believe the following to be in point with the case at bar.

In Johnson v. Du Bois, 208 Minn. 557, 294 N. W. 839, an election contest, contestant, contestee, and one Berggreen were candidates for director of the board of education of the school district of Sauk Centre at the annual meeting and election held pursuant to law at which two directors were to be elected. The question for de-

cision was whether the district court had jurisdiction of a contest of a school district election. The court said: "The authority of courts to entertain election contests is purely statutory. Absent statutory authorization, the courts are without jurisdiction to hear and determine election contests. State ex rel. Narveson v. Village of McIntosh, 95 Minn. 243, 245, 103 N. W. 1017. If the statute did not authorize the court to entertain a school district election contest, it had no jurisdiction to hear the contest. * * * 'Sec. 2. (referring to the election laws) The word "election", as used in this act, shall mean and include any election, *except those held in any school district,* at which the electors of the state or of any subdivision thereof nominate or choose by ballot public officials or decide any public question lawfully submitted to them.' (Italics supplied.) * * * By defining an 'election' to mean and include any election 'except those held in any school district,' school district elections were entirely excluded from the provisions of the act. The exception extends to all provisions thereof, including those relating to election contests. The subjects embraced in an exception clause are exempt from the operation of the statute. State, by Ervin, v. Goodman, 206 Minn. 203, 208, 288 N. W. 157."

The appellees in the instant case had no cause of action by way of election contest. An election that can be contested by virtue of section 32-1001, R. R. S. 1943, does not include the voting by the legal voters of a school district, at an annual meeting, upon the proposition of contracting for instruction of pupils.

In this connection, it is stipulated and agreed that the appellees are residents and taxpayers of school district No. 54. The contracting by defendants for the instruction of pupils of school district No. 54 by school district No. 2 was beyond the power conferred by the Legislature by section 79-486, R. S. Supp., 1955, and was illegal, as was the action of the president and the treasurer in executing the contract on behalf of school district

No. 54. See Fulk v. School District, *supra*.

In Solomon v. Fleming, 34 Neb. 40, 51 N. W. 304, this court held: "A court of equity will, on the application of resident taxpayers, restrain public officers from doing an illegal act where the effect of such act, if consummated, would be a waste of public funds raised by taxation." See, also, McLain v. Maricle, 60 Neb. 353, 83 N. W. 85; Lindeman v. Corson, 93 Neb. 548, 141 N. W. 153.

In Roberts v. Thompson, 82 Neb. 458, 118 N. W. 106, this court held: "In an action instituted by a resident taxpayer, a court of equity will restrain public officers from illegally creating a debt or obligation which must be paid by taxation." See, also, Martin v. City of Lincoln, 155 Neb. 845, 53 N. W. 2d 923.

We believe that in the light of the authorities cited the appellees were entitled to resort to injunctive process to have the performance of the contract here involved enjoined.

The votes of Joseph P. Dolan, Kathryn Dolan, Harry W. Frey, and Mildred M. Frey, which were cast in favor of the proposition heretofore set out, were illegal votes. These four votes must be discounted. By not counting these four illegal votes, the result of the voting at the annual meeting of school district No. 54 on June 11, 1956, changed the voting on the proposition heretofore mentioned from 15 in favor and 12 against such proposition, to 11 in favor and 12 against the proposition. As a result of the election, the school board of school district No. 54 was not authorized by a majority of the votes cast at the annual meeting to contract with school district No. 2 for the instruction of the pupils of school district No. 54 for the 1956-1957 school year. There was a failure to comply with section 79-486, R. S. Supp., 1955. The school board of school district No. 54 was not authorized or empowered to enter into such contract, and the contract so entered into was beyond the power conferred by the Legislature and was void. Fulk v. School District, *supra*.

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

AFFIRMED.

AMOS M. SEARS, APPELLEE AND CROSS-APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE.
83 N. W. 2d 857

Filed June 28, 1957. No. 34172.

1. **Workmen's Compensation: Appeal and Error.** An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo on the record.
2. **Workmen's Compensation.** The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by him in an accident arising out of and in the course of his employment.

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

Edward F. Fogarty, Bernard E. Vinardi, Neal H. Hilmes, and *Irving B. Epstein,* for appellant.

Edward T. Hayes, for appellee.

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

YEAGER, J.

This is an action by Amos M. Sears, plaintiff and appellee, against the City of Omaha, a municipal corporation, defendant and appellant, to recover workmen's compensation on account of an accidental injury alleged to have been sustained by the plaintiff growing out of and in the course of employment by the city. The action was tried first to one judge of the workmen's compensation court. In that court an award was rendered in favor of the plaintiff. By the award the plaintiff was

granted temporary total disability compensation for 49 4/7 weeks at the rate of $28 a week, for 38 1/7 weeks of which the plaintiff had at the time been paid, and compensation for 15 percent permanent partial disability payable at the rate of $28 a week for 32¼ weeks. From the award an appeal was taken by the defendant to the district court. On the trial in the district court the award of the workmen's compensation court was affirmed and a decree was accordingly rendered. In addition an attorney's fee in the amount of $300 was taxed in favor of plaintiff and against the defendant.

Two motions for new trial were duly filed and overruled. From the decree and the order overruling the motions for new trial the defendant has appealed. The plaintiff has presented a cross-appeal.

The assignments of error set forth by the defendant are numerous but they may be summarized as follows: The decree is contrary to law; it is contrary to the evidence; and the allowance of an attorney's fee was improper.

The only assignment of error set forth by plaintiff is that the allowance for permanent partial disability was insufficient and contrary to evidence and to law.

The defendant's first assignment of error requires no separate consideration since no legal impediment to the right of the plaintiff to receive what has been awarded in this action is urged except that which inheres in the controversy as to whether or not the evidence is sufficient to sustain the decree. Attention will therefore be directed to the cause of action as presented by the pleadings and the evidence of the parties in relation thereto.

On December 8, 1955, the plaintiff filed a petition in the Nebraska Workmen's Compensation Court wherein he alleged in substance that on or about February 7, 1955, he was employed by the defendant and while removing snow from a truck, the truck was struck by another truck causing the first truck to strike the left leg and knee of plaintiff whereby he received injuries

and serious disability for which he was entitled to benefits under the Nebraska workmen's compensation law.

To the extent necessary to state here, the defendant denied the allegations of the petition. The case was tried on the issues thus joined by the workmen's compensation court. The issues presented to the district court were in all substantial particulars the same. The case comes here for consideration de novo on the record made in the district court. "An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record." Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394.

In support of his cause of action the plaintiff testified that about 2 a. m. on February 6, 1955, he was employed by the defendant and at the time he was spotting trucks which were hauling snow to a dump at a location in the east part of Omaha; that in the performance of his duties he was required to stand back of trucks and rake residual snow with a long-handled instrument from the interior thereof; that while raking snow from the truck and while standing on snow which was piled behind the truck, the height of which was uncertain but which at the trial in the workmen's compensation court the plaintiff estimated at about 10 inches, another truck backed into the front end of the truck behind which plaintiff was working, the result of which was that he was caused to be knocked down and injured; that the point of contact with him was in the vicinity of or above his left knee; that he got up and walked to a bonfire probably from 100 to 200 feet away where he remained for a short time when he was first taken in a truck to a place called an office and from there to the county hospital by a special policeman; that in consequence of what happened he suffered pain in the left knee; that the knee began to swell and was swollen when he arrived at the hospital; that he was examined, directed to report to a city physician, and taken to a point near where he was living from which place he

walked the rest of the way home; that he did not report to the doctor because of pain and suffering until February 8, 1955, on which date he was examined; and that he suffered continuous pain and complete disability in the knee thereafter. He gave other evidentiary details but this is a summary of his testimony which is important for the purposes of the determination herein. Two witnesses in the case corroborated the testimony of the plaintiff that the one truck backed into the other. There is no evidence to the contrary.

It must be said therefore that the plaintiff sustained the burden of showing that he was the victim of an accident which came upon him within and growing out of his employment by the defendant.

In the light of this and the issues being tried the next question is that of whether or not the plaintiff has sustained the burden of showing that he sustained the injury claimed, the extent thereof, and if so, what compensation he was and is entitled to receive in consequence thereof.

The record of the evidence discloses that on February 8, 1955, the plaintiff went to the office of the city physician heretofore referred to who made an examination. He found the muscle on the left knee tender and rigid and evidence of pain. He saw plaintiff on February 10, 12, and 14, 1955. On February 14, he strapped and bandaged the knee. On March 11, 1955, he referred plaintiff to a specialist in orthopedic surgery. An Ace bandage was applied and on April 2, 1955, a plaster cast was applied. The doctors suspected a loose cartilage in the knee and on June 9, 1955, an operation was performed on the knee and medial cartilage about 3 inches long and ½ inch wide was removed. The knee was kept in a bandage and in September 1955 diathermy was prescribed. The city physician gave it as his opinion at the trial that the plaintiff had permanent partial disability, a part of which resulted from the cartilaginous condition and part from arthritic change, of from 15

percent to 20 percent. This is a summary of evidence given by the city physician who was a witness for the defendant.

The orthopedic surgeon testified that in his opinion there was 10 percent disability resulting from the cartilaginous condition. He said that there was other disability due to arthritis. He gave no estimate as to the percentage of this. This witness was also a witness for the defendant. Neither of these witnesses testified that there would have been any actual disability flowing from the arthritic condition in the absence of the cartilaginous condition.

An orthopedic surgeon was called and testified on behalf of the plaintiff. He had examined the plaintiff for the purpose of preparing himself to become a witness. He testified that in his opinion the permanent partial disability amounted to about 50 percent. It is established therefore that following the accident in question and at the time of trial the plaintiff had an injury to his left knee as the result of which he had permanent partial disability in some amount.

In the light of the disparity of the opinions of the medical men it becomes necessary to say that the character and quality of the condition of plaintiff may not be arrived at here with certainty. However in the light of the fact that the defendant's doctors had the better and more intimate opportunity for diagnosis, analysis, and evaluation the inclination is to say, as did the district court and the workmen's compensation court, that the permanent partial disability is 15 percent.

As to whether or not the plaintiff was totally disabled for 49 4/7 weeks from and after February 6, 1955, the conclusion reached is that the evidence preponderantly sustains the contention that he was. These conclusions effectually dispose of the cross-appeal, except for the comments which will be made hereinafter with regard to terms of the award of the workmen's compensation

court which were repeated in and approved by the decree of the district court.

The next question to be considered, which of course is vital in the determination of the case, is that of whether or not the injury which has been established flowed from the accident which has been described. The defendant insists that it did not. The plaintiff insists that it did.

To support his contention the plaintiff testified that he had sustained no injury to and suffered no disability in the knee prior to the accident and that the condition of his knee directly followed the accident. As to the period from the date of the accident to the time of trial he described his condition and activities and, without summarizing this evidence, if it is taken as true, he suffered such pain and disability as to prevent him from pursuing any gainful occupation for at least the period for which total disability compensation was allowed. The doctors called as witnesses by the defendant, it is apparent, assumed over a period of months that the condition of the knee as described by plaintiff resulted from the accident. This assumption appears to have been based upon the history of the case which they possessed.

Against this it was shown that the plaintiff had suffered injuries in other previous employment accidents but it was not shown that the plaintiff ever had a previous injury to his left knee.

The defendant attempted by evidence of measurements and photographs applied to physical facts, the testimony of the plaintiff given at the trial in the district court and the workmen's compensation court, the opinion of the orthopedic surgeon, and argument, to demonstrate deductively that the accident, if it happened, could not have produced the injury to plaintiff's knee.

The complete premise does not require restatement here. One of its elements and attendant fallacies however will be mentioned as an illustration. It is that the plaintiff when struck fell directly backward, and thus

the type of injury suffered by the plaintiff could not have resulted since such injuries are produced by twisting of the knee. The fallacies are that there was no fixed description of the fall, and the defendant's orthopedic surgeon said only that they are usually produced by a twisting. He did not rule out such an injury from a direct fall.

This it is thought is a fair résumé of the evidence of probative value on the question of whether or not the condition of plaintiff's knee was caused by the accident which occurred on February 6, 1955. It preponderantly shows that it was.

In the light of what has been said it appears that the elements necessary to sustain a recovery by plaintiff of workmen's compensation from the defendant have been established. The applicable rule as to proof sufficient to sustain an award of workmen's compensation, as follows, has been met by the plaintiff: "The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment." Miller v. Livestock Buying Co., 157 Neb. 51, 58 N. W. 2d 596. See, also, Hammond v. Doctor's Hospital, 145 Neb. 446, 17 N. W. 2d 9; Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379.

As pointed out the plaintiff was awarded compensation for temporary total disability for 49 4/7 weeks with a rate based upon his wage of $28 a week. The award was for 15 percent permanent partial disability thereafter or $28 a week for 32¼ weeks. The correctness of the computation has not been brought into question.

The conclusion therefore is that the record sustains the right of plaintiff to recover workmen's compensation from the defendant for the period and in the amount provided by the decree of the district court.

The remaining question for consideration is that of whether or not an attorney's fee should be allowed in

favor of plaintiff's attorney and taxed against the defendant. Nothing convincing has been advanced as a reason why a fee should not have been allowed.

Clearly under section 48-125, R. R. S. 1943, this is a case authorizing the allowance of a reasonable fee. In this case the trial extended over 3 days and into a 4th. In this light it may not well be said that a fee of $300 was unreasonable. The assignment is without merit.

The decree of the district court is affirmed. An attorney's fee in the amount of $300 is allowed in favor of plaintiff to be taxed as costs against the defendant.

AFFIRMED.

DONALD A. STEWART, APPELLEE, V. L. N. RESS, STATE ENGINEER OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.
83 N. W. 2d 901

Filed June 28, 1957. No. 34196.

1. Criminal Law. An accused, by making a plea of guilty, waives all defenses except that the complaint or information is not sufficient to charge an offense.
2. ———. A plea of guilty accepted by the court is a conviction or the equivalent of a conviction of the highest order. The effect of it is to authorize the imposition of a sentence prescribed by law on a verdict of guilty of the crime charged.
3. Automobiles. It is the duty of the Director of Motor Vehicles, when it is disclosed by the records of his office that the holder of a license to operate a motor vehicle in this state has accumulated 12 or more points within any 2-year period, to revoke the license of such person for a period of at least 1 year from the date of his last conviction.

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

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

Stewart & Stewart and *Raymond K. Calkins,* for appellee.

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

BOSLAUGH, J.

The object of this litigation is to secure an adjudication that the order of revocation made on September 26, 1956, by L. N. Ress, as the Director of Motor Vehicles, of the license issued to appellee authorizing him to operate a motor vehicle in Nebraska was void; to obtain a restraining order and an injunction; and general equitable relief.

Appellee asserted that the action taken in that regard by L. N. Ress as Director of Motor Vehicles, hereafter referred to as appellant, was unauthorized and ineffective because his files and records did not contain sufficient proof as specified by law to authorize him to suspend or revoke the license of appellee and that the files and records of the office of appellant did not disclose that appellee had accumulated a total of 12 or more points as described in the point system of the state dealing with traffic violations. §§ 39-7,128 to 39-7,133, R. S. Supp., 1955. It was alleged that the files and records of appellant did show that the conviction for speeding on March 13, 1956, was of a person named Donald H. Stewart whereas the name of appellee is Donald A. Stewart and he has not been known by nor has he used the name of Donald H. Stewart; that the conviction for speeding on July 23, 1956, was of the holder of motor vehicle operator's license No. J2-1901 L whereas the driver's license of appellee was on that date No. J2-190 16; and that the alleged convictions on March 13, 1956, July 23, 1956, and September 11, 1956, were for speeding but evidence is lacking that the convictions were for speeding in violation of a municipal ordinance or statutory prohibition as is required by statute.

The hearing of the application of appellee for a restraining order was set by the district court for 10 a. m., October 20, 1956. The order revoking the license

of appellee was canceled by appellant October 19, 1956. A second order of revocation of the license of appellee was made on that date and notice thereof to appellee was then mailed to him. Appellee and his counsel learned from the attorney for appellant of the cancellation of the first order of revocation and the making of the second when they appeared for the hearing on October 20, 1956. Appellee filed a supplemental petition asserting reasons why the second order of revocation of his license was void. This order of revocation was canceled by appellant December 3, 1956. A third order of revocation of the license of appellee for 1 year from September 11, 1956, was made December 3, 1956, and notice thereof was given to appellee on December 4, 1956.

The answer of appellant to the petition of appellee, filed November 19, 1956, contained a denial and an allegation that appellant made an order October 19, 1956, revoking the license of appellee and notice thereof was given him October 20, 1956; and that appellee surrendered his license to appellant on demand therefor October 1, 1956.

The cause was tried to the district court December 12, 1956, on the petition of appellee, the answer of appellant, and the supplemental petition of appellee. There was no mention in the pleadings at that time of the order of revocation of the license of appellee made on December 3, 1956. At the conclusion of the trial on December 12, 1956, the court gave appellant leave to make answer to the supplemental petition which was done on December 19, 1956, and permission to appellee to reply to the answer of appellant which was done on December 29, 1956.

The answer of appellant to the supplemental petition alleged that appellant revoked the license of appellee December 3, 1956, by authority of section 39-7,129, R. S. Supp., 1955, because he had been convicted of speeding on July 7, 1955, in violation of section 39-723, R. R. S.

1943, in the justice of the peace court in Fairbury; on March 13, 1956, in violation of a city ordinance of the city of Lincoln in the municipal court of that city; on July 24, 1956, in violation of an ordinance of the city of North Platte in the police court of that city; and on September 11, 1956, in violation of a city ordinance of the city of Lincoln in the municipal court of that city. The answer further alleged that appellee pleaded guilty to each of the charges of speeding as aforesaid and that he surrendered his license to appellant on his demand therefor on October 1, 1956. Appellee by reply denied the new matter of the answer of appellant.

The district court found generally for appellee, granted an injunction enjoining appellants from retaining the license of appellee or from interfering with his use and enjoyment of it, ordered appellants to return the license to appellee and to expunge from the records of the Director of Motor Vehicles any showing appearing therein concerning any of the alleged four convictions of appellee for speeding, and set aside and annulled the action taken by appellants in reliance on the four alleged convictions of appellee for speeding. A motion for a new trial was denied. The subject of this appeal is the judgment and denial of a new trial.

The material circumstances of this case are few. There is no conflict of evidence concerning them. The record contains proof to this effect:

Appellee was charged in the justice of the peace court in Fairbury, Nebraska, with operating a motor vehicle on June 24, 1955, at a speed in excess of that allowed by and in violation of section 39-723, R. R. S. 1943. A hearing thereon was had July 7, 1955. Appellee pleaded guilty to the charge and was sentenced to pay a fine and the costs.

Appellee was charged in the municipal court of Lincoln, Nebraska, with operating a motor vehicle within the city of Lincoln on March 3, 1956, at a greater speed than 25 miles per hour, contrary to and in violation of

an ordinance of the city regulating speed of motor vehicles therein. A hearing of the complaint was had on March 13, 1956. Appellee pleaded guilty to the charge and was adjudged to pay a fine and costs which he paid on that date.

Appellee was charged in the police court of the city of North Platte, Nebraska, with operating a motor vehicle on July 23, 1956, within that city at a greater speed than allowed by and in violation of an ordinance of that city regulating the speed of motor vehicles therein. A hearing of the matter was had on July 24, 1956. Appellee pleaded guilty to the charge and was adjudged to pay a fine and costs.

Appellee was charged in the municipal court of the city of Lincoln, Nebraska, with operating a motor vehicle within the city of Lincoln on September 4, 1956, at a greater speed than 25 miles per hour, contrary to and in violation of an ordinance of the city regulating the speed of motor vehicles therein. A hearing concerning the charge was had on September 11, 1956. Appellee pleaded guilty to the charge and was adjudged to pay a fine and costs which he paid on that date.

Appellee does not contend in this litigation that he was not charged with the four offenses above described or that he did not plead guilty to each of them or that he was not in each instance adjudged to pay and did pay a fine and the costs. He admitted the first conviction described above by the allegation in his petition: "That at the time of the first conviction of this plaintiff as set forth in the attached notice * * *." He inferentially concedes that he was charged with and arrested for the four offenses for speeding described herein by the part of his supplemental petition in which he says: "Plaintiff has not been arrested for or charged with any of the violations set forth in Section 39-7,128, Revised Statutes of Nebraska, 1955 Cumulative Supplement * * * other than those set forth in the original notice sent to him by defendants, a copy of which is attached to

the petition * * *." The plea of guilty to each of the charges made by appellee was the equivalent of a conviction by trial and verdict or a finding of guilt by the court.

Accused, by making a plea of guilty, waives all defenses except that the complaint or information is not sufficient to charge an offense. Such a plea makes a jury trial or any trial unnecessary. A plea of guilty accepted by the court is a conviction or the equivalent of a conviction of the highest order. The effect of it is to authorize the imposition of the sentence prescribed by law on a verdict of guilty of the crime charged. Martin v. Sanford, 129 Neb. 212, 261 N. W. 136, 100 A. L. R. 179; Duggan v. Olson, 146 Neb. 248, 19 N. W. 2d 353, certiorari denied 327 U. S. 790, 66 S. Ct. 803, 90 L. Ed. 1016; Taylor v. State, 159 Neb. 210, 66 N. W. 2d 514; Lingo v. Hann, 161 Neb. 67, 71 N. W. 2d 716.

Each conviction of appellee for speeding in violation of a city ordinance or a statute of the state amounted, under the point system for dealing with traffic violations, to 3 points and a total of 12 points for the four convictions. § 39-7,128, R. S. Supp., 1955. Evidence of the convictions of appellee as recited above was certified to the Director of Motor Vehicles and when it came to his attention that appellee had accumulated a total of 12 points within a 2-year period it was the duty of appellant to revoke the license of appellee to operate a motor vehicle in the state for a period of 1 year from September 11, 1956, the date of the last conviction. § 39-7,129, R. S. Supp., 1955; Durfee v. Ress, 163 Neb. 768, 81 N. W. 2d 148. This was a duty, ministerial in character, required to be performed by appellant. § 39-796, R. S. Supp., 1955.

This is an action for injunction. It is an indirect or collateral challenge of the administrative act of appellant in revoking the license of appellee. The statutes provide for a direct attack on such an act by an appeal to the district court for the county of the residence

of the licensee. § 39-7,130, R. S. Supp., 1955; § 60-420, R. R. S. 1943. Appellee did not choose to pursue a direct attack on the order of the director by appeal. The order of revocation of the license of appellee of December 3, 1956, is valid and effective. The license of appellee to operate a motor vehicle was surrendered to appellant because of his demand for it October 1, 1956, and he retained it until December 29, 1956, when it was returned to appellee. Appellee was thereby wrongfully and without authority of law deprived of his license and its use and enjoyment for 2 months and 29 days.

The judgment should be and it is reversed and the cause is remanded with directions to the district court for Lancaster County to render a judgment herein dismissing the petition of appellee; sustaining the order of revocation of the license of appellee of December 3, 1956, involved in this case; requiring appellee to surrender his license to operate a motor vehicle to appellant; and adjudicating that the period of revocation of the license remaining shall be 9 calendar months and 2 days from and after the rendition of a judgment as herein described. The cost of this appeal should be taxed to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., participating on briefs.

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Actions.

1. An action may be maintained by a next friend when the person in whose behalf the action is commenced is not insane but is incapable of managing his affairs, has not been adjudged to be incompetent, and has no appointed guardian. *Fiala v. Tomek* 20
2. The expression "in their proper persons" in statute regulating practice of law is derived from the Latin "in propria persona" and means in their own persons. *Niklaus v. Abel Construction Co.* 842
3. As a general rule a plaintiff cannot join an individual cause of action and a representative cause of action. *Niklaus v. Abel Construction Co.* 842
4. Proceedings in a suit by a person not entitled to practice are a nullity, and the suit may be dismissed. *Niklaus v. Abel Construction Co.* 842

Adverse Possession.

1. The title to land becomes complete in the occupant by adverse possession when he and his grantors have maintained an actual, exclusive, open, and continuous possession thereof, claiming title to the same against all persons, for 10 years. *James v. McNair* 1
2. The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereof. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted. *James v. McNair* 1
3. When a fence is constructed as a boundary line fence between two properties, and where the parties claim ownership of the land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. *James v. McNair* 1

Appeal and Error.

1. On proper showing that bill of exceptions was

timely settled and allowed, Supreme Court will vacate judgment of affirmance and permit correction of record. *Bryant v. Greene* 15

2. In an appeal from an order directing a verdict and dismissing an action, the party against whom the verdict was directed 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. *Bryant v. Greene*.... 15

3. Rule for trial of equity case de novo stated. *Fiala v. Tomek* 20

4. When a trial court sustains a motion for judgment notwithstanding the verdict, the party against whom it is sustained is entitled on appeal to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. *Holliday v. Patchen* 53

5. In a proceeding in error to reverse the action of the county superintendent in creating a new district or changing the boundaries of an existing district affecting a city, village, or Class III school district, the board of education is the real party in interest. *Clausen v. School Dist. No. 33* 78

6. In a proceeding in error to reverse the action of the county superintendent in creating a new district or changing the boundaries of existing districts in case of changes affecting districts other than city, village, or Class III school districts, the petitioners who signed the petitions for change of boundaries or new district creation are the real parties in interest. *Clausen v. School Dist. No. 33* 78

7. In a proceeding in error the summons must be served upon the real party or parties in interest or the attorney of record of the defendant or defendants in error, unless the issuance or service is waived in writing by the attorney or the defendants. *Clausen v. School Dist. No. 33* 78

8. In a proceeding in error all necessary parties must be made parties to the proceeding. *Clausen v. School Dist. No. 33* 78

9. All parties to a joint judgment are necessary parties to a proceeding in error brought to reverse such judgment. *Clausen v. School Dist. No. 33* 78

10. The failure to make all parties who may be affected by the modification or reversal of a judgment in a proceeding to review the cause by petition in error

is ground for dismissal of the petition. *Clausen v. School Dist. No. 33* 78

11. One necessary party who has been properly served with summons in a proceeding in error may properly move for dismissal of the petition for failure to make others parties to the proceeding. *Clausen v. School Dist. No. 33* 78

12. In the absence of a bill of exceptions, it will be presumed that an issue of fact presented by the pleadings was established by the evidence and that it was correctly decided. The only question that will be considered on appeal is the sufficiency of the pleadings to support the judgment. *Combes v. Anderson* 131

13. In an equity case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant. The Supreme Court on appeal will not reverse a judgment in a case so tried because other evidence was introduced when there is relevant and competent evidence in the record to sustain the judgment of the trial court. *Koehn v. Koehn* 169

14. Report of pre-trial hearing need not be offered in evidence or included in bill of exceptions. *Powell v. Farmers State Bank* 180

15. Under the Revised Rules of the Supreme Court, assignments of error relied upon for reversal and intended to be urged are required to be separately numbered and paragraphed. *Romans v. Bowen* 209

16. Ordinarily only errors separately numbered and paragraphed and which have been discussed will be considered on review by the Supreme Court. *Romans v. Bowen* 209

17. The Supreme Court may, at its option, notice plain errors not assigned. *Romans v. Bowen* 209

18. On appeal to the Supreme Court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265

19. Upon appeal to the Supreme Court from a decision of the railway commission involving charges of a railway company or other common carrier, the rates fixed by the commission will be considered

prima facie just and equitable. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265
20. In a law action where a jury has been waived, findings of fact upon conflicting evidence will not be disturbed unless clearly wrong. *Capital Bridge Co. v. County of Saunders* 304
21. Where all the instructions given by the trial court disclose that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon. *Bezdek v. Patrick* 398
22. The question of the amount of damage is one solely for the jury. Its action will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved. *Bezdek v. Patrick* 398
23. The verdict of a jury based upon conflicting evidence will not be disturbed on appeal unless it is clearly wrong. *Bezdek v. Patrick* 398
State v. Hohensee 476
24. An order of the district court sustaining a demurrer to a cause of action and dismissing it, either with or without prejudice, is a final order and is appealable. *Akins v. Chamberlain* 428
25. Time and manner of perfecting an appeal to the Supreme Court stated. *Akins v. Chamberlain* 428
26. On an appeal to the Supreme Court from a judgment of the district court convicting a defendant of a violation of a city ordinance, the existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. *State v Hohensee* 476
27. On appeal to the Supreme Court from a judgment of the district court convicting a defendant of the violation of a municipal ordinance, it will be presumed, nothing appearing to the contrary, that the facts set out in the complaint constituted a violation of the ordinance of the city. *State v. Hohensee* 476
28. A final judgment is one that disposes of the case either by dismissing it before hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant. A judgment or order is not final unless it determines the rights of the litigants and precludes further inquiry. *Lindquist v. Towle* 524
29. An order sustaining a demurrer to a petition, with-

out a dismissal or other final disposition of the case, is not a final order reviewable on appeal. *Lindquist v. Towle* 524

30. 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 for review in the Supreme Court. *Parker v. State* 614

31. To make error in a trial available for a reversal in the appellate court it should be called to the attention of the district court and be affirmatively shown on the record for review. *Parker v. State* 614

32. A motion for new trial in a criminal action must be filed within 10 days after the verdict is rendered in order to be considered on appeal, except for the cause of newly discovered evidence or unless the defendant was unavoidably prevented from filing the motion within 10 days. *Parker v. State* 614

33. A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record, unless its admission is assigned as error in the Supreme Court and the assignment is sustained. *Buhrman v. Smollen* 655

34. Before an error requires a reversal it must be determined that it was prejudicial to the rights of the party against whom it was made. *Buhrman v. Smollen* 655

35. Instructions not complained of in such a way as to be reviewable in the Supreme Court will be taken as the law of the case, and if, when tested by such instructions the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained. *Buhrman v. Smollen* 655

36. Erroneous instructions to the jury will not cause a reversal of a case unless they are prejudicial to the complaining party. *Buhrman v. Smollen* 655

37. Instructions to a jury must be considered together. If as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. *Buhrman v. Smollen* 655

38. The Supreme Court will reverse on appeal a decree

of divorce granted on uncorroborated testimony of a party. *O'Neill v. O'Neill* 674
39. A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered. *Hoffman v. State* 679
40. In a negligence case, where different minds may reasonably draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence the issues must be submitted to the jury for its determination, and its verdict based thereon will not be disturbed unless clearly wrong. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
41. In a criminal case, the credibility of witnesses and weight of evidence are for the jury to determine. The verdict of the jury may not be disturbed by the Supreme Court unless it is clearly wrong. *Pew v. State* 735
42. Where the excessive amount in a judgment is subject to exact determination, a remittitur may be required as a condition of affirmance for the correct amount. *Bear v. Auguy* 756
43. By statute and under 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. *Schaffer v. Strauss Brothers* 773
44. On an appeal to the Supreme Court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. *City of Bayard v. North Central Gas Co.* 819
45. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo on the record. *Sears v. City of Omaha* 869

Assault and Battery.

1. Previous threats to commit an assault and battery are admissible in evidence provided the threats were made in such a manner and at such a time as to have a direct bearing on the assault in question. *Elliott v. Brandt* 790
2. In an action for assault and battery, it is not error to allow plaintiff to be cross-examined fully

in regard to his former relations with the defendant. *Elliott v. Brandt* 790

Attachment.

1. In the absence of malice, an action for the wrongful suing out of an attachment can be maintained alone on the attachment bond. To maintain an action independently of the statute, and not on the bond, malice in suing out the writ and want of probable cause must be averred. *Carlson v. Schroeder* 443
2. An attachment affidavit setting forth the nature of the plaintiff's claim, that the claim is just, the amount which the affiant believes the plaintiff ought to recover, and the existence of one or more statutory grounds for the writ in the language of the statute, is sufficient as a basis for the issuance of the writ. *National Reefer Service, Inc. v. Felman* 783
3. Where an attachment is predicated on two or more claims one or more of which does not properly provide the basis for attachment, the defendant on motion is entitled to have the entire attachment dissolved. *National Reefer Service, Inc. v. Felman* 783
4. Where the facts stated in an affidavit for attachment are denied on a motion to dissolve, the burden is cast upon the plaintiff to sustain the charges contained in the affidavit by proof. *National Reefer Service, Inc. v. Felman* 783
5. Affidavits used at the hearing of a motion to dissolve an attachment will not be considered in the Supreme Court on appeal unless preserved in a bill of exceptions. *National Reefer Service, Inc. v. Felman* 783
6. An attachment may not be dissolved on the ground alone that the debt is not due at the time the action is started. If the plaintiff is entitled to prosecute the case to final judgment, he is entitled to the security afforded by the attachment in the absence of any other ground for dissolution. *National Reefer Service, Inc. v. Felman* 783
7. An action for damages for the breach of the terms of an agreement is an action on the contract within the meaning of attachment statute. *National Reefer Service, Inc. v. Felman* 783
8. The merits of a cause of action will not be adjudicated on a motion to dissolve an attachment. *National Reefer Service, Inc. v. Felman* 783

Attorney and Client.

1. The rules of equity as to fiduciary relations are not restricted to attorney and client, nor to similar conventional relations, but extend to all cases, where, on one hand, confidence is properly reposed, and, on the other, knowledge or authority or influence arises from any cause. *James v. McNair* 1
2. A communication made to an attorney at law, where the relationship of attorney and client does not exist, is not privileged, although the attorney was employed as such in some other capacity. *Beacom v. Daley* 120
3. When two or more persons employ or consult the same attorney in the same matter, communications made by them in relation thereto are not privileged inter sese. *Beacom v. Daley* 120
4. Communications between attorney and client made in the presence of others do not constitute privileged communications within the meaning of the statutory prohibition against divulging same. *Beacom v. Daley* 120
5. Attorney's fees are not allowable in an action for divorce in the absence of statutory authority therefor. *O'Neill v. O'Neill* 674
6. The statutes of this state contain no provision for the allowance of attorney's fees in an action for divorce in favor of a husband and against a wife. *O'Neill v. O'Neill* 674
7. The courts are without authority in an action for divorce to fix the amount of the attorney's fees the parties are to pay their respective attorneys. *O'Neill v. O'Neill* 674
8. An attorney's fee under Small Claims Act was properly denied where a large number of small claims were sought to be recovered on one cause of action. *Schaffer v. Strauss Brothers* 773
9. Courts will not permit laymen to appear in court in a representative capacity and such a rule may not be circumvented by subterfuge. *Niklaus v. Abel Construction Co.* 842
10. While a layman may represent himself in court, he cannot, even on a single occasion, represent another, whether for a consideration or not. *Niklaus v. Abel Construction Co.* 842
11. Proceedings in a suit by a person not entitled to practice are a nullity, and the suit may be dismissed. *Niklaus v. Abel Construction Co.* 842

Automobiles.

1. The subsequent purchaser for value of an automobile who obtains a certificate of title, based upon a previous valid title thereto and compliance with statutory requirements, obtains title and ownership superior to that of a prior purchaser. *Allstate Ins. Co. v. Enzolera* 38
2. A purchaser for value of an automobile who obtains a certificate of title based upon a previous false or fraudulently obtained title obtains no title as against a previous purchaser and holder of a valid certificate of title to the automobile. *Allstate Ins. Co. v. Enzolera* 38
3. If the evidence is undisputed, or such that but one conclusion could reasonably be reached, whether or not a person riding in a motor vehicle is a guest is a matter of law for the court. *Holliday v. Patchen* 53
4. Gross negligence within the meaning of the guest statute is great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. *Holliday v. Patchen* 53
5. To recover damages from a host for injuries received while riding in an automobile operated by the host, a guest must prove by a preponderance of the evidence the gross negligence relied upon and that it was the proximate cause of the accident. *Holliday v. Patchen* 53
6. The operation of an automobile at a rate of speed prohibited by law is not in itself gross negligence. *Holliday v. Patchen* 53
7. Momentary inattention in the operation of a motor vehicle does not ordinarily amount to gross negligence. This is true even where such inattention is voluntary and in no manner induced by a distracting influence. *Holliday v. Patchen* 53
8. A warning of imminent danger to a host by a guest riding in an automobile operated by such host must be made in time to afford the host a reasonable opportunity to avoid the accident. *Holliday v. Patchen* 53
9. A guest passenger in an automobile has the right to assume the driver thereof is a reasonably safe and careful driver. A duty to warn the driver does not arise until some fact or situation out of the

usual and ordinary is presented. *Burhoop v. Bracken* 382

10. Where the negligence of the driver of an automobile is the sole proximate cause of a collision in which a guest is injured, the guest cannot recover from a third person for such injury. *Burhoop v. Bracken* 382

11. A motorist entering an intersection from the right has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored car to exercise ordinary care. *Burhoop v. Bracken* 382
Bezdek v. Patrick 398

12. The duty of the driver of an automobile about to enter a street intersection to look for automobiles approaching the same intersection implies the duty to see that which is in plain sight, unless some reasonable excuse for not seeing is shown. *Burhoop v. Bracken* 382

13. A driver of a motor vehicle about to enter a highway protected by stop signs must stop, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection. *Bezdek v. Patrick* 398

14. The violation of traffic regulations is not negligence as a matter of law of any kind or degree, but it is a fact to be considered with the other evidence in the case in deciding an issue of negligence. *Bezdek v. Patrick* 398

15. Duty of driver of a motor vehicle approaching a through street or highway stated. *Bezdek v. Patrick* 398

16. 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. *Bezdek v. Patrick* 398

17. A user of the highways may assume that other users of the highways will use them in a lawful manner, and until he has warning, notice, or knowledge to the contrary, he is entitled to govern his actions in accordance with such assumption. *Bezdek v. Patrick* 398

18. Upon entering an intersection, a motorist should have his motor vehicle under such control that he can avoid a collision with another vehicle which is operated with due care. *Bezdek v. Patrick* 398

19. The right of a motorist on an arterial highway to assume that a motor vehicle on a nonfavored intersecting street will be brought to a stop before entering the intersection does not permit him to claim the right-of-way when too far from the intersection to be entitled thereto. *Bezdek v. Patrick* 398
20. The question of the admissibility of evidence as to the speed of a motor vehicle shortly prior to the time of an accident rests largely in the discretion of the court. *Buhrman v. Smollen* 655
21. When the speed of a motor vehicle is charged as negligence, it is proper to admit competent evidence of the speed at which it was being driven a few seconds before the collision. *Buhrman v. Smollen* 655
22. An owner of a garage with whom a motor vehicle is left by its owner for repairs or to be serviced is a bailee for hire or for mutual benefit and is required to exercise ordinary care for the safekeeping of the vehicle. *Federal Ins. Co. v. International Harvester Co.* 698
23. Physical facts are sufficient to warrant a directed verdict in an automobile collision case when they conclusively demonstrate that the collision out of which the injuries arose was not caused by any negligence on the part of the party making the motion. Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
24. Testimony as to tire marks on the highways is admissible in civil actions for injury or damage where a sufficient foundation therefor is laid. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
25. The lawfulness of the speed of a motor vehicle within the prima facie limits fixed by statute is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing. *Bear v. Auguy* 756
26. A driver is required to have his motor vehicle under such reasonable control as will enable him to avoid a collision with other vehicles, assuming that the drivers thereof will exercise due care. *Bear v. Auguy* 756
27. Duty of motorist with respect to keeping a proper lookout stated. *Bear v. Auguy* 756
28. It is the duty of the Director of Motor Vehicles,

when it is disclosed by the records of his office that the holder of a license to operate a motor vehicle in this state has accumulated 12 or more points within any 2-year period, to revoke the license of such person for a period of at least 1 year from the date of his last conviction. *Stewart v. Ress* 876

Bailments.

1. An owner of a garage with whom a motor vehicle is left by its owner for repairs or to be serviced is a bailee for hire or for mutual benefit and is required to exercise ordinary care for the safekeeping of the vehicle. *Federal Ins. Co. v. International Harvester Co.* 698
2. A bailee of a chattel for the mutual benefit of the parties to the bailment or for hire, in the absence of an express contract, is liable to the bailor only for any loss resulting from the negligence of the bailee. *Federal Ins. Co. v. International Harvester Co.* 698
3. In an action by a bailor to recover for damage done by fire to the subject of such a bailment while in the custody of the bailee, a petition which does not allege that negligence of the bailee was the proximate cause of the damage does not state a cause of action. *Federal Ins. Co. v. International Harvester Co.* 698

Banks and Banking.

1. Statute declaring effect of joint bank deposit was intended for the protection of banks but it also establishes the property rights of the persons described therein unless the contrary is expressed by the terms of the deposit. *Slocum v. Bohuslov* 156
2. If a deposit is made in a bank payable to two persons, either expressly as joint tenants with right of survivorship or without those or similar qualifying words, upon the death of one of the co-owners of the deposit it becomes the sole property of and is payable to the surviving co-owner. *Slocum v. Bohuslov* 156
   Nelson v. Rasmussen 274
3. A certificate of deposit made payable on the return of the certificate properly endorsed with no other stipulation fixing a specified or determinable future time after date for payment thereof is a demand

certificate and the statute of limitations does not begin to run thereon until demand for payment is made. *Powell v. Farmers State Bank* 180

4. A certificate of deposit made payable on the return of the certificate properly endorsed at specified or determinable future time after date is a time certificate and the statute of limitations begins to run thereon at the expiration of such time without the necessity of any demand for payment. *Powell v. Farmers State Bank* 180

5. Statute regulating deposits payable to two persons was intended for the protection of banks but it also establishes the property rights of the persons described therein unless the contrary is expressed by the terms of the deposit. *Nelson v. Rasmussen* 274

6. A joint deposit in a bank in the name of two persons is not, upon the death of one of them, conclusive of the ownership of the deposit by the surviving co-owner as between him and a third person who claims that the surviving owner holds the legal title to the deposit in trust for the third party. *Nelson v. Rasmussen* 274

Bills and Notes.

1. It is deemed prima facie (1) that every negotiable instrument has been issued for a valuable consideration, and (2) that every person whose signature appears thereon has become a party thereto for value. *Leach v. Treber* 419

2. In an action on a promissory note, the party alleging want of consideration has the burden of proving it by a preponderance of the evidence. *Leach v. Treber* 419

3. A promissory note is supported by a valid consideration if the transaction confers a benefit upon the promisor or causes a detriment to the promisee. Either is a valid consideration which will support a contract. *Leach v. Treber* 419

4. In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them. *Leach v. Treber* 419

5. Retention for more than 24 hours by a bank of a check forwarded to it for collection and payment does not render the bank liable as an acceptor under

the Negotiable Instruments Law. *Urwiller v. Platte Valley State Bank* 630

Cancellation of Instruments.

Equity may decree cancellation or rescission of a contract for fraud or misrepresentation constituting an inducement to its execution, especially when the legal remedy is inadequate or the equitable relief by way of cancellation is more complete. *Caruso v. Moy* 68

Carriers.

1. At common law, a common carrier is one that holds itself out to the public as a carrier always open to employment for the transportation of persons or freight, and that it will carry for all persons indiscriminately. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85
2. Carriage for all persons indiscriminately is implicit in the statutory definition of a common carrier. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85
3. The lowest rates published or charged by any railway company for substantially the same kind of service, whether in this or another state, shall, when introduced in evidence, be accepted as prima facie evidence of a reasonable rate for the service under investigation. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265
4. A statute specifically authorizes the railway commission to put into effect certain rates when an emergency exists. The commission, in doing so, exercises its legislative authority to regulate rates, to declare an emergency, and to prescribe the time when such rates shall become effective. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265
5. Where the railway commission specifically adopts the rates and charges fixed by the Interstate Commerce Commission as its own, they become the regularly fixed rates and charges of the railway commission until altered or set aside. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265
6. Rates and charges duly established by the railway commission, until altered or set aside, have the effect of a legislative enactment. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265

7. It is unjust discrimination or undue preference only, under substantially similar circumstances and conditions, that is unlawful and prohibited. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247
8. A private carrier is one who, without making it a vocation or holding himself out to the public as ready to act for all who desire his services, undertakes by special agreement in a particular instance only to transport property from one place to another either gratuitously or for hire. *City of Bayard v. North Central Gas Co.* 819
9. Operation for hire is a jurisdictional prerequisite to general regulation of a common carrier by the railway commission. Common carrier is defined. *City of Bayard v. North Central Gas Co.* 819

Conspiracy.

1. A civil conspiracy is a combination of two or more persons to accomplish by concerted action (1) an unlawful or oppressive object, or (2) a lawful object by unlawful or oppressive means. *Stillinger & Napier v. Central States Grain Co., Inc.* 458
2. The principal element of a conspiracy is an agreement or understanding between two or more persons to do a wrong to or inflict an injury upon another. It involves action and an intent to commit the act which results in the injury. *Stillinger & Napier v. Central States Grain Co., Inc.* 458
3. A conspiracy, like other facts, may be proved by direct or circumstantial evidence, and one means of proof is by showing overt acts or representations of the individuals charged with conspiracy. *Stillinger & Napier v. Central States Grain Co., Inc.* 458
4. Admissibility of evidence and sufficiency thereof to establish a conspiracy stated. *Stillinger & Napier v. Central States Grain Co., Inc.* 458
5. If a conspiracy between the parties is established, whatever was done in pursuance of it by one conspirator is considered as the act of all. All are liable irrespective of the fact of the extent to which they benefited thereby. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

Constitutional Law.

1. Temporary damage to land caused by the establishment and maintenance of a free dump for the dis-

posal of garbage is such a damage as is required to be compensated by Article I, section 21, of the Constitution. *Patrick v. City of Bellevue* 196

2. Even though city was performing a governmental function and did not create a nuisance, the Constitution requires payment of just compensation for damage to private property for public use by a city. *Patrick v. City of Bellevue* 196

3. The fact that the city is not liable for the negligence of its officers, agents, or employees when the city is engaged in the performance of a governmental function does not exempt it from liability for damage to private property in the exercise of its powers of eminent domain. *Patrick v. City of Bellevue* 196

4. Private property damage by a city for a public purpose without an actual taking thereof is required by the Constitution to be justly compensated. *Patrick v. City of Bellevue* 196

5. It is not indispensable that a constitutional provision be set out or its existence alleged in the statement of a cause of action if the litigant otherwise pleads and proves a right of recovery because of it. *Patrick v. City of Bellevue* 196

6. The prohibition contained in Article XIII, section 3, Constitution of Nebraska, relating to the giving or loaning of credit in aid of any individual, association, or corporation, applies to the State and all political subdivisions thereof. *State ex rel. Beck v. City of York* 223

7. Money derived from the sale of municipal revenue bonds is public money. *State ex rel. Beck v. City of York* 223

8. Public money may not be expended for a private purpose whatever its source may be. *State ex rel. Beck v. City of York* 223

9. The purchase of land by a municipality and the erection of an industrial plant thereon for lease to a private corporation for private gain and profit, by issuing revenue bonds to be paid solely from rentals, is not for a public purpose. *State ex rel. Beck v. City of York* 223

10. Statute authorizing the building and leasing of industrial plants to private concerns for use for private profit or gain, financed by municipal revenue bonds payable solely from rentals, violates

Article XIII, section 3, of the Constitution. *State ex rel. Beck v. City of York* 223

11. The Constitution gives the Legislature exclusive power and authority to divide the state into legislative districts. Annexation ordinances enacted by municipalities do not change the territorial boundaries of legislative districts. *Buller v. City of Omaha* 435
12. When land is taken outside the boundaries of the right-of-way condemned, it constitutes a second taking of private property for a public use and liability attaches therefor under Article I, section 21, of the Constitution. *McGree v. Stanton-Pilger Drainage Dist.* 552
13. In an action for damages based upon Article I, section 21, of the Constitution, against a drainage district organized by vote of landowners for the taking or damaging of private property for a public use, it is not necessary for plaintiff to plead or prove that he filed a notice. *McGree v. Stanton-Pilger Drainage Dist.* 552
14. The right of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement of which he cannot be deprived without due process of law and compensation for his loss. *Hillerege v. City of Scottsbluff* 560
15. The grant by the state to a city of the power to control and improve streets in any manner it deems proper is the delegation of police power to be exercised with a sound discretion in a reasonable and not in an arbitrary or discriminatory manner. *Hillerege v. City of Scottsbluff* 560
16. It is the right of a city, in the exercise of the police power delegated to it in reference to its streets, to determine the action required for the safety, convenience, and welfare of the public. *Hillerege v. City of Scottsbluff* 560
17. The action of a city in the exercise of the police power is not absolute or final but is subject to judicial review. *Hillerege v. City of Scottsbluff* 560
18. The test of the proper exercise of police power is whether or not the action proposed is a good faith, reasonable exercise of the power or is an arbitrary and unreasonable interference with the rights of

persons affected thereby. *Hillerege v. City of Scottsbluff* 560
19. Action taken by a city in the exercise of the police power is presumed to be valid. The burden is on the party contesting its validity to establish by clear and unequivocal proof that it is so unreasonable, arbitrary, or discriminatory as to amount to depriving the party of his property without due process of law. *Hillerege v. City of Scottsbluff* 560
20. Municipal action, in the exercise of the police power, is not necessarily invalid because it infringes on private rights or property but such infringement may not be unreasonable, discriminatory, or confiscatory. *Hillerege v. City of Scottsbluff* 560
21. It is a denial of equal protection of the law to apply a regulation differently to different persons under the same or similar circumstances. *Hillerege v. City of Scottsbluff* 560
22. Municipal action applicable to all persons affected thereby within the area described is not discriminatory. *Hillerege v. City of Scottsbluff* 560
23. It is the function of the county board of equalization to determine the actual value of property for tax purposes and give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property. *S. S. Kresge Co. v. Jensen* 833
24. Uniformity and proportionate taxation is a constitutional requirement, and prevails over statutory requirement that property be assessed at its actual value. *S. S. Kresge Co. v. Jensen* 833
25. The Constitution of this state vests all matters pertaining to schools and school districts, and their creation, dissolution, government, and control, in the Legislature. In all such matters the state is supreme. *Farrell v. School Dist. No. 54* 853

Contracts.

1. The rescission of a contract must be in toto and the parties must be placed in status quo as far as the circumstances will permit. *Caruso v. Moy* 68
2. There can be no rescission of a contract unless the parties can be placed in status quo, or substantially so. *Caruso v. Moy* 68
3. The right to rescind a contract for fraud or breach of covenant is barred by failure of the one

party, for an unreasonable time after knowledge of the facts giving rise to such right, to declare a rescission and disclaim the benefits of the contract. *Caruso v. Moy* 68

4. A consideration for a promise may be a detriment to the promisee as well as a benefit accruing to the promisor. *Reed v. Williamson* 99

5. A United States savings bond is a contract between the federal government and the purchaser. Treasury Department regulations governing such bonds are incorporated into the contract by reference and are beyond the reach of state law to modify or destroy. *Slocum v. Bohuslov* 156
Nelson v. Rasmussen 274

6. If a United States savings bond is registered in the names of two persons as co-owners, the rights of the surviving co-owner arise solely by contract. *Slocum v. Bohuslov* 156
Nelson v. Rasmussen 274

7. A surviving co-owner of a United States savings bond takes title thereto as sole owner by reason of Treasury Department regulations incorporated in the contract between the federal government and the purchaser of the bond. *Slocum v. Bohuslov* 156
Nelson v. Rasmussen 274

8. To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof. *Griggs v. Oak* 296

9. To constitute a contract, an offer must be accepted as made. 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. *Griggs v. Oak* 296

10. Where one, to whom an offer is made, makes a counterproposition of different terms and new conditions, such counterproposition amounts to a rejection of the offer. *Griggs v. Oak* 296

11. In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them. *Leach v. Treber* 419

12. Mutuality of obligation of both parties to a con-

tract is not essential to effectuate a binding agreement where there is a separate valid consideration as an inducement to the agreement. *Leach v. Treber* 419

13. A promise which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of the promisee and which does induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise. *Leach v. Treber* 419

14. Preliminary negotiations leading to the execution of an integrated agreement of uncertain meaning are admissible for the purpose of determining the intentions of the parties, the conditions existing at the time, and the objects thereby to be accomplished, but not to vary plain terms of the instrument. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

15. If a construction contract is substantially performed, the damage caused by defective workmanship or unsuitable material used is measured by the fair and reasonable cost of remedying the defects. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

16. A person in whose name a contract is made for the benefit of another may bring an action thereon without joining with him the person for whose benefit it is prosecuted. *McNish v. General Credit Corp.* 526

Corporations.

1. An officer or director of a corporation occupies a fiduciary relation to the corporation and is treated by a court of equity as a trustee. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

2. An officer or director of a corporation, being a fiduciary, is denied business relationship with it without complete and truthful disclosure of all material facts known to him concerning the transaction and the subject matter of it. A material nondisclosure by a fiduciary constitutes fraud. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

Counties.

1. Where a statute prohibits a county from making a

contract, and avoids the obligation of the contract for so doing, a recovery quantum meruit cannot be had. *Capital Bridge Co. v. County of Saunders* 304

2. Where a contract has been entered into in good faith with a county, which contract is within the power of the county to make but is void for the reason that statutory requirements were not complied with, an action in quantum meruit for the service performed or material furnished may be maintained. *Capital Bridge Co. v. County of Saunders* 304

3. The right to recover in quantum meruit for service performed or material furnished under a void contract with a county exists up to the limit of, and not beyond, that which would have been recoverable under a valid contract covering the same subject matter. *Capital Bridge Co. v. County of Saunders* 304

4. By statute, the obligation of a county upon a contract is void where the contract is contrary to a statutory limitation, or where there are no funds legally available at the time with which to pay the obligation, or in the absence of a statute expressly authorizing such contract. The statute has no application where the county has general authority to make the contract but the power has been irregularly exercised. *Capital Bridge Co. v. County of Saunders* 304

Courts.

1. Courts will not permit laymen to appear in court in a representative capacity and such a rule may not be circumvented by subterfuge. *Niklaus v. Abel Construction Co.* 842

2. While a layman may represent himself in court, he cannot, even on a single occasion, represent another, whether for a consideration or not. *Niklaus v. Abel Construction Co.* 842

Covenants.

1. A restrictive covenant that lots in an addition to a city shall be exclusively a residential area is unambiguous and prohibits use of the lots for any purpose other than residential. *Reed v. Williamson* 99

2. The mutual agreement and obligation of the signers of an instrument to conform to a restrictive covenant expressed therein are a sufficient consideration to support the contract. *Reed v. Williamson* 99

3. Restrictive covenants, particularly if negative, create equitable easements or servitudes which may be enforced in equity by anyone interested in the property without regard to privity either of contract or of estate and without regard to whether or not the covenants run with the land. *Reed v. Williamson* 99
4. A restrictive covenant is not required to be a grant or reservation. It creates an equitable right in the nature of an equitable easement or servitude enforceable in equity on no broader principle than that equity will enforce a proper contract concerning real estate against all taking with notice of it. *Reed v. Williamson* 99
5. The test of whether a change of condition of the surrounding neighborhood is a defense to an action to enforce a restrictive covenant is whether the original purpose and intention of the parties creating the restriction, pursuant to the general scheme, has been so destroyed by the changed condition that the restriction is no longer a substantial benefit to the residents. *Reed v. Williamson* 99
6. If the restriction in a residential area has been substantially complied with, the fact that adjoining or surrounding property is used for business purposes does not generally change the character of the area itself so that the owners of property therein may not be entitled to have the restriction enforced. *Reed v. Williamson* 99
7. Injunction is a proper remedy to prevent violation of a restrictive covenant. *Reed v. Williamson* 99

Criminal Law.

1. A confession of guilt alleged to have been made by the defendant is not admissible in evidence unless first shown to have been voluntarily made. *Parker v. State* 614
2. In laying the foundation for the determination of whether or not a confession was voluntarily made, the evidence to establish foundation must be taken out of the presence of the jury, if there is objection to taking it in the presence of the jury. *Parker v. State* 614
3. As a basis for the receipt of a confession in evidence the State is required to adduce evidence that the confession was voluntary. Witnesses of the State on this question may be cross-examined and the de-

fendant has the right to adduce countervailing evidence. *Parker v. State* 614
4. A confession is admissible if the affirmative evidence shows that it was voluntarily made and excludes any other hypothesis. *Parker v. State* 614
5. It is sufficient to establish the foundation for the admission of a confession in evidence that there is affirmative proof it was freely and voluntarily made and the hypothesis of improper inducements or threats is excluded. *Parker v. State* 614
6. The question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of such evidence is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected. Where the confession is received in evidence, its voluntary character is still a question of fact for the jury. *Parker v. State* 614
7. Where separate confessions have been made and each are dependent on a separate foundation, admissibility depends upon the separate foundations. *Parker v. State* 614
8. It is ordinarily within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting. *Parker v. State* 614
9. In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce evidence in its possession for inspection by the defendant's counsel before trial. *Parker v. State* 614
10. It is only where there is in fact no preliminary examination upon a criminal charge, either in form or substance, that a plea in abatement may successfully be interposed. *Hoffman v. State* 679
11. In a criminal case, the credibility of witnesses and weight of evidence are for the jury to determine. The verdict of the jury may not be disturbed by the Supreme Court unless it is clearly wrong. *Pew v. State* 735
12. An accused, by making a plea of guilty, waives all defenses except that the complaint or information is not sufficient to charge an offense. *Stewart v. Ress* 876
13. A plea of guilty accepted by the court is a conviction or the equivalent of a conviction of the highest

order. The effect of it is to authorize the imposition of a sentence prescribed by law on a verdict of guilty of the crime charged. *Stewart v. Ress* 876

Crops.

1. The measure of damages to a growing crop that is destroyed by the wrongful act or omission of another is its value at the time of the destruction. *Patrick v. City of Bellevue* 196
2. Damage based upon the value of an unmatured crop is analagous to profits lost and is governed by the same rule precluding recovery in cases of either uncertainty or remoteness. *Patrick v. City of Bellevue* 196
3. The question of whether damage based on the destruction of an unmatured crop is speculative is decided by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if it had matured. *Patrick v. City of Bellevue* 196

Damages.

1. The measure of damages to a growing crop that is destroyed by the wrongful act or omission of another is its value at the time of the destruction. *Patrick v. City of Bellevue* 196
2. Damage based upon the value of an unmatured crop is analagous to profits lost and is governed by the same rule precluding recovery in cases of either uncertainty or remoteness. *Patrick v. City of Bellevue* 196
3. The question of whether damage based on the destruction of an unmatured crop is speculative is decided by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if it had matured. *Patrick v. City of Bellevue* 196
4. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or where it is clear that the jury disregarded the evidence or controlling rules of law. *Bezdek v. Patrick* 398
5. The question of the amount of damage is one solely for the jury. Its action will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved. *Bezdek v. Patrick* 398
6. If a construction contract is substantially performed,

the damage caused by defective workmanship or unsuitable material used is measured by the fair and reasonable cost of remedying the defects. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

Declaratory Judgments.

The state is not a necessary party in an action by a taxpayer for a declaratory judgment attacking the validity of an assessment brought against the county treasurer and the county in which the property was assessed. *S. S. Kresge Co. v. Jensen* 833

Deeds.

A deed of real estate, absolute in form, may be shown by parol to have been intended by the parties to it as security for a debt or loan, and as between such parties, at least, the instrument will be construed to be a mortgage. *Koehn v. Koehn* 169

Divorce.

1. A decree of separate maintenance may be granted only when the evidence brings the case within the scope of the statute providing for such relief. *Robinson v. Robinson* 413
2. A decree of separate maintenance may not be granted on the uncorroborated declarations or admissions of the parties to the case. *Robinson v. Robinson* 413
3. In a divorce case where the custody of minor children is involved, the custody of the children is to be determined by the best interests of the children, with due regard for the superior rights of fit, proper, and suitable parents. *Speck v. Speck* 506
4. In awarding the custody of minor children the court looks to the best interests of the children. Children of tender age are usually awarded to the mother if she is a fit and proper person to have their custody. *Speck v. Speck* 506
5. Custody of minor children awarded to the mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree unless it is shown that the mother is an unfit person to have their custody, or that their best interests under all the circumstances require such action. *Speck v. Speck* 506
6. Child support payments under a divorce decree become vested in the payee as they accrue. The courts

are without authority to reduce the amounts of such accrued payments. *Speck v. Speck* 506
7. Extreme cruelty as ground for divorce defined. *Workman v. Workman* 642
8. A decree of divorce cannot be granted solely on the declarations, confessions, or admissions of the parties. There must be corroborative evidence. *Workman v. Workman* 642
9. 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. *Workman v. Workman* 642
10. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned. *Workman v. Workman* 642
11. In a divorce suit where the court has jurisdiction of the parties, it has power to adjust all their respective property interests. *Workman v. Workman* 642
12. The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case. *Workman v. Workman* 642
13. Rule for determination of alimony in divorce case stated. *Workman v. Workman* 642
14. The Supreme Court will reverse on appeal a decree of divorce granted on uncorroborated testimony of a party. *O'Neill v. O'Neill* 674
15. Attorney's fees are not allowable in an action for divorce in the absence of statutory authority therefor. *O'Neill v. O'Neill* 674
16. The statutes of this state contain no provision for the allowance of attorney's fees in an action for divorce in favor of a husband and against a wife. *O'Neill v. O'Neill* 674
17. The courts are without authority in an action for divorce to fix the amount of the attorney's fees the parties are to pay their respective attorneys. *O'Neill v. O'Neill* 674

Drains.

1. A drainage district organized by vote of landowners has no duty to maintain and repair its works unless the plans and specifications of the project specifically provide therefor. *McGree v. Stanton-Pilger Drainage Dist.* 552

2. A drainage district organized by vote of landowners is liable for damages caused by the negligent construction of its works. *McGree v. Stanton-Pilger Drainage Dist.* 552

Easements.

1. Restrictive covenants, particularly if negative, create equitable easements or servitudes which may be enforced in equity by anyone interested in the property without regard to privity either of contract or of estate and without regard to whether or not the covenants run with the land. *Reed v. Williamson* 99
2. A restrictive covenant is not required to be a grant or reservation. It creates an equitable right in the nature of an equitable easement or servitude enforceable in equity on no broader principle than that equity will enforce a proper contract concerning real estate against all taking with notice of it. *Reed v. Williamson* 99

Elections.

1. A statute conferring a right to vote upon absentee and disabled voters will be strictly construed since its provisions are mandatory as to a voter desiring to exercise such right. *Haggard v. Misko* 778
2. Statutory provisions regulating the conduct of elections are directory only when they are not essential to a fair election and they are not made mandatory by the statute itself. *Haggard v. Misko* 778
3. Failure of a city clerk to keep a poll book of disabled voters in the form provided by law does not deprive an elector of the right to have his vote counted where he has complied with all mandatory provisions of the statute applicable to him. *Haggard v. Misko* 778
4. The posting of a notice of the convening of a canvassing board is directory. The failure to do so does not invalidate the votes of absentee and disabled voters. *Haggard v. Misko* 778
5. Irregularities of a canvassing board in conducting a canvass of votes cast at an election will not invalidate the votes of electors otherwise valid where there is no fraud and proper effect can be given to them. *Haggard v. Misko* 778
6. The statute that deals with election contests does not include a school district election held for the purpose

of contracting for the instruction of pupils. *Farrell v. School Dist. No. 54* 853

Embezzlement.

1. Under embezzlement statute, the failure of an agent to deliver property entrusted to his care to the proper person upon demand is prima facie proof of an intent to embezzle. *Hoffman v. State* 679
2. Embezzlement is the fraudulent appropriation or conversion of another's money or property by a person to whom it has been entrusted or into whose hands it has lawfully come by virtue of his employment with the felonious intent to defraud or deprive the owner thereof. *Hoffman v. State* 679
3. Conversion of the property alleged to have been embezzled to the personal use of the person charged is not an essential element of the crime of embezzlement. *Hoffman v. State* 679
4. The falsification of books and records and misrepresentations of fact for the purpose of concealing shortages of money or property entrusted to the defendant's care is competent evidence that such actions were done with a felonious intent. *Hoffman v. State* 679
5. In a prosecution for the embezzlement of gasoline, the amount to be allowed for normal shrinkage is a jury question. *Hoffman v. State* 679
6. Where evidence is adduced in a prosecution for embezzlement that a gasoline tank used by the defendant was found to be leaking on a date subsequent to the period in which the embezzlement is charged, it is admissible as a circumstance to be considered by the jury in determining if there was a reasonable doubt as to the guilt of the defendant. *Hoffman v. State* 679
7. In a prosecution for embezzlement, evidence of shortages of other products which suffered no loss by leakage is admissible as bearing upon the question of whether or not the shortage of gasoline resulted from a felonious act of the defendant or otherwise. *Hoffman v. State* 679
8. An error by the jury in calculating the amount embezzled is not material where it does not have the effect of changing the punishment of the defendant to his prejudice. *Hoffman v. State* 679

Eminent Domain.

1. In a condemnation proceeding, an error in a metes and bounds description may be corrected by the district court to conform to the plans and specifications, which were followed by actual survey and marking of the right-of-way on the ground. *McGree v. Stanton-Pilger Drainage Dist.* 552
2. On appeal from an award in a condemnation proceeding for a right-of-way, the judgment of the district court is conclusive upon the parties thereto as to all matters actually litigated, and also as to all matters necessarily within the issues whether formally presented or not. *McGree v. Stanton-Pilger Drainage Dist.* 552
3. In the trial of a condemnation proceeding the owner of property taken or damaged is entitled to have all proper elements of damage considered by the jury, and he cannot afterwards maintain an action to recover for damages omitted which were necessarily involved in the condemnation proceeding. *McGree v. Stanton-Pilger Drainage Dist.* 552
4. When land is taken outside the boundaries of the right-of-way condemned, it constitutes a second taking of private property for a public use and liability attaches therefor under Article I, section 21, of the Constitution. *McGree v. Stanton-Pilger Drainage Dist.* 552
5. In an action for damages based upon Article I, section 21, of the Constitution, against a drainage district organized by vote of landowners for the taking or damaging of private property for a public use, it is not necessary for plaintiff to plead or prove that he filed a notice. *McGree v. Stanton-Pilger Drainage Dist.* 552

Equity.

1. An equity court obtaining jurisdiction of a cause for any purpose will retain it for all purposes and proceed to final determination of all matters in issue thus avoiding unnecessary litigation. *Fiala v. Tomek* 20
2. The question of whether laches exists in a particular case depends upon its own peculiar circumstances and is addressed to the sound discretion of the court. *Caruso v. Moy* 68
3. A court of equity will consider the substance and

not the form. The particular form or words of a conveyance are unimportant if the intention of the parties can be ascertained. *Koehn v. Koehn* 169

Estoppel.

1. General rule as to elements of estoppel stated. *James v. McNair* 1
2. Equitable estoppel defined. *Roll v. Martin* 133
3. Where one by his own words or conduct willfully causes another to believe in a certain state of facts and thereby induces him to act on that belief so as to alter his own position, the former is concluded from averring against the latter a different state of facts from that represented. *Roll v. Martin* 133
4. Ordinarily estoppels in pais are available in favor of privies, provided the privity is created after the event out of which the estoppel arises, and provided the elements of such estoppel are present. *Roll v. Martin* 133
5. Title to real estate may not be created by estoppel but a party may estop himself, after a transaction has been fully executed, from asserting that the title he, by his own acts, has created or aided in creating is not the true title. *Roll v. Martin* 133

Evidence.

1. A municipal court will take judicial notice of the ordinances of the city. On appeal to the district court from a conviction under a city ordinance the latter court will on a trial de novo take notice of whatever facts the municipal court was required to notice judicially. *State v. Hohensee* 476
2. The official charts and records, kept in the regular course of business under the rules of a hospital, are admissible in evidence when a proper foundation has been laid. *Anderson v. Evans* 599
3. As limited in the opinion, the notes and entries by a nurse relating to care, treatment, and observation of patients in a hospital do not come within the Business Records as Evidence Act. *Anderson v. Evans* 599
4. Color photographs showing the physical condition of a plaintiff where his condition is an issue are admissible in evidence. *Anderson v. Evans* 599
5. A confession of guilt alleged to have been made by the defendant is not admissible in evidence unless first shown to have been voluntarily made. *Parker v. State* 614

6. In laying the foundation for the determination of whether or not a confession was voluntarily made, the evidence to establish foundation must be taken out of the presence of the jury, if there is objection to taking it in the presence of the jury. *Parker v. State* 614

7. As a basis for the receipt of a confession in evidence the State is required to adduce evidence that the confession was voluntary. Witnesses of the State on this question may be cross-examined and the defendant has the right to adduce countervailing evidence. *Parker v. State* 614

8. A confession is admissible if the affirmative evidence shows that it was voluntarily made and excludes any other hypothesis. *Parker v. State* 614

9. It is sufficient to establish the foundation for the admission of a confession in evidence that there is affirmative proof it was freely and voluntarily made and the hypothesis of improper inducements or threats is excluded. *Parker v. State* 614

10. The question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of such evidence is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected. Where the confession is received in evidence, its voluntary character is still a question of fact for the jury. *Parker v. State* 614

11. Where separate confessions have been made and each are dependent on a separate foundation, admissibility depends upon the separate foundations. *Parker v. State* 614

12. Ordinarily evidence of conduct, acts, and utterances of a deceased person unrelated to a homicidal act and unconnected therewith is irrelevant and inadmissible in evidence. *Parker v. State* 614

13. The admission of evidence of conduct, acts, and utterances of a deceased person unrelated to a homicidal act and unconnected therewith is ordinarily error, but if it appears that the rights of the defendant were not prejudiced thereby the error may not be regarded as ground for reversal. *Parker v. State* 614

14. It is ordinarily within the discretion of the court to

permit in rebuttal the introduction of evidence not strictly rebutting. *Parker v. State* 614

15. In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce evidence in its possession for inspection by the defendant's counsel before trial. *Parker v. State* 614

16. The polygraph, commonly known as a lie detector, used for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory. *Parker v. State* 614

17. The falsification of books and records and misrepresentations of fact for the purpose of concealing shortages of money or property entrusted to the defendant's care is competent evidence that such actions were done with a felonious intent. *Hoffman v. State* 679

18. Where evidence is adduced in a prosecution for embezzlement that a gasoline tank used by the defendant was found to be leaking on a date subsequent to the period in which the embezzlement is charged, it is admissible as a circumstance to be considered by the jury in determining if there was a reasonable doubt as to the guilt of the defendant. *Hoffman v. State* 679

19. In a prosecution for embezzlement, evidence of shortages of other products which suffered no loss by leakage is admissible as bearing upon the question of whether or not the shortage of gasoline resulted from a felonious act of the defendant or otherwise. *Hoffman v. State* 679

20. Testimony as to tire marks on the highways is admissible in civil actions for injury or damage where a sufficient foundation therefor is laid. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

21. Where a plaintiff is permitted to give evidence on a specific issue, defendant's evidence to the contrary is admissible on the same issue. *Elliott v. Brandt* 790

Executors and Administrators.

When one claims the estate of a deceased person under an alleged oral contract, the evidence of such contract must be clear, satisfactory, and unequivocal. *Drew v. Hawley* 141

Fire Protection Districts.

1. Nonjurisdictional irregularities and defects in the formation of rural fire protection districts can be challenged only in direct proceedings to test the validity of their organization. If the defects are of such a character that the proceedings are in fact void then that fact may be shown in any action. *Kelle v. Crab Orchard Rural Fire Protection Dist.* 593
2. The formation of rural fire protection districts may be collaterally attacked when the defects complained of are jurisdictional and not merely irregularities. *Kelle v. Crab Orchard Rural Fire Protection Dist.* 593
3. Compliance with statutory requirements as to number of signers and their qualifications is essential to validity of petition for rural fire protection district. *Kelle v. Crab Orchard Rural Fire Protection Dist.* 593

Forfeitures.

Ordinarily courts of equity will refuse to aid in the enforcement of penalties and forfeitures and leave the parties to whatever remedies they may have at law. However, this is not an absolute or inflexible rule and should yield when good reason exists for doing so. *McNish v. General Credit Corp.* 526

Forgery.

1. To utter and publish a forged instrument is to offer to pass it to another with intent to prejudice, damage, or defraud, declaring or asserting directly or indirectly by words or actions that it is good. *Crawford v. State* 231
2. In a prosecution for uttering and publishing a forged instrument, knowing it to be forged, a conviction cannot be sustained without proof of the forgery. *Crawford v. State* 231
3. To sustain a conviction for forgery, it is not sufficient for the State to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority. *Crawford v. State* 231

Fraud.

1. Where a party suffered injuries clearly in excess of any that were contemplated by the parties when a settlement and release of liability were made, it is evidence that may properly be considered, along

with the other evidence and circumstances in the case, in determining the question of fraud and misrepresentation in the procurement of the settlement and release. *Bryant v. Greene* 15

2. Equity may decree cancellation or rescission of a contract for fraud or misrepresentation constituting an inducement to its execution, especially when the legal remedy is inadequate or the equitable relief by way of cancellation is more complete. *Caruso v. Moy* 68

3. The right to rescind a contract for fraud or breach of covenant is barred by failure of the one party, for an unreasonable time after knowledge of the facts giving rise to such right, to declare a rescission and disclaim the benefits of the contract. *Caruso v. Moy* 68

4. An officer or director of a corporation, being a fiduciary, is denied business relationship with it without complete and truthful disclosure of all material facts known to him concerning the transaction and the subject matter of it. A material nondisclosure by a fiduciary constitutes fraud. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

Frauds, Statute of.

1. When one claims the estate of a deceased person under an alleged oral contract, the evidence of such contract must be clear, satisfactory, and unequivocal. *Drew v. Hawley* 141

2. An oral contract partly performed, which the statute of frauds requires to be in writing, will be enforced by a court of equity. *Griggs v. Oak* 296

3. To obtain specific performance of an oral contract within the statute of frauds, the burden is upon the plaintiff to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract. *Griggs v. Oak* 296

Fraudulent Conveyances.

1. A conveyance is declared to be fraudulent when its object or effect is to defraud another, or the intent with which it is made is to avoid some duty or debt

due by or incumbent upon the party making the transfer. *Smith v. Ely* 636
2. The intent may be gathered from the acts of the parties, and a conveyance becomes fraudulent in law when it is shown that it was made for the purpose of placing the property beyond the reach of creditors, or that it would hinder or delay them in collecting their just demands. *Smith v. Ely* 636

Gifts.

1. In the case of a gift and voluntary conveyance from a parent to his child or children, no presumption of fraud or undue influence arises as between the parties thereto by the mere fact of the relation. *Reynolds v. Knott* 365
2. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence, and will not render it voidable unless this influence has been so used as to confuse the judgment and control the will of the donor. *Reynolds v. Knott* 365

Habeas Corpus.

The sufficiency of evidence adduced at a preliminary hearing to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings. *Hoffman v. State* 679

Highways.

1. The word "highway" means a public road of general use by the public in travel from place to place. *School District No. 228 v. State Board of Education* 148
2. The word "improved" qualifying "highway" means a highway made better for travel by human effort. This includes one or more of the elements of grading, elevating or lowering a roadbed, surfacing, drainage, and like betterments. *School District No. 228 v. State Board of Education* 148
3. The word "reasonably" qualifying "improved highway" means sufficiently improved to meet the normal demands put upon its use. *School District No. 228 v. State Board of Education* 148
4. A driver of a motor vehicle about to enter a highway protected by stop signs must stop, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that

it would be obviously dangerous for him to proceed across the intersection. *Bezdek v. Patrick* 398
5. The violation of traffic regulations is not negligence as a matter of law of any kind or degree, but it is a fact to be considered with the other evidence in the case in deciding an issue of negligence. *Bezdek v. Patrick* 398
6. Duty of driver of a motor vehicle approaching a through street or highway stated. *Bezdek v. Patrick* 398
7. A motorist entering an intersection from the right has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored motor vehicle to exercise ordinary care. *Bezdek v. Patrick* 398
8. 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. *Bezdek v. Patrick* 398
9. A user of the highways may assume that other users of the highways will use them in a lawful manner, and until he has warning, notice, or knowledge to the contrary, he is entitled to govern his actions in accordance with such assumption. *Bezdek v. Patrick* 398
10. Upon entering an intersection, a motorist should have his motor vehicle under such control that he can avoid a collision with another vehicle which is operated with due care. *Bezdek v. Patrick* 398
11. The right of a motorist on an arterial highway to assume that a motor vehicle on a nonfavored intersecting street will be brought to a stop before entering the intersection does not permit him to claim the right-of-way when too far from the intersection to be entitled thereto. *Bezdek v. Patrick* 398
12. The violation of a statute, the purpose of which is to protect the safety of people in the use of the public highways, is not negligence per se but is evidence of negligence. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

Homicide.

1. Ordinarily evidence of conduct, acts, and utterances of a deceased person unrelated to a homicidal act and unconnected therewith is irrelevant and inadmissible in evidence. *Parker v. State* 614
2. The admission of evidence of conduct, acts, and utterances of a deceased person unrelated to a homi-

cidal act and unconnected therewith is ordinarily error, but if it appears that the rights of the defendant were not prejudiced thereby the error may not be regarded as ground for reversal. *Parker v. State* 614

Husband and Wife.

A directed verdict is proper in an action by a husband to recover for pecuniary injury suffered by reason of the death of his wife, wherein the evidence discloses that the husband was guilty of more than slight negligence as a matter of law. *Ecker v. Union P. R. R. Co.* 744

Indemnity.

An indemnitee may proceed against his indemnitor by an action ex contractu on the contract of indemnity. *National Reefer Service, Inc. v. Felman* 783

Indictments and Informations.

Where a crime created by statute may be committed by any of several methods, the information may charge in a single count that it was committed by any or all of the enumerated methods if they are not inconsistent with or repugnant to each other. *Hoffman v. State* 679

Infants.

1. Liability or nonliability in an instance where an infant is ordered into a dangerous situation by his employer does not depend upon presumption but upon knowledge and prudent action in relation thereto by the employee. *Anderson v. Evans* 599
2. Whether or not a minor between 14 and 15 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law. *Bear v. Auguy* 756
3. The degree of care required of a minor is that which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. *Bear v. Auguy* 756

Injunctions.

1. Injunction is a proper remedy to prevent violation of a restrictive covenant. *Reed v. Williamson* 99

2. The general rule is that prospective action of a city in the exercise of legislative power in relation to a subject committed to its jurisdiction cannot be enjoined. Courts will not ordinarily intervene until some effort is made to enforce alleged unauthorized action taken by the city. *Hillerege v. City of Scottsbluff* 560
3. In an action instituted by a resident taxpayer, a court of equity will restrain public officers from illegally creating a debt or obligation which must be paid by taxation. *Farrell v. School Dist. No. 54* 853

Insane Persons.

1. Where a person is not actually insane, but is incapable, through age or weakness of mind, of conducting his affairs, a suit may be maintained on his behalf by his next friend. *Fiala v. Tomek* 20
2. In general, any proof that is material and relevant to the issue of sanity or competency may be admitted upon the trial thereof. *Fiala v. Tomek* 20
3. In the determination of the mental condition of a person, his conversation, acts, declarations, and conduct in general may be shown. *Fiala v. Tomek* 20
4. The physical condition of a person alleged to be incompetent may be considered only insofar as it affects his mental condition. *Fiala v. Tomek* 20

Interest.

A borrower coming under the statutes relating to installment loans is not regarded as being in pari delicto but rather as being in vinculus to the lender, to whom he therefore owes no duty in equity. *McNish v. General Credit Corp.* 526

Joint Adventures.

1. A joint adventure is in the nature of a partnership, but may exist where persons embark on an undertaking without entering into the prosecution of a business as partners strictly but engage in a common enterprise for their mutual benefit. *Anderson v. Evans* 599
2. Requisites of a joint adventure stated. *Anderson v. Evans* 599

Joint Tenancy.

If a deposit is made in a bank payable to two persons,

either expressly as joint tenants with right of survivorship or without those or similar qualifying words, upon the death of one of the co-owners of the deposit it becomes the sole property of and is payable to the surviving co-owner. *Slocum v. Bohuslov* 156
Nelson v. Rasmussen 274

Judgments.

1. A determination by the proper county court in a proceeding brought to determine heirship is, after it becomes final, binding and conclusive on all persons. *Nelson v. Rasmussen* 274
2. The function of a nunc pro tunc order is not to correct some affirmative action of the court which ought to have been taken, but its purpose is to correct the record which has been made, so that it will truly express the action taken but which through inadvertence or mistake was not truly recorded. *Akins v. Chamberlain* 428
3. When a judgment is attacked collaterally, or when a long time after the judgment is entered the correctness of an officer's return is assailed, great faith and credit must be given to the formal return of the officer. *State v. County of Kimball* 479
4. A final judgment is one that disposes of the case either by dismissing it before hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant. A judgment or order is not final unless it determines the rights of the litigants and precludes further inquiry. *Lindquist v. Towle* 524
5. On appeal from an award in a condemnation proceeding for a right-of-way, the judgment of the district court is conclusive upon the parties thereto as to all matters actually litigated, and also as to all matters necessarily within the issues whether formally presented or not. *McGree v. Stanton-Pilger Drainage Dist.* 552
6. In the trial of a condemnation proceeding the owner of property taken or damaged is entitled to have all proper elements of damage considered by the jury, and he cannot afterwards maintain an action to recover for damages omitted which were necessarily involved in the condemnation proceeding. *McGree v. Stanton-Pilger Drainage Dist.* 552
7. One aggrieved by the action of a county board of

equalization may appeal to the district court. One who fails to pursue this remedy is precluded from objecting to the valuation of his separate property for taxation purposes and a collateral attack may not be made thereon except where the assessment is void, willfully discriminatory, or the result of fraud. *S. S. Kresge Co. v. Jensen* 833

8. Collateral attack by taxpayer on valuation of his property is precluded by failure to exercise his right to a hearing before county board of equalization. *S. S. Kresge Co. v. Jensen* 833

Landlord and Tenant.

1. The occupancy of premises by one person with the consent or permission of the owner creates between the parties the relation of landlord and tenant. In the absence of an agreement or circumstances indicating a contrary intent, the law will imply an agreement on the part of the tenant to pay the reasonable value for his use and occupation. *Beacom v. Daley* 120
2. Where rent is payable yearly, and there is no provision for payment in advance, it is not due until the end of the year. *Beacom v. Daley* 120
3. In the absence of an express covenant or stipulation, a lessor is not bound to make repairs to leased property. *Sipprell v. Merner Motors* 447
4. Guests and invitees of a tenant have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects on leased premises than the tenant has. *Sipprell v. Merner Motors* 447
5. Exceptions to the general rule of liability of a landlord to invitees of a tenant generally have no relation to conditions arising after leasing and surrender of control but only to those existing at the time of leasing. *Sipprell v. Merner Motors* 447
6. Subject to specific exceptions, the lessor of land is not liable for bodily harm caused to his lessee, or others upon the demised land with the consent of the lessee or sublessee, by any dangerous condition, whether natural or artificial, which existed when the lessee took possession. *Sipprell v. Merner Motors* 447

Larceny.

Generally, a thief can acquire no title to stolen property,

nor can title to personal property be acquired through another's larceny or theft. *Allstate Ins. Co. v. Enzolera* 38

Life Estates.

1. On the termination of a life estate, the reversioner is entitled to all rentals thereafter becoming due upon real estate. *Beacom v. Daley* 120
2. As between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes charged against the land during the continuance of his estate. *Beacom v. Daley* 120
3. A life tenant must make all the ordinary repairs necessary to preserve the property and prevent its going to waste, but he need not make extraordinary repairs. *Beacom v. Daley* 120
4. The owner of a life estate is entitled to all the income from the property. *Slocum v. Bohuslov* 156
5. If the life tenant acquires other property by investment of the income, such property is subject only to his disposition of it. *Slocum v. Bohuslov* 156

Limitations of Actions.

1. An action for the recovery of the reasonable value for the use and occupancy of lands is not barred by the statute of limitations until 4 years have elapsed from the accruing of such action. *Beacom v. Daley* 120
2. Any voluntary payment made by the debtor upon such cause of action would arrest the running of the statute of limitations with reference thereto. *Beacom v. Daley* 120
3. To toll the statute of limitations, a voluntary payment must be intentionally and consciously made and accepted as part payment of the particular indebtedness. *Beacom v. Daley* 120
4. A certificate of deposit made payable on the return of the certificate properly endorsed with no other stipulation fixing a specified or determinable future time after date for payment thereof is a demand certificate and the statute of limitations does not begin to run thereon until demand for payment is made. *Powell v. Farmers State Bank* 180
5. A certificate of deposit made payable on the return of the certificate properly endorsed at a specified or determinable future time after date is a time certificate and the statute of limitations begins to run thereon at the expiration of such time without

the necessity of any demand for payment. *Powell v. Farmers State Bank* 180

Malicious Prosecution.

In the absence of malice, an action for the wrongful suing out of an attachment can be maintained alone on the attachment bond. To maintain an action independently of the statute, and not on the bond, malice in suing out the writ and want of probable cause must be averred. *Carlson v. Schroeder* 443

Mandamus.

The issuance of a peremptory writ of mandamus without notice is justified only where there is no room for controversy as to the right, and where from the facts set forth in the affidavit on which an application is based the court can take judicial notice that a valid excuse is impossible. *State ex rel. Beck v. Chicago, St. P., M. & O. Ry. Co.* 60

Master and Servant.

1. The relation of master and servant does not generally render the master liable for the torts of his servant, unless connected with his duties as such servant or within the scope of his employment. *Farr v. Cambridge Co-Operative Oil Co.* 45
2. If a servant does an act merely to frighten a third person or to perpetrate a joke on a third person, and the act is entirely disconnected from the purpose of the employment, the master generally is not liable therefor. *Farr v. Cambridge Co-Operative Oil Co.* 45
3. Duty of master to control his servant while the servant is acting outside the course of his employment stated. *Farr v. Cambridge Co-Operative Oil Co.* 45
4. A servant cannot recover from a master where he has subjected himself to manifest and inevitable danger which danger cannot be avoided by the exercise of ordinary care and skill, even if commanded by the master to incur the risk. *Anderson v. Evans* 599
5. If a master orders a servant into a place of danger and the servant is injured, the servant is not guilty of contributory negligence unless the danger is so glaring that a reasonably prudent person would not have entered into it. *Anderson v. Evans* 599
6. An employee who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are

open and obvious is chargeable with negligence or contributory negligence. *Anderson v. Evans* 599

7. An employee assumes risks not ordinarily incident to his employment, provided he knows of them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know of them and to appreciate the danger. *Anderson v. Evans* 599
8. Where there is a disputed question of fact as to whether or not an employee was informed or had knowledge of latent dangers of his employment, a question is presented for determination by a jury. *Anderson v. Evans* 599
9. Liability or nonliability in an instance where an infant is ordered into a dangerous situation by his employer does not depend upon presumption but upon knowledge and prudent action in relation thereto by the employee. *Anderson v. Evans* 599

Mines and Minerals.

A valid restriction that lots in an addition to a city shall be exclusively a residential area prevents use of them for the exploration for or production of oil and gas. *Reed v. Williamson* 99

Mortgages.

1. A deed of real estate, absolute in form, may be shown by parol to have been intended by the parties to it as security for a debt or loan, and as between such parties, at least, the instrument will be construed to be a mortgage. *Koehn v. Koehn* 169
2. If the evidence shows that an instrument is intended by the parties to be security for a debt it is in equity, without regard to its form or name, a mortgage. *Koehn v. Koehn* 169

Motor Carriers.

1. By statute, a common carrier is defined as any person who or which undertakes to transport passengers or property for the general public in intrastate commerce by motor vehicle for hire, whether over regular or irregular routes, upon the highways of this state. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85
2. The declared policy of the Motor Carrier Act is to regulate transportation in the public interest, and to promote efficient service without undue prefer-

ences or advantages, and unfair or destructive competitive practices. The declared policy does not condemn competition. It does condemn unfair or destructive competitive practices. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85

Municipal Corporations.

1. A restrictive covenant that lots in an addition to a city shall be exclusively a residential area is unambiguous and prohibits use of the lots for any purpose other than residential. *Reed v. Williamson* 99
2. The test of whether a change of condition of the surrounding neighborhood is a defense to an action to enforce a restrictive covenant is whether the original purpose and intention of the parties creating the restriction, pursuant to the general scheme, has been so destroyed by the changed condition that the restriction is no longer a substantial benefit to the residents. *Reed v. Williamson* 99
3. If the restriction in a residential area has been substantially complied with, the fact that adjoining or surrounding property is used for business purposes does not generally change the character of the area itself so that the owners of property therein may not be entitled to have the restriction enforced. *Reed v. Williamson* 99
4. In establishing and maintaining a free dump for the disposal of garbage, a city performs a governmental function. *Patrick v. City of Bellevue* 196
5. Temporary damage to land caused by the establishment and maintenance of a free dump for the disposal of garbage is such a damage as is required to be compensated by Article I, section 21, of the Constitution. *Patrick v. City of Bellevue* 196
6. Even though city was performing a governmental function and did not create a nuisance, the Constitution requires payment of just compensation for damage to private property for public use by a city. *Patrick v. City of Bellevue* 196
7. The fact that the city is not liable for the negligence of its officers, agents, or employees when the city is engaged in the performance of a governmental function does not exempt it from liability for damage to private property in the exercise of its powers of eminent domain. *Patrick v. City of Bellevue* 196
8. Private property damaged by a city for a public purpose without an actual taking thereof is required

by the Constitution to be justly compensated. *Patrick v. City of Bellevue* 196

9. Municipal revenue bonds are obligations of a city even though they are not general obligations and not subject to payment through the exercise of the taxing power. *State ex rel. Beck v. City of York* 223

10. Money derived from the sale of municipal revenue bonds is public money. *State ex rel. Beck v. City of York* 223

11. The purchase of land by a municipality and the erection of an industrial plant thereon for lease to a private corporation for private gain and profit, by issuing revenue bonds to be paid solely from rentals, is not for a public purpose. *State ex rel. Beck v. City of York* 223

12. Statute authorizing the building and leasing of industrial plants to private concerns for use for private profit or gain, financed by municipal revenue bonds payable solely from rentals, violates Article XIII, section 3, of the Constitution. *State ex rel. Beck v. City of York* 223

13. The Constitution gives the Legislature exclusive power and authority to divide the state into legislative districts. Annexation ordinances enacted by municipalities do not change the territorial boundaries of legislative districts. *Buller v. City of Omaha* 435

14. A lot owner in a municipality is not required to repair an adjacent sidewalk until he has been notified by the municipality to do so, and in the absence of such notice he is not liable to pedestrians for damages for personal injuries. *Sipprell v. Merner Motors* 447

15. A lot owner may be held in damages where defects in a sidewalk have been caused by his affirmative wrong doing or wrongful use of a sidewalk. *Sipprell v. Merner Motors* 447

16. A municipal court will take judicial notice of the ordinances of the city. On appeal to the district court from a conviction under a city ordinance the latter court will on a trial de novo take notice of whatever facts the municipal court was required to notice judicially. *State v. Hohensee* 476

17. On an appeal to the Supreme Court from a judgment of the district court convicting a defendant of a violation of a city ordinance, the existence of a valid ordinance creating the offense charged will

be presumed where the ordinance is not properly set forth in the record. *State v. Hohensee* 476

18. On appeal to the Supreme Court from a judgment of the district court convicting a defendant of the violation of a municipal ordinance, it will be presumed, nothing appearing to the contrary, that the facts set out in the complaint constituted a violation of the ordinance of the city. *State v. Hohensee* 476

19. A prosecution for the violation of a city ordinance, which does not embrace any offense made criminal by the laws of the state, while in form a criminal proceeding, is, in fact, a civil one to recover a penalty, and a preponderance of the evidence is all that is required to sustain a conviction. *State v. Hohensee* 476

20. The title to a street is not generally a fee simple absolute but is a qualified base or determinable fee. It is held in trust for the purposes to which the street is dedicated. *Hillerege v. City of Scottsbluff* 560

21. The right which an owner of abutting property possesses in a street is different in kind from that possessed by one whose interest is only that of a right-of-way along the street. *Hillerege v. City of Scottsbluff* 560

22. The right of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement of which he cannot be deprived without due process of law and compensation for his loss. *Hillerege v. City of Scottsbluff* 560

23. The owner of property abutting on a street is not entitled, as against the public, to access to his land at all points in the boundary between it and a street, although entire access cannot be denied him. The measure of the right of the property owner is reasonable ingress and egress under all the circumstances. *Hillerege v. City of Scottsbluff* 560

24. The grant by the state to a city of the power to control and improve streets in any manner it deems proper is the delegation of police power to be exercised with a sound discretion in a reasonable and not in an arbitrary or discriminatory manner. *Hillerege v. City of Scottsbluff* 560

25. It is the right of a city, in the exercise of the police power delegated to it in reference to its streets, to

determine the action required for the safety, convenience, and welfare of the public. *Hillerege v. City of Scottsbluff* 560

26. The action of a city in the exercise of the police power is not absolute or final but is subject to judicial review. *Hillerege v. City of Scottsbluff* 560

27. The test of the proper exercise of police power is whether or not the action proposed is a good faith, reasonable exercise of the power or is an arbitrary and unreasonable interference with the rights of persons affected thereby. *Hillerege v. City of Scottsbluff* 560

28. Action taken by a city in the exercise of the police power is presumed to be valid. The burden is on the party contesting its validity to establish by clear and unequivocal proof that it is so unreasonable, arbitrary, or discriminatory as to amount to depriving the party of his property without due process of law. *Hillerege v. City of Scottsbluff* 560

29. Municipal action, in the exercise of the police power, is not necessarily invalid because it infringes on private rights or property but such infringement may not be unreasonable, discriminatory, or confiscatory. *Hillerege v. City of Scottsbluff* 560

30. It is a denial of equal protection of the law to apply a regulation differently to different persons under the same or similar circumstances. *Hillerege v. City of Scottsbluff* 560

31. Municipal action applicable to all persons affected thereby within the area described is not discriminatory. *Hillerege v. City of Scottsbluff* 560

32. The general rule is that prospective action of a city in the exercise of legislative power in relation to a subject committed to its jurisdiction cannot be enjoined. Courts will not ordinarily intervene until some effort is made to enforce alleged unauthorized action taken by the city. *Hillerege v. City of Scottsbluff* 560

33. The violation of city ordinances or statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se but evidence of negligence. Where the evidence is such that reasonable minds may draw different conclusions therefrom, the question of negligence is for the jury. *Bear v. Auguy* 756

34. Firemen's Pension Act contemplates a hearing before proper municipal authorities and a decision

based upon evidence presented at the hearing as a condition to the right therein provided. *Schaub v. City of Scottsbluff* 805

35. The requirement that it be ascertained by proper municipal authorities within 12 months of the date of the accident that the disability of the fireman has become permanent is mandatory and a condition of the right of recovery of benefits after the expiration of the designated period. *Schaub v. City of Scottsbluff* 805

36. Although taxpayers have an interest which entitles them to protect the interest of a municipal corporation, the cause of action remains in the corporation and final relief is for its benefit. *Niklaus v. Abel Construction Co.* 842

37. Statute authorizing taxpayer's suit clearly recognizes that the cause of action is that of the city and not that of the citizen or taxpayer. *Niklaus v. Abel Construction Co.* 842

38. Where the officers of a public corporation refuse to act, the taxpayer may bring suit on behalf of himself and others similarly situated. The direct injury to be remedied where the taxpayer sets the judicial machinery in motion for that purpose is not personal and direct to himself, but to the corporation. *Niklaus v. Abel Construction Co.* 842

Names.

1. In law the name of a person consists of one given name and one surname and the two, using the given name first and the surname last, constitute such person's legal name. *Kelle v. Crab Orchard Rural Fire Protection Dist.* 593

2. A married woman's name consists, in law, of her own Christian name and her husband's surname. Marriage confers on her the surname of the husband. *Kelle v. Crab Orchard Rural Fire Protection Dist.* 593

Negligence.

1. Gross negligence within the meaning of the guest statute is great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. *Holliday v. Patchen* 53

2. To recover damages from a host for injuries received while riding in an automobile operated by the

host, a guest must prove by a preponderance of the evidence the gross negligence relied upon and that it was the proximate cause of the accident. *Holliday v. Patchen* 53

3. When the evidence is resolved most favorably toward the existence of gross negligence and the facts thus determined, the question of whether or not they support a finding of gross negligence is one of law. *Holliday v. Patchen* 53

4. The operation of an automobile at a rate of speed prohibited by law is not in itself gross negligence. *Holliday v. Patchen* 53

5. Momentary inattention in the operation of a motor vehicle does not ordinarily amount to gross negligence. This is true even where such inattention is voluntary and in no manner induced by a distracting influence. *Holliday v. Patchen* 53

6. A warning of imminent danger to a host by a guest riding in an automobile operated by such host must be made in time to afford the host a reasonable opportunity to avoid the accident. *Holliday v. Patchen* 53

7. Where the negligence of the driver of an automobile is the sole proximate cause of a collision in which a guest is injured, the guest cannot recover from a third person for such injury. *Burhoop v. Bracken* 382

8. A lot owner in a municipality is not required to repair an adjacent sidewalk until he has been notified by the municipality to do so, and in the absence of such notice he is not liable to pedestrians for damages for personal injuries. *Sipprell v. Merner Motors* 447

9. A lot owner may be held in damages where defects in a sidewalk have been caused by his affirmative wrong doing or wrongful use of a sidewalk. *Sipprell v. Merner Motors* 447

10. In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. *Sipprell v. Merner Motors* 447

11. The proprietor of a salesroom is not an insurer against accidents to customers, but is bound to exercise reasonable care and prudence to keep the premises, which the public is tacitly invited to use, safe for that purpose. *Sipprell v. Merner Motors* 447

12. The fact that an invitee falls upon steps leading from the exit of a building to the sidewalk below does not raise any presumption of negligence on the part of its owner, and the doctrine of res ipsa loquitur does not apply. *Sipprell v. Merner Motors* 447
13. A servant cannot recover from a master where he has subjected himself to manifest and inevitable danger which danger cannot be avoided by the exercise of ordinary care and skill, even if commanded by the master to incur the risk. *Anderson v. Evans* 599
14. If a master orders a servant into a place of danger and the servant is injured, the servant is not guilty of contributory negligence unless the danger is so glaring that a reasonably prudent person would not have entered into it. *Anderson v. Evans* 599
15. An employee who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is chargeable with negligence or contributory negligence. *Anderson v. Evans* 599
16. An employee assumes risks not ordinarily incident to his employment, provided he knows of them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know of them and to appreciate the danger. *Anderson v. Evans* 599
17. Where there is a disputed question of fact as to whether or not an employee was informed or had knowledge of latent dangers of his employment, a question is presented for determination by a jury. *Anderson v. Evans* 599
18. An allegation that an accident and resulting damage was solely and proximately caused by the negligence of a third person is not an affirmative defense and imposes no burden of proof. *Buhrman v. Smollen* 655
19. A litigant who charges his adversary with negligence has the burden throughout the litigation to establish it. *Federal Ins. Co. v. International Harvester Co.* 698
20. In a negligence action, plaintiff has the burden of establishing that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
21. Proof of negligence is sufficient if the facts and circumstances proved, together with the reasonable

inferences which may be drawn therefrom, shall indicate with reasonable certainty the negligent act of which complaint is made. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

22. Where the accident and resulting damages were solely and proximately caused by the negligence of a third person, such issue is provable under a general denial. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

23. The violation of a statute, the purpose of which is to protect the safety of people in the use of the public highways, is not negligence per se but is evidence of negligence. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

24. Rule of intervening efficient cause in negligence case stated. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

25. If the original negligence is of a character which 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. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

26. In a negligence case, where different minds may reasonably draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the issues must be submitted to the jury for its determination, and its verdict based thereon will not be disturbed unless clearly wrong. *Egenberger v. National Alfalfa Dehyrating & Milling Co.* 704

27. Where the use of intoxicating liquor is so close in time to an accident as to be considered an incident relating thereto, it may be admitted as a circumstance proper to be considered by a jury in determining the existence or nonexistence of negligence. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

28. 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 evidence, and such rule applies in negligence cases. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

29. Where the evidence adduced to sustain issues of negligence and proximate cause are such that rea-

sonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the issues as a matter of law rather than submit them to a jury for determination. *Ecker v. Union P. R. R. Co.* 744

30. Contributory negligence defined. *Ecker v. Union P. R. R. Co.* 744

31. Proximate cause is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which it would not have occurred. *Ecker v. Union P. R. R. Co.* 744
Bear v. Auguy 756

32. Ordinarily, where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident, the latter is the proximate cause. *Ecker v. Union P. R. R. Co.* 744

33. A directed verdict is proper in an action by a husband to recover for pecuniary injury suffered by reason of the death of his wife, wherein the evidence discloses that the husband was guilty of more than slight negligence as a matter of law. *Ecker v. Union P. R. R. Co.* 744

34. When in an action for wrongful death the evidence discloses that plaintiff's decedent was guilty of negligence more than slight as a matter of law which proximately contributed to or caused the accident and death, it is the duty of the court to direct a verdict for defendant. *Ecker v. Union P. R. R. Co.* 744

35. A person who knowingly and of his own volition exposes himself to obvious danger cannot recover damages for any injury which he might have avoided by the use of reasonable care. *Ecker v. Union P. R. R. Co.* 744

36. A traveler on a highway is required to exercise reasonable care for the safety of others thereon. *Bear v. Auguy* 756

37. What is reasonable care does not permit of definitive statement applicable to all cases but the presence or absence of reasonable care must be determined by the facts and circumstances of each case. *Bear v. Auguy* 756

38. The lawfulness of the speed of a motor vehicle within the prima facie limits fixed by statute is determined by the further test of whether the speed was greater than was reasonable and pru-

dent under the conditions then existing. *Bear v. Auguy* 756

39. A driver is required to have his motor vehicle under such reasonable control as will enable him to avoid a collision with other vehicles, assuming that the drivers thereof will exercise due care. *Bear v. Auguy* 756

40. Duty of motorist with respect to keeping a proper lookout stated. *Bear v. Auguy* 756

41. The violation of city ordinances or statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se but evidence of negligence. Where the evidence is such that reasonable minds may draw different conclusions therefrom, the question of negligence is for the jury. *Bear v. Auguy* 756

42. Where different minds may reasonably draw different conclusions from the evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence and the degree thereof, when one is compared with the other, such issues must be submitted to a jury. *Bear v. Auguy* 756

43. Whether or not a minor between 14 and 15 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law. *Bear v. Auguy* 756

44. The degree of care required of a minor is that which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. *Bear v. Auguy* 756

New Trial.

A new trial will be granted on the ground of newly discovered evidence only if the evidence is material and could not with reasonable diligence have been discovered at the time of the trial, which evidence would probably change the result substantially and favorably to the applicant. *Romans v. Bowen* 209

Parent and Child.

1. In the case of a gift and voluntary conveyance from a parent to his child or children, no presumption of fraud or undue influence arises as between the parties thereto by the mere fact of the relation. *Reynolds v. Knott* 365

2. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence, and will not render it voidable unless this influence has been so used as to confuse the judgment and control the will of the donor. *Reynolds v. Knott* 365

Parties.

1. In a proceeding in error to reverse the action of the county superintendent in creating a new district or changing the boundaries of an existing district affecting a city, village, or Class III school district, the board of education is the real party in interest. *Clausen v. School Dist. No. 33* 78
2. In a proceeding in error to reverse the action of the county superintendent in creating a new district or changing the boundaries of existing districts in case of changes affecting districts other than city, village, or Class III school districts, the petitioners who signed the petitions for change of boundaries or new district creation are the real parties in interest. *Clausen v. School Dist. No 33* 78
3. In a proceeding in error the summons must be served upon the real party or parties in interest or the attorney of record of the defendant or defendants in error, unless the issuance or service is waived in writing by the attorney or the defendants. *Clausen v. School Dist. No. 33* 78
4. In a proceeding in error all necessary parties must be made parties to the proceeding. *Clausen v. School Dist. No. 33* 78
5. All parties to a joint judgment are necessary parties to a proceeding in error brought to reverse such judgment. *Clausen v. School Dist. No. 33* 78
6. The failure to make all parties who may be affected by the modification or reversal of a judgment in a proceeding to review the cause by petition in error is ground for dismissal of the petition. *Clausen v. School Dist. No. 33*..... 78
7. One necessary party who has been properly served with summons in a proceeding in error may properly move for dismissal of the petition for failure to make others parties to the proceedings. *Clausen v. School Dist. No. 33* 78
8. The real party in interest is the person entitled to the avails of the suit. *McNish v. General Credit Corp.* 526

9. A person in whose name a contract is made for the benefit of another may bring an action thereon without joining with him the person for whose benefit it is prosecuted. *McNish v. General Credit Corp.* 526
10. The state is not a necessary party in an action by a taxpayer for a declaratory judgment attacking the validity of an assessment brought against the county treasurer and the county in which the property was assessed. *S. S. Kresge Co. v. Jensen* 833

Partnership.

A partnership is created by contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions. *Anderson v. Evans* 599

Penalties.

1. A prosecution for the violation of a city ordinance, which does not embrace any offense made criminal by the laws of the state, while in form a criminal proceeding, is, in fact, a civil one to recover a penalty, and a preponderance of the evidence is all that is required to sustain a conviction. *State v. Hohensee* 476
2. Ordinarily courts of equity will refuse to aid in the enforcement of penalties and forfeitures and leave the parties to whatever remedies they may have at law. However, this is not an absolute or inflexible rule and should yield when good reason exists for doing so. *McNish v. General Credit Corp.* 526

Pensions.

1. The right to a fireman's pension is statutory. The Legislature has authority to attach any condition to the existence of the right it desires. *Schaub v. City of Scottsbluff* 805
2. Firemen's Pension Act contemplates a hearing before proper municipal authorities and a decision based upon evidence presented at the hearing as a condition to the right therein provided. *Schaub v. City of Scottsbluff* 805
3. The requirement that it be ascertained by proper municipal authorities within 12 months of the date of the accident that the disability of the fireman has become permanent is mandatory and a condition

of the right of recovery of benefits after the expiration of the designated period. *Schaub v. City of Scottsbluff* 805

4. The Legislature intended partial disability to describe and mean the identical condition with reference to temporary total disability in Firemen's Pension Act. *Schaub v. City of Scottsbluff* 805
5. A fireman is permanently and totally disabled under the Firemen's Pension Act when the disability from which he suffers renders him permanently unable to obtain, hold, or do any substantial amount of remunerative work, either in his previous occupation or in any other established and recognized field of employment for which he is fitted. *Schaub v. City of Scottsbluff* 805
6. Total disability contemplates the loss of earning power. In measuring such loss consideration should be given to the ability to earn wages, eligibility to procure employment generally, ability to hold a job obtained, and the capacity to perform the tasks of the work in which a person is engaged. *Schaub v. City of Scottsbluff* 805

Pleading.

1. It is not indispensable that a constitutional provision be set out or its existence alleged in the statement of a cause of action if the litigant otherwise pleads and proves a right of recovery because of it. *Patrick v. City of Bellevue* 196
2. When an answer to a petition consists of a general denial, the defendant may introduce such testimony as will tend to disprove the testimony of the plaintiff in support of his petition. For such purpose no other allegations in the answer are necessary. *Towner v. Western Contracting Corp.* 235
3. In an action on a promissory note, the party alleging want of consideration has the burden of proving it by a preponderance of the evidence. *Leach v. Treber* 419
4. 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. *Buller v. City of Omaha* 435
5. In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof, if the allegations stated therein either

aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant. *Buller v. City of Omaha* 435

6. An admission made in a pleading on which the trial is had is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it. It is therefore a limitation of the issues. *McNish v. General Credit Corp.* 526

7. An allegation that an accident and resulting damage was solely and proximately caused by the negligence of a third person is not an affirmative defense and imposes no burden of proof. *Buhrman v. Smollen* 655

8. The failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation. *Federal Ins. Co. v. International Harvester Co.* 698

9. Where the accident and resulting damages were solely and proximately caused by the negligence of a third person, such issue is provable under a general denial. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

Principal and Agent.

1. A person gratuitously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the implied terms of his confidential relation as one who is regularly employed and paid. *James v. McNair* 1

2. Where a principal has placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform a particular act, the principal is estopped as against such third person from denying the agent's authority. *McNish v. General Credit Corp.* 526

3. Whether or not an act is within the scope of an agent's apparent authority is to be determined as a question of fact from all the circumstances of the transaction and the business. *McNish v. General Credit Corp.* 526

4. If the principal desires to repudiate the unauthorized act of his agent, he must, as soon as he acquires knowledge of the facts, return or tender a return of any benefits received as the result of such

acts, or be held to have ratified them. *McNish v. General Credit Corp.* 526
5. A principal who accepts the benefits of a contract executed in his behalf by an agent is chargeable with the instrumentalities employed by the latter in procuring it. *McNish v. General Credit Corp.* 526

Process.
1. Where the return of an officer recites that he served the summons on which the return is endorsed, the presumption is that he performed his duty in making the service. *State v. County of Kimball* 479
2. An officer's return on a summons is prima facie proof of the service therein indicated. *State v. County of Kimball* 479
3. The return of an officer cannot be impeached except by clear and convincing evidence. *State v. County of Kimball* 479

Public Service Commissions.
1. Rule relating to continuances before the railway commission applies generally to applications, made to the commission as such, for a continuance prior to the beginning of a hearing. It is not applicable to ordinary motions for continuances during a hearing before an examiner. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85
2. An order of the railway commission, making ultimate findings of fact in the language of the statutes, is not void because of the failure of the commission to make basic findings of fact in the order upon which the ultimate facts rest. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85
3. Courts are without authority to interfere with the findings and orders of the railway commission except where it exceeds its jurisdiction or acts arbitrarily. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85
4. The declared policy of the Motor Carrier Act is to regulate transportation in the public interest, and to promote efficient service without undue preferences or advantages, and unfair or destructive competitive practices. The declared policy does not condemn competition. It does condemn unfair or destructive competitive practices. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85
5. Function of Supreme Court in reviewing orders of

the railway commission stated. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85

6. Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265

7. On appeal to the Supreme Court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265

City of Bayard v. North Central Gas Co. 819

8. Upon appeal to the Supreme Court from a decision of the railway commission involving charges of a railway company or other common carrier, the rates fixed by the commission will be considered prima facie just and equitable. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265

9. A statute specifically authorizes the railway commission to put into effect certain rates when an emergency exists. The commission, in doing so, exercises its legislative authority to regulate rates, to declare an emergency, and to prescribe the time when such rates shall become effective. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265

10. Where the railway commission specifically adopts the rates and charges fixed by the Interstate Commerce Commission as its own, they become the regularly fixed rates and charges of the railway commission until altered or set aside. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265

11. Rates and charges duly established by the railway commission, until altered or set aside, have the effect of a legislative enactment. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265

12. It is unjust discrimination or undue preference only, under substantially similar circumstances and conditions, that is unlawful and prohibited. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247

13. Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its

jurisdiction and protect legal and constitutional rights. *City of Bayard v. North Central Gas Co.* 819

14. Operation for hire is a jurisdictional prerequisite to general regulation of a common carrier by the railway commission. Common carrier is defined. *City of Bayard v. North Central Gas Co.* 819

Public Utilities.

Function of Supreme Court in reviewing orders of the railway commission stated. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85

Rape.

1. The exertion of force by the accused or resistance by the female is not essential to the commission of assault with intent to commit rape if the latter is incapable of giving consent because of her age and the accused is at least 18 years of age. *Pew v. State* 735

2. In a prosecution for assault with intent to commit rape, if the prosecutrix testifies to facts constituting the offense and the accused denies the commission of the crime, the testimony of the prosecutrix must be corroborated on material points by other evidence to sustain a conviction of the accused. *Pew v. State* 735

3. It is not essential in a rape case that the prosecutrix be corroborated by other evidence as to the principal act constituting the offense but it is indispensable that she be corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue. *Pew v. State* 735

4. In a prosecution for an assault with intent to commit rape proof that the accused had opportunity and inclination to assault the prosecutrix with intent to ravish her may be sufficient corroboration of direct and positive evidence by her that he did so. *Pew v. State* 735

5. A finding of guilt of the offense of assault with intent to commit rape is justified where a male person, at least 18 years of age and capable of completing the offense, physically abuses or injures the person of a female, prohibited because of her age from giving consent, with the intention of then having sexual intercourse. *Pew v. State* 735

Release.

1. When the amount received for a release of liability is grossly inadequate to compensate for the injuries sustained, that fact may be considered, with the other evidence and circumstances in the case, as tending to show that the party executing the release was overreached and that the minds of the parties never met in the consummation of a valid agreement. *Bryant v. Greene* 15
2. Where a party suffered injuries clearly in excess of any that were contemplated by the parties when a settlement and release of liability were made, it is evidence that may properly be considered, along with the other evidence and circumstances in the case, in determining the question of fraud and misrepresentation in the procurement of the settlement and release. *Bryant v. Greene* 15

Schools and School Districts.

1. The education of physically handicapped children is provided for in an independent act dealing exclusively and fully with that subject. *Schutte v. Decker* 582
2. The general school laws have no applicability to the transportation of a physically handicapped child who is required to attend a special school outside of the school district in which he lives. *Schutte v. Decker* 582
3. The Constitution of this state vests all matters pertaining to schools and school districts, and their creation, dissolution, government, and control, in the Legislature. In all such matters the state is supreme. *Farrell v. School Dist. No. 54* 853
4. A statute provides for the procedure to be followed at the time an original transfer is made of pupils from the school district of their residence in one county to an adjoining school district of another county for educational purposes. *Farrell v. School Dist. No. 54* 853
5. Statute authorizing transfer does not provide for a renewal of a transfer of pupils from the school district of their residence in one county to an adjoining school district of another county, but authorizes the parents or guardians of such pupils to recall a request for an original transfer within 15 days after the county clerk has received the certificate of transfer. *Farrell v. School Dist. No. 54* 853

6. Statute authorizing transfer of pupils is effective for one year only. A transfer once granted ceases to exist unless a renewal is made. When a transfer is once renewed, it is in existence for a period of one year and may not in the interim be recalled, revoked, or canceled. *Farrell v. School Dist. No. 54* 853
7. The procedure for a recall of an orignial transfer of pupils does not apply to a recall of a renewal of a transfer. *Farrell v. School Dist. No. 54* 853
8. Statute authorizes one school district to contract for instruction of pupils in another district for a period not exceeding 3 years, when a majority of the votes cast at the annual or special meeting of a school district favor such a proposition. *Farrell v. School Dist No. 54* 853
9. School boards of Class II districts are creatures of statute with power to bind the district only within the limits fixed by the Legislature. *Farrell v. School Dist. No. 54* 853
10. A Class II school district is a creature of statute possessing no powers to contract beyond those granted by the Legislature. *Farrell v. School Dist. No. 54* 853
11. In case a Class II school district enters into a contract without the power granted by the Legislature such contract must be declared void and invalidated in an appropriate action. *Farrell v. School Dist. No. 54* 853
12. The Legislature intended that parents or guardians of children transferred to a school district in an adjoining county, while such transfers are in effect, are not entitled to vote and are not considered legal voters in their home school district. *Farrell v. School Dist. No. 54* 853

Specific Performance.

1. One seeking specific performance of an oral contract to will property has the burden not only of proving the contract but also that he has performed the obligations imposed upon him thereby. *Drew v. Hawley* 141
2. An interested third person who seeks to enforce an oral contract to will property has the burden not only of proving the contract but also that the obligations imposed by the contract have been performed. *Drew v. Hawley* 141
3. An oral contract partly performed, which the stat-

ute of frauds requires to be in writing, will be enforced by a court of equity. *Griggs v. Oak* 296

4. To obtain specific performance of an oral contract within the statute of frauds, the burden is upon the plaintiff to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract. *Griggs v. Oak* 296

Statutes.

1. In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account, in order to determine the legislative will. *School District No. 228 v. State Board of Education* 148
2. In construing a statute the legislative intent is to be gathered from the necessity or reason for its enactment. The several provisions of the legislative act should be construed together, in the light of its general objects and purposes, so as to give effect to the main intent. *Schutte v. Decker* 582
3. A court cannot read a meaning into a statute that is not warranted by the legislative language, nor can it read plain, direct, and unambiguous language out of the statute. *Schutte v. Decker* 582
4. Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning. *Schutte v. Decker* 582
5. The fundamental principal of statutory construction is ascertainment of the intent of the Legislature. The court will not read into a statute exceptions not made by the Legislature. Where a statute is clear and unambiguous in its terms, it is the duty of the court, in construing a statute, to give the language used by the Legislature its plain and ordinary meaning. *Farrell v. School Dist. No. 54* 853
6. When the Legislature reenacts a law, it thereby adopts the judicial construction which has there-

tofore been placed upon it. *Farrell v. School Dist. No. 54* 853
7. The Legislature is presumed to have known the effect the statute originally had, and by its reenactment to have intended that such same effect should again be had. *Farrell v. School Dist. No. 54* 853

Taxation.
1. Municipal revenue bonds are obligations of a city even though they are not general obligations and not subject to payment through the exercise of the taxing power. *State ex rel. Beck v. City of York* 223
2. The assessment of property is not final until acted upon by the county and state boards of equalization, and not until the action of the latter is certified to the county clerks of the different counties and by them extended upon the tax rolls. *S. S. Kresge Co. v. Jensen* 833
3. Individual discrepancies and inequalities must be corrected and equalized by the county board of equalization. *S. S. Kresge Co. v. Jensen* 833
4. One aggrieved by the action of a county board of equalization may appeal to the district court. One who fails to pursue this remedy is precluded from objecting to the valuation of his separate property for taxation purposes and a collateral attack may not be made thereon except where the assessment is void, willfully discriminatory, or the result of fraud. *S. S. Kresge Co. v. Jensen* 833
5. It is the function of the county board of equalization to determine the actual value of property for tax purposes and give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property. *S. S. Kresge Co. v. Jensen* 833
6. Uniformity and proportionate taxation is a constitutional requirement, and prevails over statutory requirement that property be assessed at its actual value. *S. S. Kresge Co. v. Jensen* 833
7. The State Board of Equalization and Assessment cannot deal with individual assessments, nor take into consideration inequalities as between individual taxpayers. It deals only with the values of taxable property of a county in the aggregate. *S. S. Kresge Co. v. Jensen* 833
8. Collateral attack by taxpayer on valuation of his property is precluded by failure to exercise his

right to a hearing before county board of equalization. *S. S. Kresge Co. v. Jensen* 833
9. Although taxpayers have an interest which entitles them to protect the interest of a municipal corporation, the cause of action remains in the corporation and final relief is for its benefit. *Niklaus v. Abel Construction Co.* 842
10. If a taxpayer is permitted to maintain a taxpayer's suit, it is not in his individual right, but as the representative of the district whose interests are alleged to be jeopardized by the inefficiency or maladministration of its officers. *Niklaus v. Abel Construction Co.* 842
11. In a taxpayer's action potentially all of the taxpayers and citizens are parties. *Niklaus v. Abel Construction Co.* 842
12. Statute authorizing taxpayer's suit clearly recognizes that the cause of action is that of the city and not that of the citizen or taxpayer. *Niklaus v. Abel Construction Co.* 842
13. Where the officers of a public corporation refuse to act, a taxpayer may bring suit on behalf of himself and others similarly situated. The direct injury to be remedied where the taxpayer sets the judicial machinery in motion for that purpose is not personal and direct to himself, but to the corporation. *Niklaus v. Abel Construction Co.* 842
14. In an action instituted by a resident taxpayer, a court of equity will restrain public officers from illegally creating a debt or obligation which must be paid by taxation. *Farrell v. School Dist. No. 54* 853

Torts.

1. The relation of master and servant does not generally render the master liable for the torts of his servant, unless connected with his duties as such servant or within the scope of his employment. *Farr v. Cambridge Co-Operative Oil Co.* 45
2. If a servant does an act merely to frighten a third person or to perpetrate a joke on a third person, and the act is entirely disconnected from the purpose of the employment, the master generally is not liable therefor. *Farr v. Cambridge Co-Operative Oil Co.* 45
3. Duty of master to control his servant while the servant is acting outside the course of his employment stated. *Farr v. Cambridge Co-Operative*

Oil Co. 45
4. Where independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held for the entire damage. *Burhoop v. Bracken* 382
5. 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. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

Trial.

1. When a trial court sustains a motion for judgment notwithstanding the verdict, the party against whom it is sustained is entitled on appeal to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. *Holliday v. Patchen* 53
2. If the evidence is undisputed, or such that but one conclusion could reasonably be reached, whether or not a person riding in a motor vehicle is a guest is a matter of law for the court. *Holliday v. Patchen* 53
3. Where the record shows that a motion for a directed verdict should have been sustained at the close of the evidence, it is proper for the trial court to sustain a motion for judgment notwithstanding the verdict in favor of the party entitled to the directed verdict. *Holliday v. Patchen* 53
4. In an equity case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant. The Supreme Court on appeal will not reverse a judgment in a case so tried because other evidence was introduced when there is relevant and competent evidence in the record to sustain the judgment of the trial court. *Koehn v. Koehn* 169
5. A court of equity will consider the substance and not the form. The particular form or words of a conveyance are unimportant if the intention of the parties can be ascertained. *Koehn v. Koehn* 169
6. Report of pre-trial hearing need not be offered in evidence or included in bill of exceptions. *Powell v. Farmers State Bank* 180
7. In testing the sufficiency of evidence to support a verdict it must be considered in the light most fav-

orable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of very inference that can reasonably be deduced therefrom. *Reynolds v. Knott* 365

8. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them to the jury. 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 for proponent. *Reynolds v. Knott* 365

9. To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury. It is sufficient that there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. *Reynolds v. Knott* 365

10. Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. *Burhoop v. Bracken* 382

11. If there is any evidence which will sustain a finding for the party having the burden of proof, the trial court may not disregard it and direct a verdict against him. *Burhoop v. Bracken* 382

12. In stating the issues of fact to the jury, the court should submit to the jury only such issues as are in controversy under the pleadings and which find support in the evidence. *Burhoop v. Bracken* 382

13. It is for the triers of fact to decide any issue upon all of the evidence adduced. This is true even when the more favorable evidence relied on by a party to overcome the effect of his own self-injurious statement is found in his own testimony. *Burhoop v. Bracken* 382

14. Rule for consideration of motion for directed verdict and for judgment notwithstanding the verdict stated. *Bezdek v. Patrick* 398

15. Instructions should be considered together in order that they may be properly understood. When as an entire charge instructions properly submit the issues to the jury, the verdict will not be set aside. *Bezdek v. Patrick* 398

16. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was

the result of passion, prejudice, or mistake, or where it is clear that the jury disregarded the evidence or controlling rules of law. *Bezdek v. Patrick* 398

17. If, from undisputed evidence, different minds may not reasonably reach different conclusions or draw different inferences, the trial court should render judgment consistent with the facts. *Leach v. Treber* 419

18. If the evidence is insufficient to sustain a verdict in favor of the plaintiff, the trial court may instruct a verdict for defendant or discharge the jury and dismiss the case. *Akins v. Chamberlain* 428

19. A motion of a litigant to dismiss because of insufficiency of evidence to sustain a recovery has the identical purpose and should be treated the same as a motion for a directed verdict. *Akins v. Chamberlain* 428

20. Rule for consideration of motion for directed verdict by the defendant stated. *Anderson v. Evans* 599

21. No proof is required as to the existence of a fact admitted by the pleadings. *Anderson v. Evans* 599

22. The giving of oral instructions to a jury in regard to the principles of law applicable to the case and the evidence, in the absence of waiver of written instructions, is reversible error. *Anderson v. Evans* 599

23. 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 for review in the Supreme Court. *Parker v. State* 614

24. Where counsel for the State referred in argument to the jury to facts not in evidence, and on objection that the statements were unwarranted by the evidence the court instructed the jury to disregard such statements, there was left no ground for complaint. *Parker v. State* 614

25. A motion for new trial in a criminal action must be filed within 10 days after the verdict is rendered in order to be considered on appeal, except for the cause of newly discovered evidence or unless the defendant was unavoidably prevented from filing the motion within 10 days. *Parker v. State* 614

26. Where, in a jury trial, a defendant, when plaintiff rests, moves for a verdict in his favor and upon the overruling of such motion proceeds with the

trial and introduces evidence in support of the defenses set up in his answer, he thereby waives the right to assign error in the ruling upon such motion. *Buhrman v. Smollen* 655

27. A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record, unless its admission is assigned as error in the Supreme Court and the assignment is sustained. *Buhrman v. Smollen* 655

28. 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. *Buhrman v. Smollen* 655

29. It is the duty of the trial court to present to the jury those issues which are raised by the pleadings and which find support in the evidence. *Buhrman v. Smollen* 655

30. Instructions to a jury must be considered together. If as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. *Buhrman v. Smollen* 655

31. It is proper for the trial judge to aid in preventing misconception by properly directed questions or remarks. *Buhrman v. Smollen* 655

32. There is no impropriety in a trial court interrogating witnesses regarding a fact under investigation when the tendency is only to develop the truth and is calculated in nowise to influence the jury save as the testimony will assist it to arrive at a correct conclusion on the questions of fact in issue. *Buhrman v. Smollen* 655

33. Considerable latitude must be allowed counsel at the commencement of a trial in making the opening statement in which he states the evidence by which he expects to sustain his cause of action or defense. *Buhrman v. Smollen* 655

34. The submission of a cautionary instruction that the jury is not to allow sympathy or prejudice to control or affect its finding is within the sound discretion of the trial court. *Buhrman v. Smollen* 655

35. A cautionary instruction should be given, if requested, where the circumstances of the trial and the evidence of the case is such as is likely to ap-

peal strongly to the sympathy of jurors. *Buhrman v. Smollen* 655
36. In a prosecution for the embezzlement of gasoline, the amount to be allowed for normal shrinkage is a jury question. *Hoffman v. State* 679
37. An error by the jury in calculating the amount embezzled is not material where it does not have the effect of changing the punishment of the defendant to his prejudice. *Hoffman v. State* 679
38. Rule for consideration of motion for directed verdict stated. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
Ecker v. Union P. R. R. Co. 744
Bear v. Auguy 756
39. Physical facts are sufficient to warrant a directed verdict in an automobile collision case when they conclusively demonstrate that the collision out of which the injuries arose was not caused by any negligence on the part of the party making the motion. Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
40. While it is not the duty of the court reporter to take down the arguments to the jury unless he is directed to do so, he should be available. If objections are made or controversy arises during the course of the argument, the court should direct a record to be made thereof. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
41. A trial court may in its discretion permit counsel, in addressing the jury, to display and use drawings, diagrams, or maps, not put in evidence, by way of illustration or elucidation of evidence actually adduced, provided the jury understands that they are employed merely for such purposes and are not of themselves evidence in any sense. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
42. 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 evidence, and such rule applies in negligence cases. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
43. The purpose of an instruction is to furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict. An instruction

should state clearly and concisely the issues of fact and the principles of law which are necessary to enable it to accomplish the purpose desired. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

44. Where the evidence adduced to sustain issues of negligence and proximate cause are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the issues as a matter of law rather than submit them to a jury for determination. *Ecker v. Union P. R. R. Co.* 744

45. Where different minds may reasonably draw different conclusions from the evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence and the degree thereof, when one is compared with the other, such issues must be submitted to a jury. *Bear v. Auguy* 756

46. Where the excessive amount in a judgment is subject to exact determination, a remittitur may be required as a condition of affirmance for the correct amount. *Bear v. Auguy* 756

47. A defendant waives the right to assign error in a ruling on motion for directed verdict at the close of plaintiff's evidence where he proceeds with the trial and introduces evidence in support of the defenses in his answer. *Schaffer v. Strauss Brothers* .. 773

48. An instruction as to effect of previous threats, taken together with other instructions given by the trial court, stated the law correctly. *Elliott v. Brandt* 790

Trusts.

1. Every man has a trust to whom a business is committed by another. Every man is a trustee whose office is to advise or to operate, not for himself, but for others. *James v. McNair* 1

2. The rules of equity as to fiduciary relations are not restricted to attorney and client, nor to similar conventional relations, but extend to all cases, where, on one hand, confidence is properly reposed, and, on the other, knowledge or authority or influence arises from any cause. *James v. McNair* 1

3. A person gratuitously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the implied terms of his confidential relation as one who is regularly employed and paid. *James v. McNair* 1

4. The burden of establishing a constructive trust requires evidence that is clear, satisfactory, and convincing. *Slocum v. Bohuslov* 156
5. A joint deposit in a bank in the name of two persons is not, upon the death of one of them, conclusive of the ownership of the deposit by the surviving co-owner as between him and a third person who claims that the surviving owner holds the legal title to the deposit in trust for the third party. *Nelson v. Rasmussen* 274
6. Rule for creation of constructive trust arising out of confidential relations stated. *Nelson v. Rasmussen* 274
7. The burden of establishing a constructive trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing. *Nelson v. Rasmussen* 274
8. An officer or director of a corporation occupies a fiduciary relation to the corporation and is treated by a court of equity as a trustee. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

United States.

1. A United States savings bond is a contract between the federal government and the purchaser. Treasury Department regulations governing such bonds are incorporated into the contract by reference and are beyond the reach of state law to modify or destroy. *Slocum v. Bohuslov* 156
Nelson v. Rasmussen 274
2. If a United States savings bond is registered in the names of two persons as co-owners, the rights of the surviving co-owner arise solely by contract. *Slocum v. Bohuslov* 156
Nelson v. Rasmussen 274
3. A surviving co-owner of a United States savings bond takes title thereto as sole owner by reason of Treasury Department regulations incorporated in the contract between the federal government and the purchaser of the bond. *Slocum v. Bohuslov* 156
Nelson v. Rasmussen 274

Usury.

1. A truck dealer may in good faith sell a truck on time for a price in excess of the cash price without tainting the transaction with usury, even though the

difference in the two prices may exceed lawful interest for a loan. *McNish v. General Credit Corp.* 526

2. A time sale made in good faith at a price in excess of a cash price, which time price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not necessarily be regarded as being tainted with usury, even though the difference exceeds the lawful rate of interest for a loan. *McNish v. General Credit Corp.* 526
McNish v. Grand Island Credit Co. 543

3. To avoid the charge of usury, it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price. It is not enough to merely show that the instruments signed evidencing the indebtedness refer to a time price or time differential when, in fact, the buyer was never quoted a time sale price as such. *McNish v. General Credit Corp.* 526

4. The statutes make no requirement that a borrower, in order to come within the provisions thereof, must be a necessitous one. The statutes relating to installment loans have no requirements of any kind in that respect. *McNish v. General Credit Corp.* 526

Wills.

1. One seeking specific performance of an oral contract to will property has the burden not only of proving the contract but also that he has performed the obligations imposed upon him thereby. *Drew v. Hawley* 141

2. An interested third person who seeks to enforce an oral contract to will property has the burden not only of proving the contract but also that the obligations imposed by the contract have been performed. *Drew v. Hawley* 141

3. Where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his death, the presumption is that the testator destroyed it animo revocandi. *Drew v. Hawley* 141

4. The presumption that a will has been destroyed animo revocandi is one of fact, and it may be overcome by evidence, circumstantial or otherwise, to the contrary. *Drew v. Hawley* 141

5. Burden of proof of establishing undue influence and the elements thereof stated. *Drew v. Hawley* 141

6. A will, made and left in the custody of the testator, that cannot be found after his death is presumed to have been destroyed by him with the intention of revoking it. *Nelson v. Rasmussen* 274
7. A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein but it does require that he have testamentary capacity and that the will was not procured by undue influence. *Reynolds v. Knott* 365
8. Burden of proof resting upon contestants to sustain charge of undue influence stated. *Reynolds v. Knott* 365
9. Undue influence cannot be inferred from motive or opportunity alone. There must be competent 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. *Reynolds v. Knott* 365
10. Mere suspicion, surmise, conjecture, or speculation is not enough to warrant a finding of undue influence, but there must be a solid foundation of established facts upon which to rest an inference of its existence. *Reynolds v. Knott* 365
11. There may be influences directing the attention of the maker of a will 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 influence. Circumstances often arise where such conduct is proper and wholly justifiable. *Reynolds v. Knott* 365
12. In order to invalidate a will duly executed by a testator having testamentary capacity, undue influence must be of such character as to destroy the free agency of the testator and substitute another's will for his own. *Reynolds v. Knott* 365
13. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them to the jury. 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 for proponent. *Reynolds v. Knott* 365
14. In the construction of a will, the court is required to give effect to the true intent of the testator so

far as it can be collected from the whole instrument, if such intent is consistent with the rules of law. *McLaughlin v. Heath* 511

15. Parol evidence is inadmissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intent obscure or uncertain. *McLaughlin v. Heath* 511

16. Where in a will there is a patent ambiguity resulting from the use of words, and nothing appears within its four corners to resolve or clarify the ambiguity, the words must be given their generally accepted literal and grammatical meaning. *McLaughlin v. Heath* 511

17. A will speaks as of the date of the death of the testator. *McLaughlin v. Heath* 511

18. Evidence to support a contention that a will is enforceable by reason of a contractual obligation must be clear, satisfactory, and unequivocal. *McLaughlin v. Heath* 511

Witnesses.

1. Rule governing admissibility of evidence of transaction or conversations with a person since deceased stated. *Koehn v. Koehn* 169

2. A party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion. *Leach v. Treber* 419
Ecker v. Union P. R. R. Co. 744

3. A party is entitled to the benefit of the testimony of other witnesses in contradiction of his own testimony, whenever such testimony is not a judicial admission and concerns only some evidential or constituent circumstance of his case. *McNish v. General Credit Corp.* 526

Work and Labor.

1. Where a statute prohibits a county from making a contract, and avoids the obligation of the contract for so doing, a recovery quantum meruit cannot be had. *Capital Bridge Co. v. County of Saunders* 304

2. Where a contract has been entered into in good faith with a county, which contract is within the power of the county to make but is void for the

reason that statutory requirements were not complied with, an action in quantum meruit for the service performed or material furnished may be maintained. *Capital Bridge Co. v. County of Saunders* 304

3. The right to recover in quantum meruit for service performed or material furnished under a void contract with a county exists up to the limit of, and not beyond, that which would have been recoverable under a valid contract covering the same subject matter. *Capital Bridge Co. v. County of Saunders* 304

Workmen's Compensation.

1. A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment. *McCauley v. Harris* 216
2. In order to recover, the burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. *Towner v. Western Contracting Corp.* 235
3. To recover under the workmen's compensation law, facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and his disability. *McCauley v. Harris* 216
4. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant shall prove his right to compensation nor does it permit a court to award compensation where the requisite proof is lacking. *McCauley v. Harris* 216
5. A compensation award cannot be based on possibilities, probabilities, or speculation. If an inference favorable to the claimant can only be reached on the basis thereof then he cannot recover. *McCauley v. Harris* 216
6. Where there have been two accidents to an employee, the question of whether the disability sustained by him should be attributable to the first

accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause. *Towner v. Western Contracting Corp.* 235

7. If a second injury is but a recurrence of the original injury, compensation therefor must be paid by the employer and insurance carrier at the time of the first injury. *Towner v. Western Contracting Corp.* 235

8. Where the first accident was not a proximate cause of the second accident, the second accident constitutes an independent intervening cause. *Towner v. Western Contracting Corp.* 235

9. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence. *Towner v. Western Contracting Corp.* 235

10. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo on the record. *Sears v. City of Omaha* 869

11. The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by him in an accident arising out of and in the course of his employment. *Sears v. City of Omaha* 869