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DALLAS L. WOOD ET AL., APPELLEES, V. COMMONWEALTH TRAILER SALES, INC., A CORPORATION, APPELLANT.

110 N. W. 2d 87

Filed July 7, 1961. No. 35003.

1. **Sales.** An essential of a time sale price is a price agreed upon between the parties where the buyer is actually informed of and has at the time the sale is made an opportunity to choose between a cash and a time sale price.
2. **Sales: Usury.** 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, may not be regarded as invalid as being tainted with usury.
3. **Sales.** The form of a transaction may properly be considered in determining whether the price charged was a cash or time sale price.
4. ———. Legal necessity requires looking beyond the form to the substance to ascertain whether a sale is a cash or time sale.
5. **Usury.** Under the terms of section 45-138, R. R. S. 1943, and pursuant to the declaration of Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122, neither a licensee nor any other person may legally, directly or indirectly, charge, contract for, or receive a greater rate of interest than 9 percent per annum upon any loan or upon any part or all of any aggregate indebtedness of the same person, in excess of $3,000.
6. **Interest.** The rate of interest on a debt payable in installments or partial payments is ascertained by applying the payments first to interest and the balance to the reduction of principal.
7. **Usury.** Under section 45-138, R. R. S. 1943, an installment loan is unlawful if payments are contracted to be made over a period exceeding 36 calendar months from the date of making the contract.
8. ———. By the terms of section 45-138, R. R. S. 1943, it is required that installments for repayment of principal and charges shall be arranged, with exceptions which are not important to note here, so that no installment is substantially greater than any preceding installment.
9. ———. Any contract of loan made knowingly or without the exercise of due care to prevent the same in violation of section 45-138, R. R. S. 1943, is void and the lender has no right to collect or receive any principal, interest, or charges thereon.

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

Wright & Simmons and *James R. Hancock*, for appellant.

Robert L. Gilbert, for appellees.

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

YEAGER, J.

This is an action in equity instituted by Dallas L. Wood and Doris I. Wood, husband and wife, plaintiffs and appellees, against Commonwealth Trailer Sales, Inc., a corporation, defendant and appellant, to have declared null and void a certain conditional sales contract, to enjoin and restrain enforcement of the contract, to recover judgment for $2,200 paid on the contract with interest, to recover payments made into court, and for the costs of the action.

A trial was had to the court which resulted in a decree and judgment in favor of the plaintiffs and against the defendant for injunction on the ground that the contract was void, for $2,200 which had been paid to the defendant, for $440 which had been paid into court, and for interest and costs.

The defendant filed a motion for new trial which was overruled. From the judgment and the order overruling the motion for new trial the defendant has appealed.

As grounds for reversal the defendant has set forth seven assignments of error. Of these, five deal with the kind and character of the transaction involved and in that view separate reference to these is not required. The other two will be mentioned in due course herein.

For the most part the pertinent facts in this case are not in dispute. At the inception of the transaction involved the plaintiffs lived in a trailer in Scottsbluff, Nebraska, which had been purchased from the defendant, a portion of the cost price of which had not been paid. The defendant was engaged in the maintenance and operation of a trailer sales lot also in Scottsbluff,

Nebraska. In November 1958, the plaintiffs discussed with the agent of the defendant the purchase of a trailer which was on the lot, the named price of which was $5,895. Following discussions this agent communicated with the president of the defendant at Wichita, Kansas, the home office of the defendant. After this incident the agent of the defendant again communicated with the plaintiffs. Whether this was late in November 1958 or on December 1, 1958, is in dispute. Whether or not there was an oral agreement as to the purchase is in dispute. The plaintiffs in their testimony assert that in November the parties orally agreed upon a plan of purchase and exchange of their trailer for one on the lot the price of which was $5,895. The agent of the defendant says that there was no agreement as to purchase and exchange until, as he believes, December 1, 1958. The agent said in effect that he thought that on December 1, a written contract was presented to and signed by plaintiffs and by him as agent for the defendant. He testified that if he is mistaken as to the exact date at least no plan of purchase was presented or agreed upon until the contract to which he had reference was actually presented to the plaintiffs, which is dated December 1, 1958.

The contract which was presented was denominated "Conditional Sale Contract" and is exhibit 1 in evidence in this case, and which, along with exhibit 2, is the contract which the plaintiffs seek to have declared null and void. Exhibit 2 is the same as exhibit 1 except as to the absence of the signature of Mrs. Wood. The two bear the same date but exhibit 2 was executed on a later date than was exhibit 1. The two cover the same transaction. The only purpose of exhibit 2 was to provide additional security to the defendant on the conditional sales contract. It was not designed to and did not change in any material respect the obligations of the parties as contained in exhibit 1.

The undisputed testimony is that before exhibit 1

was signed the agent went over it in all of its details with the plaintiffs, and that it was at this time and by this instrument, and it alone, that the obligations of the parties were created except as to the matter of additional security. On the record of the evidence this must be accepted as true. The plaintiffs contend that the transaction was made under oral agreement entered into on November 27, 1958, but clearly on that date there were only negotiations which preceded the contract as it appears in exhibit 1. It is this instrument that the plaintiffs contend is void and entitles them to the relief they seek in this action.

The details of the exhibit which it is deemed necessary to set out herein are as follows:

Price (if this were a cash sale)	$5,895.00
Down payment	885.00
Unpaid balance	$5,010.00
Insurance premium	334.40
Official fees	10.00
Principal balance	$5,354.40
Finance charge	1,924.04
Time balance	$7,278.44
59 monthly installments each	$110.00
Final payment in 60th month	$788.44
Time sale price	$8,163.44

On the face of this instrument, as is apparent, a cash sale price of $5,895 is set out, also a time sale price of $8,163.44. It appears further that at the time the instrument was executed on the basis of the named cash sale price, the plaintiffs became obligated under the terms of the instrument, if it is valid, to the defendant in the amount of $7,278.44 as a time sale balance on a time sale price of $8,163.44.

The plaintiffs contend that this was not a valid and binding time sale but on the contrary it was in truth a

loan in violation of the terms of the Installment Loan Act. As a loan payable in installments, the contention is that the amount which the plaintiffs became obligated to pay by exhibit 1 in excess of $5,354.40 amounted to interest at a greater rate than was allowable under the Installment Loan Act, that the final payment was substantially greater in amount than the preceding installments, and that the period over which payments were to be made exceeded the period permitted. Further it is contended that this being a loan, the defendant was required under law to deliver a statement of insurance procured by it and, within 15 days, to deliver to plaintiffs an executed copy of the insurance policy or certificate, which it failed to do.

It is pointed out here that the defendant is not a licensee and entitled to make loans under the Installment Loan Act. It follows that if the position of the plaintiffs is to be sustained it must be done on the theory that what was done in this instance by a nonlicensee in violation of the Installment Loan Act was as much a violation of the act as if it had been done by a licensee. This court has held that by a violation of the terms of the act a nonlicensee is subject to the same burdens as those of a licensee. In Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122, it was said: "An installment loan in excess of $1,000 wherein an interest rate in excess of 9 percent per annum is contracted for, which would be void if made by a licensee under the installment loan law, is void and the lender shall have no right to collect or receive any principal or collect any interest on such loan." See, also, State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215; Thompson v. Commercial Credit Equipment Corp., 169 Neb. 377, 99 N. W. 2d 761; Robb v. Central Credit Corp., 169 Neb. 505, 100 N. W. 2d 57.

The defendant seeks in its brief to distinguish this case from the case of Powell v. Edwards, *supra,* which case, as does the one here, involved a sale made by a

dealer not engaged in making loans and not licensed to do so under the installment loan laws. It is not capable of the attempted distinction. The two transactions in all material matters were alike. The only difference at all between the two is that in that case the formula on which the transaction was closed was obtained by the dealer from a licensee whereas the source of the one used by the defendant in this case was not disclosed.

In the light of the pronouncement in Powell v. Edwards, *supra,* and section 45-138, R. R. S. 1943, neither a licensee nor a nonlicensee may contract for or receive a greater rate of interest than 9 percent per annum on any loan in excess of $3,000. If either does so he shall have no right to collect principal or interest.

The question for first consideration is that of whether this transaction was, within the meaning of law, what amounted to an installment loan or was, within the true meaning of the law, a time sale transaction.

An essential of a valid time sale price is a price agreed upon between the parties where the buyer is actually informed of and has at the time the sale is made an opportunity to choose between a cash and a time sale price. See, Powell v. Edwards, *supra;* McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1; McNish v. Grand Island Finance Co., 164 Neb. 543, 83 N. W. 2d 13; Thompson v. Commercial Credit Equipment Corp., *supra;* Commonwealth Co. v. Fauver, 169 Neb. 795, 101 N. W. 2d 150.

It is also true that 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, may not be regarded as invalid as being tainted with usury. See, Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429; Powell v. Edwards, *supra;* State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55; McNish v. Grand Island Finance Co., *supra;* Thompson v. Commercial Credit Equipment Corp., *supra;* Robb v. Central Credit Corp., *supra;* Commonwealth Co. v. Fauver, *supra.*

It is of course true that the form of the transaction as it is disclosed by the record may properly be considered in determining its true character. It is also true that it becomes necessary to look beyond the form to the substance to ascertain whether or not there was a bona fide time sale. The true intent must control. In dealing with this question it was said in McNish v. General Credit Corp., *supra:* "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, also, State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215; Restatement, Contracts, § 529, p. 1029; State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55; Curtis v. Securities Acceptance Corp., 166 Neb. 815, 91 N. W. 2d 19.

In examining the record in the light of these rules and principles, analysis of exhibit 1, the instrument on which the sale was made and the details of which have already been set out herein, discloses that a cash sale price was named. That price was $5,895. It also discloses a named time sale price of $8,163.44. This instrument discloses that $885 was allowed against the cash price leaving the plaintiffs owing the defendant a balance of $5,010. To this was added $334.40 for insurance and $10 for official fees, making a total owing of $5,354.40. To this was added $1,924.04, which was in terms designated "Finance Charge." The total of the obligation thus became $7,278.44. This was designated as "Time balance owed." The last line of the analysis on the face of exhibit 1 stated that the time sale price was $8,163.44. This was arrived at by addition of the amount of the original allowance on the cash price of $885 to the designated time balance of $7,278.44. This time balance was payable over a period of 5 years in 59 monthly payments of $110 each and a final payment of $788.44.

Upon the true character of this item of $1,924.04 de-

pends the question of whether or not this transaction was in a valid sense a time sale and lawful. If this had been in the true sense an addition to a disclosed cash sale price and the plaintiffs had been so apprised, it could well be said that involved here was a valid time sale.

The fact however is, as disclosed by the record, that this was not true. The exhibit itself discloses that it was a finance charge on an unpaid balance of $5,354.40. It amounted on its face to interest on a forbearance for a period of 5 years. In law it amounted to interest on a loan. See Powell v. Edwards, *supra.*

In addition to what was apparent from the face of the instrument itself the testimony on behalf of the defendant discloses that the finance charge was made on the basis of 7 percent interest a year on $5,354.40 for a period of 5 years, which amounted to $1,874.04, to which was added $50 making the total of $1,924.04. The $50 is not explained by the defendant. The plaintiffs' evidence indicates that it was a charge for refinancing the balance remaining unpaid at the end of 5 years.

The conclusion that this was an interest charge and was so regarded by the parties and not the difference between a cash price and a time sale price is inescapable.

It is further true that this transaction amounted to an installment loan with a rate of interest which rendered it void. Section 45-138, R. R. S. 1943, the statute in force at the date of the transaction and which controls here, provides in part: "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 of all of any aggregate indebtedness of the same person, in excess of three thousand dollars." That which appears as "any part of all" by error in publication is erroneous. As enacted it was "any part or all."

The indebtedness, as has been made clear, was in excess of $3,000 and when considered in its true light,

although the computation was made on an announced basis of 7 percent, the rate in practice was far in excess of 9 percent. The rule which makes this evident was stated in the case of Mills v. Saunders, 4 Neb. 190, as follows: "Partial payments made upon a debt drawing interest should be first applied in payment of the interest, and afterwards to the reduction of the principal." See, also, Davis v. Neligh, 7 Neb. 78; State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55. Here there was no deduction of interest on the original amount of the indebtedness notwithstanding a monthly reduction of principal over a period of 59 months.

The transaction, which must be treated as a loan, was void for the reason that the rate of interest was greater than the rate allowed by law.

It was void for the further reason that the payments exacted extended over a greater period than was permitted by law. Section 45-138, R. R. S. 1943, contains the following: "No licensee shall enter into any contract of loan, * * * under which the borrower agrees to make any payment of principal more than thirty-six calendar months from the date of making such contract, * * * if such contract is not secured by a bona fide duly recorded mortgage on real estate owned by the borrower, or under which the borrower agrees to make payment of principal more than thirty-six calendar months from the date of making such contract, if the contract of loan is secured by a bona fide duly recorded mortgage on real estate owned by the borrower." The principal payments on this transaction extended beyond 36 months contrary to the provision.

There is still another reason why it is contended that the transaction was void. Section 45-138, R. R. S. 1943, further provides: "Every loan contract shall provide for repayment of principal and charges in installments which shall be payable at approximately equal periodic intervals of time and so arranged that no installment is

substantially greater in amount than any preceding installment." Provision is made in this section of the statute for exceptions in the light of designated conditions. No such designated conditions have in this instance become apparent. As has already been pointed out payment was to be made by 59 installments of $110 each and 1, which the parties have referred to as a balloon payment, for $788.44.

This as well as all other violations of the section rendered the transaction void. The final sentence of the section is the following: "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."

In their petition the plaintiffs have asserted two other grounds for the relief claimed. One of these is that the defendant failed to deliver a statement of insurance procured and the other is that the defendant failed, within 15 days after making the loan, to deliver an executed copy of the insurance policy or certificate obtained to the plaintiffs.

The evidence in this area does not appear sufficient to sustain the allegations of the petition. Whether or not the trial court sustained these allegations does not appear from the findings and judgment. The court without elaboration found that the transaction was a loan and that it was usurious and void, and adjudicated accordingly. This of course cannot militate against the judgment rendered in view of the holding of invalidity on the other grounds.

One of the two assignments of error to which reference has hereinbefore been made complains that plaintiffs were erroneously permitted to testify orally that written contracts were executed other than on the date which they bear. It is true that such testimony was received. Assuming that this testimony was inadmissible, insofar as the decision in the case is concerned, it was

without prejudice. It is clear from what has been said herein that the conclusion reached is not in anywise based thereon. The conclusion is based on the assumption that the exhibits, as the defendant contends, correctly reflect the date or dates of the transaction involved.

The other assignment of error charges that the finding of fact as to the amount paid to defendant by the plaintiffs is erroneous and excessive. This the plaintiffs concede. Judgment was rendered on account of payments made in the amount of $2,200. Only $1,980 was actually paid. The judgment must be reduced in the amount of $220.

The judgment of the district court is therefore affirmed in all respects except that the money judgment in favor of plaintiffs is modified by reduction from $2,200 to $1,980.

AFFIRMED AS MODIFIED.

FIRST STATE BANK OF SCOTTSBLUFF, NEBRASKA, A CORPORATION, APPELLEE, V. AUSTIN BEAR, APPELLEE, FILLMORE CO. IMPLEMENT AND IRRIGATION COMPANY, A CORPORATION, INTERVENER-APPELLANT.
110 N. W. 2d 83

Filed July 7, 1961. No. 35010.

1. **Replevin: Trial.** An action in replevin in this state is properly triable to a jury.
2. **Fraudulent Conveyances.** The question of whether a transfer of property was made with intent to defraud creditors is a question of fact.
3. **Sales: Chattel Mortgages.** A contract of conditional sale is not valid as against a mortgagee for value and without notice from a purchaser of the conditional vendee under section 36-207, R. R. S. 1943.

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

Wright & Simmons and *James R. Hancock,* for intervener-appellant.

Neighbors & Danielson, for appellee First State Bank.

Andrew K. Parkansky, for appellee Bear.

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

BOSLAUGH, J.

This is an action in replevin brought by the First State Bank of Scottsbluff, Nebraska, to recover possession of a farm tractor and combine from Austin Bear. The bank claimed the right to possession of the property by reason of two chattel mortgages from Bear. The Fillmore Co. Implement and Irrigation Company intervened in the action, claiming the right to possession by reason of prior contracts of conditional sale to Andrew Jacox. The matter was tried to the court without a jury and the court found for the bank. The implement company filed a motion for new trial, which was overruled, and it has appealed.

The controversy is between the bank and the implement company. The implement company, as appellant, has assigned as error the finding of the trial court that the bank was entitled to possession of the property, and that the judgment is contrary to the evidence and the law.

An action in replevin in this state is properly triable to a jury. § 25-10,102, R. S. Supp., 1959, and §§ 25-10,103, 25-10,105, R. R. S. 1943. The findings of the trial court in this case have the effect of a verdict of a jury. Dunbier v. Stanton, 170 Neb. 541, 103 N. W. 2d 797. In considering the sufficiency of the evidence to sustain the judgment, the evidence will be considered most favorably to the successful party, any controverted fact will be resolved in its favor, and it will have the benefit of every inference reasonably deducible from

the evidence. Bailey v. Karnopp, 170 Neb. 836, 104 N. W. 2d 417.

The record shows that on February 11, 1959, Jacox purchased the combine and other equipment from the implement company by a contract of conditional sale. On July 12, 1959, Jacox purchased the tractor and other equipment from the implement company by a contract of conditional sale. Although Jacox had been a resident of Scotts Bluff County, Nebraska, since March 1, 1958, the conditional sale contracts were not recorded in Scotts Bluff County until June 2, 1960.

In the fall of 1959, Bear and Jacox entered into a transaction for the feeding of cattle and the operation of a dairy upon a farm owned by Bear. As a part of this transaction Bear purchased certain feed and equipment, including the tractor and combine, from Jacox. Bear was to pay the amount Jacox owed against the equipment.

On September 17, 1959, Bear paid Jacox $500 upon the purchase. Sometime after September 17, 1959, Jacox gave Bear a bill of sale dated September 17, 1959, for the feed and equipment.

On December 10, 1959, Bear gave Jacox two checks totaling $2,150 and borrowed $2,000 from the bank, giving the bank a mortgage upon the tractor. The bank's mortgage was filed in Scotts Bluff County on December 11, 1959. On January 9, 1960, Bear gave Jacox a check for $300. On January 11, 1960, Bear gave Jacox a check for $1,500 and borrowed $2,500 from the bank, giving the bank a mortgage upon the combine. The bank filed this mortgage in Scotts Bluff County on January 12, 1960. The bank had no notice of the conditional sale contracts between the implement company and Jacox.

The appellant's theory of the case is that the bank obtained no liens under the mortgages from Bear because Bear had no title to the property; that the transaction between Jacox and Bear was made with the intent to defraud the creditors of Jacox and was void under

section 36-401, R. R. S. 1943; and that the recording statute applicable to conditional sale contracts, section 36-207, R. R. S. 1943, does not protect a mortgagee of a purchaser from the conditional vendee.

The existence of the fraudulent intent necessary to invalidate the transfer from Jacox to Bear under section 36-401, R. R. S. 1943, is a question of fact. § 36-406, R. R. S. 1943; Smith v. Ely, 164 Neb. 636, 83 N. W. 2d 55. Although some of the circumstances surrounding the transaction between Jacox and Bear may be said to be suspicious, the evidence falls far short of establishing, as a matter of law, that the sale of the tractor and combine to Bear was made with intent to defraud the creditors of Jacox and, therefore, void under the statute. The evidence is sufficient to sustain the finding of the trial court in favor of the bank as to this issue.

It should also be noted that the bank was a bona fide mortagee of the property for value and without notice. A bona fide purchaser for value from a fraudulent vendee is protected as against the creditors of the fraudulent vendor. § 36-407, R. R. S. 1943; Hackney v. First Nat. Bank of Lincoln, on rehearing, 68 Neb. 594, 98 N. W. 412. The general rule is that a bona fide mortgagee for value is also protected as against the creditors of the fraudulent vendor. 24 Am. Jur., Fraudulent Conveyances, § 156, p. 292; 37 C. J. S., Fraudulent Conveyances, § 302, p. 1134.

The controlling question in this case is whether the recording act protects a mortgagee of a purchaser from the conditional vendee. The statute, section 36-207, R. R. S. 1943, provides in part as follows: "Where a vendee * * * of personal property * * * obtains actual possession pursuant to a contract of sale * * * containing a stipulation which makes the transfer of title or ownership depend on any condition, such stipulation shall not be valid against any purchaser, judgment creditor or mortgagee of the vendee * * * without notice of such

stipulation unless the said contract * * * be in writing signed by the vendee * * * and said contract * * * or a copy thereof be filed in the office of the clerk of the county within which such vendee * * * resides * * *. All such sales and transfers shall cease to be valid against purchasers in good faith, judgment or attaching creditors, or subsequent mortgagees without notice at the expiration of five years unless such vendor * * * shall, within thirty days prior to the expiration of the five years from the date of such sale or transfer, file said contract, * * * or a copy thereof, in the office of said clerk, and said vendor * * * may preserve the validity of his said sale or transfer of personal property by an annual refiling of a copy of said contract * * * in the same manner."

The appellant contends that although the statute clearly protects a mortgagee or purchaser of a conditional vendee, it does not protect a mortgagee of a purchaser from a conditional vendee. The appellant cites and relies, principally, upon Friendly Finance Corp. v. Quinn, 232 N. C. 407, 61 S. E. 2d 192, in support of this contention.

In the Friendly Finance Corp. case, one Stewart purchased an automobile upon a contract of conditional sale. The sale took place in Rhode Island which state did not have a recording statute. Stewart defaulted on the contract but did not attempt to convey the title to the automobile. The North Carolina court held that the assignee of the conditional sale contract was entitled to replevy the automobile from a third party who did not claim title through Stewart even though the contract of conditional sale was not recorded in North Carolina. The basis of the decision is that the North Carolina recording statute protects only creditors or purchasers for value who claim through the conditional vendee. As stated by the court: "* * * that is, the title is valid as against all except those who deraign their title from the conditional vendee. * * * Mere possession without proof

that title was acquired, either directly or by mesne conveyances, from the mortgagor or conditional vendee is not sufficient to bring a claim within the purview of the language used in the Acts."

The Friendly Finance Corp. case does not support the contention of the appellant in this case. It recognizes that those who claim title through mesne conveyances from the conditional vendee are entitled to the protection of the statute. We have examined the other authorities cited by the appellant and consider them to be distinguishable upon the facts.

The purpose of the recording act is to protect third parties who might otherwise be defrauded by notifying them that title to the property remains in the vendor. National Cordage Co. v. Sims, 44 Neb. 148, 62 N. W. 514. Persons claiming through a purchaser from a conditional vendee are entitled to the protection of the recording act because they, as well as the purchaser, also rely upon the appearance of title created by the conditional seller.

In National Cash Register Co. v. Maloney, 95 Iowa 573, 64 N. W. 618, the Iowa court held that a purchaser for value and without notice from a purchaser with notice from a conditional vendee was entitled to the protection of the recording act. In rejecting a contention that the second purchaser was not protected the court said: "It is true that the statute, by a strict literal construction, applies only 'to any creditor or purchaser of the vendee.' But consideration must be given to the object and intent of the law, and to the evil or wrong intended to be corrected thereby. It was the right of Meecham to assign his interest in the property to McGlashon, with notice of the rights of the cash-register company; and Maloney, when he made his purchase, in ignorance of the conditions upon which the title to the property depended, ought to be protected the same as if he had purchased directly from Meecham without the intervention of the claim of Mc-

Glashon, who held the property by precisely the same right which Meecham had. The construction of the law as contended for by appellant seems to us to be too narrow and restricted, and, in our opinion, the district court correctly held that, as Maloney purchased the property without notice, the conditions of the original sale are invalid as to him." See, also, Union Bank & Trust Co. v. Willey, 237 Iowa 1250, 24 N. W. 2d 796, holding a mortgagee without notice of a purchaser from a conditional vendee protected as against an unrecorded contract of conditional sale.

It is unfortunate that the appellant failed to record its contracts of conditional sale in the manner prescribed by statute. As between a conditional vendor and a third party claiming through the conditional vendee, and who has purchased or loaned money upon the property without notice, actual or constructive, of the rights of the conditional vendor, we believe that the third party should prevail. To permit the appellant to prevail over the bank in this case would defeat the purpose of the recording statute applicable to contracts of conditional sales.

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

AFFIRMED.

CLARENCE SCHLINES, AS ADMINISTRATOR OF THE ESTATE OF MYRNA SCHLINES, DECEASED, APPELLANT, V. VIRGIL EKBERG ET AL., APPELLEES.
110 N. W. 2d 49

Filed July 7, 1961. No. 35032.

1. **Trial: Judgments.** The court examines the evidence on a motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists.
2. ———: ———. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and

unless he can conclusively do so the motion must be overruled.

3. ———: ———. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom.
4. ———: ———. A motion for summary judgment is not a substitute for a demurrer, a motion to dismiss, or a motion for judgment on the pleadings.
5. **Negligence.** There is no fixed rule for the ascertainment of what is gross negligence, but whether or not gross negligence exists must be determined from the facts and circumstances in each case.
6. **Automobiles: Negligence.** More than one act of negligence may in combination amount to gross negligence within the meaning of the motor vehicle guest statute.

APPEAL from the district court for Dixon County: JOHN E. NEWTON, JUDGE. *Reversed and remanded.*

H. D. Addison and *John V. Addison,* for appellant.

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

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

BOSLAUGH, J.

This is an appeal in an action for wrongful death. The trial court sustained the motion of the defendants for summary judgment. The plaintiff's motion for new trial was overruled and the plaintiff has appealed. The assignments of error are, in substance, that the trial court erred in sustaining the motion for summary judgment.

The plaintiff is the administrator of the estate of Myrna Schlines, deceased. Myrna Schlines died as the result of injuries sustained while riding in an automobile operated by Leon J. Ekberg, deceased. The defendants are the parents of Leon J. Ekberg and were the owners of the automobile in which the plaintiff's decedent was riding at the time of the accident. The

defendants are alleged to be liable for the negligence of Leon J. Ekberg under the family-purpose doctrine.

Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. "In other words, the court can merely determine that an issue of fact does or does not exist. If such an issue does exist, the Summary Judgments Act has no application; if such issue does not exist, a motion for a summary judgment affords a proper remedy. The burden is upon the moving party to show that no issue of fact exists, and unless he can conclusively do so the motion for summary judgment must be overruled." Ingersoll v. Montgomery Ward & Co., Inc., 171 Neb. 297, 106 N. W. 2d 197.

In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom. Ingersoll v. Montgomery Ward & Co., Inc., *supra*.

The motion for summary judgment was submitted to the trial court upon the petition of the plaintiff; the deposition and affidavit of Harold Anderson, the father of Loene Anderson; the deposition and affidavit of Loene Anderson, a passenger in the Ekberg car; the deposition of Clarence Schlines, the plaintiff; the deposition and affidavit of Merle Schlines, a passenger in the Ekberg car; the depositions of Alberta Erwin and Marcia Erwin, passengers in the Erwin car; and the report of a State Patrolman who investigated the accident, and a stipulation relating thereto.

The accident occurred at about 7:15 p. m., on June 9, 1959, approximately 150 feet east of the crest of a hill on a county road in Dixon County, Nebraska. The surface of the road was graveled and was approximately 20 feet wide. The weather was clear to partly cloudy.

The plaintiff's decedent, Myrna Schlines, was riding in the front seat of the automobile operated by Leon J.

Ekberg. Loene Anderson and Merle Schlines were riding in the back seat of this car.

The Ekberg car was proceeding east at about 50 miles per hour before the accident. Its speed was not reduced as it approached the crest of the hill. As the Ekberg car reached the crest of the hill Myrna Schlines said, "Oh, Leon."

Leon J. Ekberg did not turn the car to the right or left when approaching the crest of the hill or after reaching it and did not apply his brakes or slow down.

The right front of the Ekberg car collided head-on with the right front of an automobile operated by Henry Erwin which was going west. Both vehicles came to rest at the point of impact. The Ekberg car was on the north side of the road headed slightly southeast. Both left wheels of the Erwin car were south of the center of the road and it was headed slightly northwest. There were no skid marks or brake marks in the road after the accident.

The plaintiff's decedent was alleged to have been a guest passenger in the Ekberg car at the time the accident happened. It was necessary, therefore, for the plaintiff to allege and prove that her death was caused by the gross negligence of the defendants. § 39-740, R. R. S. 1943.

Gross negligence within the meaning of the motor vehicle guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20.

There is no fixed rule for the ascertainment of what is gross negligence, but whether or not gross negligence exists must be determined from the facts and circumstances in each case. Pester v. Nelson, 168 Neb. 243, 95 N. W. 2d 491.

More than one act of negligence may in combination amount to gross negligence within the meaning of the motor vehicle guest statute. Olson v. Shellington, *supra.*

The principal allegation of gross negligence contained in the petition was that Leon J. Ekberg drove the defendants' automobile on the left side of the road over the crest of a hill and head-on into the Erwin car. The petition also alleged failure to maintain a proper lookout; failure to maintain proper control; failure to be able to stop, slow down, or turn aside so as to avoid the collision; excessive speed; failure to reduce speed when approaching the crest of a hill; driving on the left side of the highway; failure to drive on the right side of the highway; and failure to pass the Erwin automobile to the right.

The defendants do not question the sufficiency of the allegations of the petition. This is proper because a motion for summary judgment is not a demurrer or a substitute for a demurrer, a motion to dismiss, or a motion for judgment on the pleadings. Johnson v. School Dist. No. 3, 168 Neb. 547, 96 N. W. 2d 623. The defendants contend that the plaintiff has failed to meet the burden of proof in that the evidence is conflicting and that several inferences may be drawn from the evidence, some of which are unfavorable to the plaintiff.

It is true that there is some conflict in the evidence which was before the trial court on the motion for summary judgment. However, the plaintiff at this time is entitled to have all conflicts resolved in his favor, and to have the benefit of all favorable inferences that may be drawn from the evidence. The burden of proof at this time is not upon the plaintiff to prove gross negligence by a preponderance of the evidence, but upon the defendants as the moving parties to show conclusively that no issue of fact exists.

When the evidence is viewed in the light of the foregoing rules, it is apparent that the defendants have

not shown conclusively that no genuine issue of fact exists. There is evidence which tends to support the allegations of the petition and it is sufficient to show that an issue of fact exists.

The motion for summary judgment should have been overruled. The judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED AND REMANDED.

LEROY E. ELLIOTT ET AL., APPELLANTS, V. CITY OF AUBURN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
110 N. W. 2d 218

Filed July 14, 1961. No. 34883.

APPEAL from the district court for Nemaha County: VIRGIL FALLOON, JUDGE. On motion for rehearing. See *ante* p. 1, 108 N. W. 2d 328, for original opinion. *Motion for rehearing overruled.*

Dwight Griffiths, for appellants.

John Ferneau, Yale C. Holland, Dale Cullen, Clarence E. Heaney, Jr., and *Donald F. Stanley,* for appellees.

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

SPENCER, J., dissenting.

The facts in this case are set out in detail in our opinion. I shall set out only those pertinent to the consideration of the case.

This is an action in equity against the county treasurer and others to declare special paving assessments void and to enjoin their collection. A demurrer was sustained to the plaintiffs' second amended petition. Plaintiffs appeal.

Plaintiffs' second amended petition with reference to the petition presented for the creation of the paving

district alleges in substance that on April 7, 1958, there were 19 or more resident owners of real estate directly abutting upon the streets petitioned to be improved, but that the petition presented to the mayor and city council was signed by not more than 11 resident owners owning property directly abutting upon the streets petitioned to be improved; that the 11 owners signing the petition did not constitute 60 percent of the resident owners as required by section 17-510, R. R. S. 1943; and that the petition for the creation of paving district No. 27 was therefore insufficient to confer jurisdiction or authority upon the city or upon its mayor and city council to enact an ordinance for the creation of a paving district as required by section 17-510, R. R. S. 1943.

The foregoing statement from the second amended petition constitutes the nub of the case. There are allegations of fraud which are immaterial. They are fully discussed in our opinion. The question, as I see it, is: First, whether the petition to create a paving district presented pursuant to section 17-510, R. R. S. 1943, is jurisdictional; and second, whether it may be collaterally attacked. In my judgment, the answer to both questions is in the affirmative if we are to follow the only Nebraska cases which involve special paving petitions where the question has been raised, or if we are to follow the majority rule over the country. Our opinion holds otherwise.

The truth of the factual allegation in the second amended petition that there were 19 or more resident owners owning property directly abutting upon the streets proposed to be improved and that only 11 signed, is a statement of fact, and stands admitted by the demurrer.

The methods by which cities of the second class are empowered to pave streets and to levy special assessments therefor are prescribed by sections 17-509 to 17-512, R. R. S. 1943. The method used in the instant case is covered by section 17-510, R. R. S. 1943, which is as

follows: "Whenever a petition signed by sixty per cent of the resident owners, owning property directly abutting upon the street, streets, alley, alleys, public ways or public grounds proposed to be improved, shall be presented and filed with the city clerk or village clerk, petitioning therefor, the governing body shall by ordinance create a paving, graveling or other improvement district or districts, and shall cause such work to be done or such improvement to be made, and shall contract therefor, and shall levy assessments on the lots and parcels of land abutting on or adjacent to such street, streets, alley or alleys especially benefited thereby in such district in proportion to such benefits, to pay the cost of such improvement." This section is the only one applicable on the facts herein.

Section 17-513, R. R. S. 1943, provides that the sufficiency of the petition is to be determined by the record in the office of the county clerk or register of deeds "at the time of the adoption of said ordinance."

Section 17-509, R. R. S. 1943, contains the following provision on street improvements: "Provided, that none of the improvements hereinbefore named shall be ordered except as provided in sections 17-510 to 17-512."

As I view the facts in this case, they are controlled by Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734, which is not mentioned in any way in our opinion. The Morse case, like this one, was a proceeding in equity to hold a repaving ordinance void and to enjoin collection of special assessments. The statute involved, section 110, chapter 12a, Compiled Statutes, 1897, provided in substance that the city council could order repaving upon a petition of owners of a majority of the taxable front feet in any improvement district. A district was created and the improvement made. The plaintiff alleged that the repaving petition acted on by the city council did not in fact contain the names of the owners of a majority of the taxable front feet in the district. The city contended that the petition was regular upon

its face, that the city council so determined, and that the petition could not now be collaterally attacked. The following extracts from that opinion are pertinent herein: "The correct determination of the first question must depend upon whether a petition in fact containing the signatures of the owners of a majority of the taxable front feet is a jurisdictional prerequisite to valid action by the council in making the assessment. It may, in the first place, be remarked that the rule firmly established in this state by a long line of decisions is that statutory provisions authorizing the levy and collection of special assessments shall be strictly construed, and that the record of such proceedings must on its face affirmatively show a compliance with all the conditions made necessary by the statute to a valid exercise of the taxing power. In discussing this principle, IRVINE, C., in Hutchinson v. City of Omaha, 52 Nebr., 345, 349, expressing an individual opinion, said: 'Such grants of power hold out temptations and opportunities for the confiscation of property to such an extent that the protection of property rights demands that they should receive the very strictest construction, and that the courts should be insistent that the proceedings should be of the utmost regularity.' Again, in Batty v. City of Hastings, 63 Nebr., 26, it was said (p. 32): 'It is the settled construction of the statutes of this state relating to municipal corporations that the several steps required to be taken in assessing the cost of public improvements against property benefited must be construed strictly.' Medland v. Linton, 60 Nebr., 249; Grant v. Bartholomew, 58 Nebr., 839; Smith v. City of Omaha, 49 Nebr., 883; Harmon v. City of Omaha, 53 Nebr., 164. * * *

"Judge Cooley, in his work on Taxation (2d ed.), page 656, in construing provisions identical with that involved herein, says: 'Their legislative action, if properly taken, is conclusive of the propriety of the proposed improvement, and of the benefits that will re-

sult, if it covers that subject, but it will not conclude as to the preliminary conditions to any action at all; such, for example, as * * * that the particular improvement shall be petitioned for or assented to by a majority or some other defined proportion of the parties concerned. This last provision is justly regarded as of very great importance, and a failure to observe it will be fatal at any stage in the proceedings. And any decision or certificate of the proper authorities, that the requisite application or consent had been made, would not be conclusive, but might be disproved.'

"In 2 Dillon, Municipal Corporations, section 800, in discussing this question, it is said: 'Where the power to pave or to improve depends upon the assent or petition of a given number or proportion of the proprietors to be affected, this fact is jurisdictional, and the finding of the city authorities or council that the requisite number had assented or petitioned is not, in the absence of legislative provision to that effect, conclusive; the want of such assent makes the whole proceeding void, and the non-assent may be shown as a defense to an action to collect the assessment, or may, it has been held, be made the basis for a bill in equity to restrain a sale of the owner's property to pay it.'

"In the statute under consideration there is an entire absence of any provision tending to make the action of the city council in passing upon the petition final and conclusive."

The opinion then discusses cases from other jurisdictions, and then we find the following: "This court, in considering charter provisions like that involved herein, has many times said that the number of signers to the petition made necessary by statute was jurisdictional, although the question seems not in each case to have arisen in a collateral attack. Harmon v. City of Omaha, 53 Nebr., 164; Horbach v. City of Omaha, 54 Nebr., 83, 88; Leavitt v. Bell, 55 Nebr., 57; Grant v. Bartholomew, 58 Nebr., 839; City of Beatrice v. Brethren Church of

Beatrice, 41 Nebr., 358, 362; State v Birkhauser, 37 Nebr., 521.

"From an examination of the authorities upon the question we are of the opinion that the great weight of authority as well as right reason support the conclusion which we have reached, that is, that the petition with the number of signers required by statute is jurisdictional to the right of the council under an ordinance to repave a street; and that, being jurisdictional, it follows that the action of the city council, when not supported by such a petition, may be collaterally attacked."

This opinion has been cited many times in subsequent cases. In McCaffrey v. City of Omaha, 91 Neb. 184, 135 N. W. 552, the court said: " '* * * the whole tendency of recent legislation in this state has been to give those who are to be assessed with the cost of paving a voice in the determination of how, when and where the improvement shall be made.' Batty v. City of Hastings, 63 Neb., 26. In Morse v. City of Omaha, 67 Neb. 426, this court quoted with approval the following statement of the supreme court of the United States, in Ogden City v. Armstrong, 168 U. S. 224: 'No jurisdiction vested in the city council to make an assessment or to levy a tax for such an improvement, until and unless the assent of the requisite proportion of the owners of the property to be affected had been obtained,' and in the same case this court quoted from Sharp v. Speir, 4 Hill (N. Y.) 76, in which it was held that it was not competent for the city authorities to decide 'that a majority of the persons intended to be benefited had signed' the petition for the formation of the district, unless such was the fact, and that that question could be subsequently investigated by the courts. It also quoted from the supreme court of Michigan in Auditor General v. Fisher, 47 N. W. 574 (84 Mich. 128), to the effect that whether a majority of the property holders had signed the petition could be determined in collateral proceedings."

In Hoopes v. City of Omaha, 99 Neb. 460, 156 N. W. 1047, a 1916 case, the question of the sufficiency of a petition was raised. Omaha was then operating under a home rule charter, which contained a provision making a finding by the council final. In that case we said: "Where the statute makes the filing of a proper petition jurisdictional, the finding of the city council that the petition is sufficient is not conclusive, if, in fact, it is defective. Morse v. City of Omaha, 67 Neb. 426. In that case, however, it was said: 'In the statute under consideration there is an entire absence of any provision tending to make the action of the city council in passing upon the petition final and conclusive.'

"The present charter of Omaha makes the findings of the council final. The council acted under the statute and sustained the petition. Plaintiff did not appeal. She is therefore bound by the decision, if the statute is valid."

In Kelle v. Crab Orchard Rural Fire Protection Dist., 164 Neb. 593, 83 N. W. 2d 51, which involved the question as to whether 60 percent of the freeholders had signed a petition, we said: "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.)' "

In Haecke v. Eastern Sarpy County Drainage Dist., 141 Neb. 628, 4 N. W. 2d 744, the first syllabus is as follows: " 'Statutory provisions authorizing assessments of special taxes against property benefited by public improvements are to be strictly construed, and it must affirmatively appear that the taxing authorities have taken all steps which the law makes jurisdictional; the failure of the record to show such proceedings will not

be aided by presumptions.' Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734."

To the same effect is Chicago & N. W. Ry. Co. v. Payne Creek Drainage Dist., 148 Neb. 139, 26 N. W. 2d 607, and Shanahan v. Johnson, 170 Neb. 399, 102 N. W. 2d 858.

The following quotations from Shanahan v. Johnson, *supra,* found at page 412, appear to me to be pertinent: " 'A grant of power to a county is strictly construed and any reasonable doubt of the existence of the power is resolved against the county.' Such opinion was cited with approval as recently as Board of Commissioners v. McNally, 168 Neb. 23, 95 N. W. 2d 153.

"As early as Hurford v. City of Omaha, 4 Neb. 336, citing authorities, this court said: 'That when the particular provision of the statute relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the directions of the statute are given with a view to the proper, orderly, and prompt conduct of business merely, the provision may generally be regarded as directory.

" 'When a fair interpretation of the statute, which directs acts or proceedings to be done in a certain way, shows that the legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, or when some antecedent and prerequisite conditions must exist prior to the exercise of power, or must be performed before certain other powers can be exercised, *then the statute must be regarded as mandatory.* And under such statutory provisions, the corporation has no election in the matter as to how or when the duties shall be performed, and municipal officers have no option or authority to act differently from the mode particularly prescribed. And if there be manifest irregularity in the proceedings, presumptions are not indulged to sustain such proceedings, or to give new character to that which is seen to be defective, or to supply the place of that which is not apparent.' " (Italics supplied.)

There is an extensive note on the jurisdictional feature of this case in 95 A. L. R. 116, annotating a Florida case. For our purpose, the following quotations from that note give the general rule. The following is found at page 117: "Many statutes and city charters provide that a local improvement shall be undertaken only on a property owners' petition. Under statutes of this sort it is generally held that the presentation of a petition which conforms in all material particulars to the statutory requirements is jurisdictional, and the want of such a petition makes the whole proceeding void."

At page 136 we find the following: "1. Majority rule. It is held generally that the finding of the city authorities or council, that the required number of landowners have petitioned for a local improvement, is not, in the absence of legislative provision to that effect, conclusive."

In our opinion we rely on the following cases: Cacek v. Munson, 160 Neb. 187, 69 N. W. 2d 692; Roberts v. City of Mitchell, 131 Neb. 672, 269 N. W. 515; Hiddleson v. City of Grand Island, 115 Neb. 287, 212 N. W. 619; and Gergen v. The Western Union Life Ins. Co., 149 Neb. 203, 30 N. W. 2d 558.

Cacek v. Munson, *supra,* considered a basically different statute, section 79-402, R. R. S. 1943, which, so far as material here, provides: "The county superintendent shall then advertise and hold a hearing to determine the validity and sufficiency of the petitions. Upon determination, as a result of the hearing, that valid signatures of at least fifty-five per cent of the qualified voters of each district are contained in the respective petitions, the county superintendent shall proceed to effect the changes in the district boundary lines as set forth in the petitions." The statute provides for the publication of the notice of hearing to determine the validity of the petition. The statute also directs that "Upon determination, as a result of the hearing," that the petition is valid, the county superintendent shall act.

Section 17-510, R. R. S. 1943, makes no such provision. It was the absence of this provision from the statute in Morse v. City of Omaha, *supra*, which precluded the action of the city council from being final and conclusive. Incidentally, the construction of section 79-402, R. R. S. 1943, which was originally adopted in 1881, has been consistent. It was first so construed in 1886 in State ex rel. Donavan v. Palmer, 18 Neb. 644, 26 N. W. 469. It was so construed when the opinion in Morse v. City of Omaha, *supra*, was adopted, and it is still so construed. Cacek v. Munson, *supra*, cannot therefore be considered as overruling the Morse case in any particular. Obviously, the judicial characterization was accorded from 1886 to the present day to the findings and determinations of the county superintendent only because they were based on evidence adduced at a hearing held after notice of the hearing had been given.

Roberts v. City of Mitchell, *supra*, involved only the question as to whether an erroneous assessment by a board of equalization was reviewable by an appeal or error proceedings. It did not involve any determination that the finding of an insufficient petition, to be sufficient, was a judicial determination which was conclusive. Consequently, Morse v. City of Omaha, *supra*, was not considered or overruled.

Hiddleson v. City of Grand Island, *supra*, arose under what is now section 16-620, R. R. S. 1943, which is applicable to cities of the first class, and not under section 17-510, R. R. S. 1943. It is, however, for our purposes analogous to section 17-511, R. R. S. 1943. It is apparent that these two sections are intended to serve separate and distinct purposes. In section 17-511, R. R. S. 1943, the council is given authority to create a paving district if it deems it necessary, but is required to publish a notice of such ordinance. A majority of the property owners are then required to file objections within 20 days to the creation of the district. If such objections are not filed, the council is authorized to

proceed. Jurisdiction under section 17-511, R. R. S. 1943, attaches upon the determination of the council of the need for the district. The law gives the council, under this section, the authority to pass upon the sufficiency of the objections.

Under section 17-510, R. R. S. 1943, the jurisdiction and authority of the council to create the paving district is dependent and conditioned upon the actual existence of a petition containing the requisite number of signers. *It is the petition which originates the jurisdiction and authority to create the district.* Section 17-510, R. R. S. 1943, affords no opportunity to be heard in protest or remonstrance after an ordinance has been passed as does section 17-511, R. R. S. 1943, nor does it provide for notice of the intended creation of a paving district so that protest can be made prior to its passage. The case of Morse v. City of Omaha, *supra,* was not involved or considered in Hiddleson v. City of Grand Island, *supra.*

Gergen v. The Western Union Life Ins. Co., *supra,* which was an action to revive a district court judgment, is obviously premised upon the statement: "* * * if a court is one competent to decide." The point involved in the instant case is that the city council does not have jurisdiction to act on a paving petition under section 17-510, R. R. S. 1943, unless 60 percent of the resident owners have signed and filed the petition. I do not believe that we can contend that it was the intention of Gergen v. The Western Union Life Ins. Co., *supra,* to overrule Morse v. City of Omaha, *supra.*

As I view the law applicable to section 17-510, R. R. S. 1943, the petition is jurisdictional. Plaintiff may attack it collaterally. I agree with plaintiff that error proceedings would not be an adequate remedy under section 17-510, R. R. S. 1943.

In my judgment, our opinion is in error, largely due to our failure to consider Morse v. City of Omaha, *supra,* and the distinctions between sections 17-510, 17-511, and 79-402, R. R. S. 1943.

STATE SECURITIES COMPANY, A CORPORATION, APPELLANT, V. WILLIAM SVOBODA ET AL., APPELLEES.
110 N. W. 2d 109

Filed July 14, 1961. No. 34901.

1. **Pleading.** A petition which sets out the facts is sufficient and it is unnecessary to plead the legal conclusions to be drawn therefrom.
2. **Auctions and Auctioneers.** An auctioneer who sells mortgaged property at the auction at the request of the mortgagor without the consent or knowledge of the mortgagee converts the mortgaged property and is liable to the mortgagee in conversion for damages sustained.
3. **Conversion.** Anyone who aids and assists in the conversion of property of another is liable therefor though he acted as agent of another.
4. ———. If one sells the chattels of another without authority to do so, the act cannot be made any the less a conversion by proving that he acted in good faith, believing he was the agent of one whom he regarded as the owner.
5. **Conversion: Chattel Mortgages.** Where the mortgaged property is converted without the consent or knowledge of the mortgagee he may bring conversion without first bringing an action to recover the mortgaged property or exhausting his remedies against the mortgagor.
6. **Conversion.** In conversion the measure of damages is the value of the property at the time and place of conversion with interest from the date of conversion.

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

Ginsburg, Rosenberg & Ginsburg, Norman Krivosha, and *W. O. Baldwin,* for appellant.

Harvey W. Hess, for appellees.

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

BROWER, J.

Plaintiff and appellant State Securities Company, a corporation, licensed under the Industrial Loan and Investment Company Act, brought this action for damages

for conversion of certain personal property upon which it held a mortgage against the defendants and appellees William Svoboda and William Svoboda, Jr., individually, and as a copartnership under the name of Svoboda & Sons, auctioneers, who sold the same at the request of the owner and mortgagor Arnold Tambke without plaintiff's knowledge and consent.

Trial was had to a jury. At the trial most all of the facts were admitted, stipulated, or uncontroverted, leaving no substantial matter in dispute. The plaintiff's note and mortgage, dated December 16, 1954, and filed December 20, 1954, in the proper clerk's office were all proved as alleged. There was due and unpaid thereon $379.58, on the sale date which was shown to be March 7, 1955. A tractor and eight other items of farm machinery which were sold for $519.50, were in the plaintiff's mortgage and the sale price was proven to be their value. The sale was held on the premises of Lloyd Orth who sold his property ahead of that brought by Tambke. The defendants admitted acting as auctioneers for Tambke and soliciting for the bids and knocking off the property to the bidders. The property of Tambkes was separately advertised as belonging to him. Tambke was present throughout the sale, demonstrated the tractor, and acted about the property as owner. The sale was clerked by the Thayer County Bank through its cashier and president. The Thayer County Bank had a chattel mortgage on the tractor, and most of the other items of substantial value in the plaintiff's mortgage, together with one or two other small items. Its mortgage which was introduced in evidence was both dated and properly filed in May 1954, and was first in priority. The Thayer County Bank, on receipt of the sale price of $519.50, deducted first the costs of the sale in the amount of $23.96, and the amount of its mortgage of $209.40, which satisfied it in full. The mortgage note was delivered to Mrs. Tambke with a check payable to the Tambkes for the balance of $286.14. At

that time neither the Thayer County Bank nor its officers, nor the defendants, knew of the plaintiff's subsequent lien.

At the conclusion of the evidence the plaintiff moved the court for a directed verdict. The motion was overruled. Thereupon, the defendants moved the court to dismiss the plaintiff's action or direct a verdict for the defendants. The motion was sustained and a judgment was entered dismissing the plaintiff's action and taxing the costs to the plaintiff.

A motion for new trial being overruled, the plaintiff appeals to this court, assigning as error the overruling of plaintiff's motion and the sustaining of defendants' motion for directed verdict. Also it is assigned that the trial court erred in failing to find as a matter of law that defendants as auctioneers and agents of the mortgagors were liable to the plaintiff mortgagee for damages resulting from the tortious conversion; and that it erred in finding the defendants were released from liability by virtue of the disclosure of their principal to the audience at the auction which did not include the plaintiff mortgagee.

The defendants argue that plaintiff failed to properly plead a special ownership in the property which would entitle it to maintain conversion, and also that the holder of the second mortgage could not maintain conversion against the auctioneer where the first mortgagee of a past-due mortgage received the purchase money and deducted therefrom the amount due on its mortgage and paid the surplus thereof to the mortgagor.

The defendants' claim that the plaintiff's petition was insufficient cannot be sustained. Defendants cite several cases, including Raymond Bros. & Co. v. Miller, 50 Neb. 506, 70 N. W. 22; Locke, Huleatt & Co. v. Shreck, 54 Neb. 472, 74 N. W. 970; and Hill v. Campbell Commission Co., 54 Neb. 59, 74 N. W. 388, where the facts constituting the special ownership or the right of immediate possession were not set out or were insuf-

ficiently set out. In some of the cases, it was held that the conclusions stated in the words of the statute were not sufficient. In other cases, the conditions in the chattel mortgage were not shown to have been broken entitling the plaintiff to immediate possession.

In the instant case copies of the mortgage and note were attached to the petition of the plaintiff and made a part thereof. It was pleaded that the defendants acting for and on behalf of the mortgagor Tambke proceeded to sell, and did sell, the mortgaged property to various purchasers and assisted in the disposition of the property. The mortgage provided that, "if any attempt be made to dispose of or remove said property from the county * * *, said mortgagee is hereby authorized to enter upon the premises where the said property may be * * * and remove and sell the same in any manner the said mortgagee may see fit * * *." The petition alleges that the mortgagor did not pay the installment due on January 26, 1955, before the sale and was thereafter at all times in default. The petition, with the mortgage set out as a part thereof, pleads the facts sufficiently and it is not necessary to set out the conclusions of the pleader. Schmidt v. Village of Papillion, 92 Neb. 511, 138 N. W. 725. In 10 Am. Jur., Chattel Mortgages, § 181, p. 836, it was said: "A junior mortgagee who has obtained possession of the property can maintain an action for trespass or trover against a stranger who interferes with his rights. Even though he is not in possession, it is the more general rule that he can maintain an action in replevin or for conversion against the mortgagor or any person other than the senior mortgagee for any taking of the property which is in conflict with his rights as junior mortgagee." The footnote there states as follows: "The basis of the rule is that a junior mortgagee after condition broken is entitled to the possession of the property as against the whole world except the holder of the senior mortgagee (sic). Under this rule an attaching creditor of

the mortgagor stands in the shoes of the mortgagor as respects his rights against a possessory action by the junior mortgagee. Annotation: 43 A. L. R. 389; Ann. Cas. 1916A, 865." It is apparent in this action there was an excess over the first mortgage and plaintiff has pleaded and may maintain an action for conversion.

By great weight of authority it has been held that an auctioneer who sells mortgaged property at an auction at the request of the mortgagor without the consent or knowledge of the mortgagee converts the mortgaged property and is liable to the mortgagee in conversion for the damages sustained. Bunn v. Walch, 54 Wash. 2d 457, 342 P. 2d 211; Allred v. Hinkley, 8 Utah 2d 73, 328 P. 2d 726; Morin v. Hood, 96 N. H. 485, 79 A. 2d 4; First Nat. Bank of Pipestone v. Siman, 65 S. D. 514, 275 N. W. 347; Birmingham v. Rice Bros., 238 Iowa 410, 26 N. W. 2d 39, 2 A. L. R. 2d 1108; Kearney v. Clutton, 101 Mich. 106, 59 N. W. 419, 45 Am. S. R. 394; Eureka Spring Sales Co. v. Ward, 226 Ark. 424, 290 S. W. 2d 434; 5 Am. Jur., Auctions, § 60, p. 489; 7 C. J. S., Auctions and Auctioneers, § 13c, p. 1270; Annotation, 20 A. L. R. 135. There are many other similar cases in other sister states.

In the jurisdictions following the majority rule the good faith of the auctioneer and his lack of knowledge is not a defense to the action. Kearney v. Clutton, *supra;* Morin v. Hood, *supra.*

Though there are no Nebraska cases which precisely cover the case we are now considering, there are older cases which quite clearly indicate that this court has in the past considered the majority rule to be the law here. In Hill v. Campbell Commission Co., *supra,* it was held that one who converts the property of another is liable therefor and that everyone who aids and assists in the conversion by a third person is liable for its value. This was a conversion action brought by a mortgagee. In regard to the question of knowledge as affecting liability, this court there said: "The eighth instruction

given at the request of the defendants was bad, since it exonerated them from liability if they acted in good faith. If one sells the chattels of another without authority so to do, the act cannot be made any the less a conversion by proving that he acted in good faith, believing himself to be their owner, or was the agent of one whom he regarded to be the owner." In McCormick v. Stevenson, 13 Neb. 70, 12 N. W. 828, this court held that a person who aids in conversion of property is responsible to the owner for its value. To the same effect, see Peckinbaugh v. Quillin, 12 Neb. 586, 12 N. W. 104, wherein it was held that the mortgagee may replevin property taken at the suit of a creditor of a mortgagor or can sue for its value in conversion; and that in such a case the attorney for the creditor who advised and assisted in the conversion was liable also. In Starr v. Bankers Union of the World, 81 Neb. 377, 116 N. W. 61, 129 Am. S. R. 684, it was held that one who aids and assists in the wrongful taking of chattels is liable though he acted as agent of another. In Story v. Robertson, 5 Neb. (Unoff.) 404, 98 N. W. 825, it was likewise stated that the intention or ignorance of law of the defendants made no difference.

With the weight of authority of the courts of sister states holding an auctioneer liable in conversion on the sale of mortgaged goods without the consent of the mortgagee regardless of his good faith, and in view of the Nebraska cases, this court cannot adopt the minority rule without a very cogent reason.

It appears from the bill of exceptions that the trial court considered that its decision was dependent on the presence of the mortgagor Tambke at the sale, the disclosure of his presence and ownership of the property sold, and the demonstration by him of the tractor.

Defendants cite cases, many of which are not in point. They cite Corn Land Farms Co. v. Barcus, 105 Neb. 869, 182 N. W. 487, 23 A. L. R. 119; and Mercer v. Leihy, 139 Mich. 447, 102 N. W. 972. These were actions brought

by a purchaser against the auctioneer where either the mortgagor or supposed owner was present, or was identified as the owner at the sale. In such a case the action is on a warranty, express or implied. That action sounds in contract. It is well-established law that as a general rule an agent acting for a disclosed principal is not liable on the contracts of his principal. See 2 Am. Jur., Agency, § 315, p. 247, which reads in part as follows: "If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone, unless credit has been given expressly and exclusively to the agent, and it appears that it was clearly his intention to assume the obligation as a personal liability and that he has been informed that credit has been extended to him alone. * * * Ordinarily, an agent is not liable on express or implied warranties on the part of the principal, although he may, if he sees fit, for a good consideration, make a personal contract of warranty which will be binding and enforceable even though the principal has also made a similar warranty."

In actions by the mortgagee or a real owner against an auctioneer for selling mortgaged property or selling property for one without authority of the real owner, the action is based on tort and the rule of agency is quite different. See 2 Am. Jur., Agency, § 324, p. 254, where the text reads as follows: "The broad statement is frequently made that in torts the relation of principal and agent does not exist. This statement perhaps requires some qualification, yet it is declaratory of a more or less general principle. Generally speaking, the fact that one is acting as agent for another is no defense to any liability to third persons for tortious acts, although the principal may himself be liable."

The defendants in their answer set out that the plaintiff was estopped by reason of the disclosure at the sale by the auctioneer and Tambke that the property belonged to Tambke who was then present at the sale.

Obviously estoppel does not apply. The officers and agents of the plaintiff, or any of them, were not at the sale and knew nothing of it. They did not say or do anything, nor stand by in silence, while the auctioneer or Tambke said or did anything by which the plaintiff might thereafter be estopped to speak the truth.

The plaintiff is not relegated to its action to recover the mortgaged property. Alter v. Bank of Stockham, 53 Neb. 223, 73 N. W. 667. In the case before us only one purchaser testified. He did not buy all the property. It would seem that in this case it would have required several actions. Neither is it necessary that plaintiff exhaust its remedies against the mortgagor.

The defendants cite a few cases of the courts of sister states, holding that an auctioneer or warehouseman was not liable to a mortgagee or real owner for a sale without their consent where they were innocent agents asserting no interest in the mortgaged property or ownership against the real owner. Abernathy & Long v. Wheeler, Mills & Co., 92 Ky. 320, 17 S. W. 858, 36 Am. S. R. 593; Frizzell v. Rundle & Co., 88 Tenn. 396, 12 S. W. 918, 17 Am. S. R. 908; Blackwell v. Laird & Lang, 236 Mo. App. 1217, 163 S. W. 2d 91; Cresswell v. Leftridge (Mo. App.), 194 S. W. 2d 48. These cases represent a minority rule. The rules there expressed are not consistent with previous Nebraska cases and they are not followed by us in this case.

It follows that the auctioneers who assisted in the conversion by sale of the mortgaged property are liable to the plaintiff mortgagee therefor. Their good faith and lack of knowledge of the plaintiff's mortgage are not a defense to the action. Neither is it a defense that the mortgagor was present and was identified as the seller.

The measure of damages is the value of the property at the time and place of sale after the reduction by the payment of the first mortgage claim and the costs of sale for which the first mortgage expressly provided.

The plaintiff having moved for a directed verdict

which was erroneously denied, and the judgment of dismissal having erroneously been entered, a judgment in favor of the plaintiff should be entered below. Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144; Lynch v. City of Omaha, 153 Neb. 147, 43 N. W. 2d 589.

The judgment of the district court is reversed and the cause remanded with directions to enter judgment for the plaintiff and against the defendants in the amount of $286.14, with interest at 6 percent per annum from March 7, 1955.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., dissenting.

To me it is not too material whether the auctioneer was the agent of the owner or a principal. The ultimate foundation question is: Was it a conversion?

I have been unable to see where the mortgagee was deprived of any right it had by the sale of this property.

The following quote from 89 C. J. S., Trover & Conversion, § 48(b), p. 554, states my thought—to constitute a conversion the lienholder must have been *deprived of a right:* "A wrongful sale of goods whereby a person who has a part interest therein, or a lien thereon, *is deprived of his right,* is a conversion whether the wrongdoer is an owner of another part or a lienholder, or a stranger to the property."

The same text is in 65 C. J., Trover and Conversion, § 50, p. 39.

YEAGER, J., dissenting.

I respectfully dissent from the majority opinion in this case, and so that the position for which I contend may not be misunderstood I am dealing with the subject matter in detail.

This is an action by State Securities Company, a corporation, plaintiff and appellant, to recover damages for alleged conversion of personal property from William Svoboda, Billie B. Svoboda, also known as William Svoboda, Jr., and Svoboda and Sons, a partnership, defendants and appellants.

There was a trial of the case to a jury. The case however was not submitted to the jury. At the conclusion of the evidence a motion made by the defendants in the alternative for a directed verdict or for judgment in their favor was sustained. From this ruling the plaintiff has appealed.

There is no substantial dispute as to what the record in this case discloses. The record of the pleadings and evidence discloses that on and prior to March 7, 1955, Arnold Tambke and Eula Tambke were the owners of certain farm machinery and other personal property; that the Thayer County Bank, Hebron, Nebraska, had a chattel mortgage on this property; that the plaintiff also had a chattel mortgage thereon which was junior to that of the Thayer County Bank; that on March 7, 1955, the mortgage of the plaintiff was in default; that both mortgages provided that in case of default the mortgagees were entitled to take possession of and dispose of the property; that without notice to the plaintiff the farm machinery described in the mortgages was sold at a farm sale at which the defendants acted as auctioneers; that the Thayer County Bank had no notice of plaintiff's mortgage; that officers of the bank acted as clerks at the sale; and that after the sale, out of the proceeds the Thayer County Bank received sufficient to pay what was due it under its note and mortgage and the balance was paid to the Tambkes.

It is specifically pointed out that the evidence discloses without dispute that Arnold Tambke attended the sale; that there he demonstrated a tractor which was a part of the property sold; that the defendants, before the sale was made, announced and advertised that it was the property of and was being sold for the Tambkes; and that the defendants received nothing from the sale except an auctioneer's fee. On the trial the following statement was made by the court which was acceded to by plaintiff's attorney: "Thereupon the plaintiff, in open court, states that he concedes that the defendants

announced at and prior to the sale of the Tambke property set forth in plaintiff's petition, the defendants announced that the property to be sold was the property of Arnold Tambke, and that during said sale Arnold Tambke demonstrated a tractor, which was one of the articles listed, and acted about the said property as the owner thereof."

The plaintiff contends in five assignments of error that the judgment of the district court should be reversed. On the basis of these it urges also that a judgment for damages sustained should be rendered in its favor.

Although there are five assignments of error the determination to be made by this court depends upon the question of whether or not an auctioneer under facts such as existed in the circumstances disclosed by this record shall be held as a converter and be required to respond in damages for conversion of property in an action by a mortgagee of personal property where such mortgage has been properly placed of record.

It is asserted by the plaintiff, and the assertion is correct, that by the clear weight of authority the auctioneer is liable under such circumstances as these, and the fact that the owner was present at the sale, was identified as the owner by the auctioneer, and the auctioneer acted only as the spokesman in making the sale and handled no funds, would not destroy this legal attitude and viewpoint.

It should be pointed out however that while this represents the majority rule, there is a minority view, and also that the majority rule fails to contain any expression from many jurisdictions.

If this rule is to be accepted it becomes obvious that the judgment of the district court was erroneous and the plaintiff was entitled to a directed verdict and a judgment thereon in its favor.

The rule has been neither accepted nor rejected in this jurisdiction. In Corn Land Farms Co. v. Barcus, 105 Neb. 869, 182 N. W. 487, 23 A. L. R. 119, in an obiter

dictum statement, this rule was recognized but it had no controlling significance in the determination of any question before the court. The question before the court was that of whether or not a clerk at an auction was liable as a guarantor of title to property sold. In the opinion in recognition of the rule, it was said: "Plaintiff has proceeded upon the theory that the duties and liabilities of the clerk are the same as those of the auctioneer. * * * We do not believe that the same rule would apply to one occupying a purely clerical position as would apply to one who was conducting the sale as auctioneer."

In the light of a firm and fixed view that the majority rule in its all-inclusive aspects is not reasonable, and is in conflict with another well-recognized rule relating to duties and liabilities of auctioneers which appears to meet the demands of reason and justice, the majority rule should be rejected for those instances wherein, as here, the auctioneer was a mere voice for the owner who was named and pointed out, and was present; where the property was at hand, observed, and inspected; where no pertinent information was in the possession of the auctioneer and withheld; and where the sole basis of holding that the auctioneer is guilty of conversion is his failure to inspect the official records to ascertain whether or not the property put up for sale was subject to a chattel mortgage.

This is in conformity with what is termed the minority rule. The minority rule is asserted in Abernathy & Long v. Wheeler, Mills & Co., 92 Ky. 320, 17 S. W. 858, 36 Am. S. R. 593; Frizzell v. Rundle & Co., 88 Tenn. 396, 12 S. W. 918, 17 Am. S. R. 908; Blackwell v. Laird & Lang, 236 Mo. App. 1217, 163 S. W. 2d 91; Cresswell v. Leftridge (Mo. App.), 194 S. W. 2d 48.

In Frizzell v. Rundle & Co., *supra,* it was said: "Defendants having neither actual or constructive notice of the mortgage, and having in the whole matter acted only as the innocent agent and factor of the mortgageor

(sic), with whom the possession had been left, are not guilty of conversion, and the judgment is affirmed."

In Abernathy & Long v. Wheeler, Mills & Co., *supra*, in dealing with a like situation, it was said: "In such case the warehouseman asserts no interest in the goods or right to them, hostile to the mortgagee or true owner; he simply acts as the custodian and mouthpiece of the apparent owner." Recovery against the auctioneer was denied.

In the case of Cresswell v. Leftridge, *supra*, the reasoning contained in the three preceding cases was commented on with approval. From an examination of the majority and the minority rules it appears that reason supports the latter. It is difficult to see why an auctioneer should be held liable as a converter in an instance, such as the one being considered here, where he has made a full disclosure with the claimed owner present and he acts only as the mouthpiece of the owner. The effect of doing so is not to allow recourse against him for some wrong which he has committed but to arbitrarily impose a liability on him for the wrong of another. If instead of the auctioneer acting as mouthpiece the owner himself had acted, would any liability attach to the auctioneer? No one would say so. Then from what source comes a meritorious reason for holding the auctioneer (mouthpiece) liable?

The majority rule is not only on its face fallacious but it is also contrary to and inconsistent with a related situation pertaining to liability of auctioneers. If an auctioneer is liable to a mortgagee under circumstances such as exist in this case, why should he not be liable to a purchaser who has been damaged on account of the sale of the mortgaged property? He however ordinarily is not.

The general rule as stated in 5 Am. Jur., Auctions, § 57, p. 488, is as follows: "Accordingly, an auctioneer selling for a known principal is not responsible to the buyer for the title, in the absence of his own affirma-

tive agreement, for an auctioneer does not impliedly warrant the title of his vendor."

The rule is stated in 7 C. J. S., Auctions and Auctioneers, § 13 b (1), p. 1269, as follows: "Generally speaking, an auctioneer is not personally liable to third persons where his principal is disclosed; but he must keep within the limits of his agency, and, like any other agent, may make himself personally liable by expressly pledging his own responsibility."

By comparison of this rule with the majority rule with reference to the liability of an auctioneer to a mortgagee it becomes clear that the two are definitely inconsistent. Reason fails to harmonize a deprivation of relief against the man who has paid his purchase money and the grant of relief to a mortgagee. Both have an action against the seller and in addition the mortgagee has the further right of recovery of the property itself for the purposes of foreclosure of his recorded mortgage.

The simple answer is that neither should be treated as having been wronged by the auctioneer, since in reason nothing has been done by the auctioneer to the prejudice of either of them.

In the light of the observations made herein it is my opinion that an auctioneer who in good faith and without notice of a mortgage thereon sells personal property at auction, which is in fact subject to a chattel mortgage, for a principal whose identity has been disclosed, in which property the auctioneer has no interest but acts only as a mouthpiece of the owner, is not liable to the mortgagee for any damage sustained as the result of such sale.

MESSMORE, J., concurs in this dissent.

C. R. T. CORPORATION, A NEBRASKA CORPORATION, APPELLANT, V. BOARD OF EQUALIZATION, IN THE COUNTY OF DOUGLAS, IN THE STATE OF NEBRASKA, ET AL., APPELLEES.

110 N. W. 2d 194

Filed July 14, 1961. No. 34986.

1. **Taxation.** The county board of equalization of Douglas County, Nebraska, is required to make the levy of taxes for all county purposes.
2. **Taxation: Schools and School Districts.** Included within "county purposes" is the amount necessary to be raised by taxation as provided in the annual budget of the school districts for school purposes.
3. **Taxation.** A taxpayer may appeal from the action of the county board of equalization, if in the judgment of the taxpayer the levy is for an unlawful or unnecessary purpose, or in excess of the amount necessary to perform the purposes of the levy.
4. **Constitutional Law.** By the Constitution of the State of Nebraska the powers of government are divided into three distinct departments, the legislative, executive, and judicial, and no person or persons of any of these departments shall exercise any power properly belonging to either of the others, except as the Constitution directs or permits.
5. **Constitutional Law: Courts.** The Legislature may not impose upon the courts the performance of nonjudicial duties nor delegate to them legislative power.
6. ———: ———. The Constitution does not bar the right of the Legislature to confer upon the courts the power to review the propriety and legality of legislative action, or of administrative or ministerial action taken pursuant to legislative grant of power.
7. **Courts.** A definition of that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions.
8. ———. When a judicial controversy in fact arises, the courts have the inherent right to intervene, even without or against the expressed will of the Legislature.
9. ———. It is competent for the Legislature to provide a procedure or multiple procedures for the bringing of judicial questions before the courts for determination.

10. **Schools and School Districts.** There is a presumption that the officers of a school district acted within their authority and did not transgress the scope thereof.
11. ———. When it is charged that the action of the officers of a school district was beyond their authority, the burden is upon the one making the charge to adduce proof to sustain the charge.
12. **Taxation: Schools and School Districts.** The amount of taxes to be levied for school purposes is not capable of exact determination, and if the levy appears to be reasonable in the light of contingencies to which regard must be given, even though a surplus may be anticipated, the levy will be sustained.

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

Ross & O'Connor and *McGowan & Troia,* for appellant.

John J. Hanley, John C. Burke, W. Ross King, and *Seymour L. Smith,* for appellees.

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

YEAGER, J.

The action here flows from a levy of taxes made by the county board of equalization of Douglas County, Nebraska, for the fiscal year 1960-1961 for the School District of the City of Omaha, Nebraska, a Class V district, on August 9, 1960. The levy was made pursuant to sections 79-1007 and 79-1052, R. R. S. 1943, and sections 79-1007.01 and 79-1007.02, R. S. Supp., 1959. The total was 28.5 mills on the dollar of tangible property in the district. It was allocated as follows: General operations, 23.4 mills; site and building, 1 mill; bond redemption, 3 mills; and pension fund-special levy, 1.1 mills. From this levy the C. R. T. Corporation, the owner of real estate subject to taxation in the district, as plaintiff, perfected an appeal to the district court. The Board of Equalization in the county of Douglas, Nebraska, the County of Douglas, Nebraska, and the School District

of Omaha, Nebraska, were made defendants. The district is in the county of Douglas. On the appeal no attack is made upon any item of levy except that for general operations or, as stated in a petition which was filed by the plaintiff, the general fund. The contention on appeal is that 3 mills of this levy of 23.4 mills is null and void. There is no contention that the remaining 20.4 mills of the levy for the general fund is not valid.

The basis of the contention that this portion of the levy is null and void is that it is for an unlawful and unnecessary purpose, and in excess of the requirements of the district. Alleged reasons why this was true are that the levy failed to take into consideration the balance on hand at the end of the school year; that this was an attempt to create a surplus in excess of requirements; that it represented an underestimate of revenue from tax and nontax sources; and that there was an improper transfer of funds from the general fund.

To the petition the school district filed an answer. By the answer it alleged that the court was without jurisdiction over the subject matter; that the plaintiff had no lawful power or authority to prosecute the appeal; and that this being a purported class action the appeal on that account is void.

For further answer this defendant denied generally all of the allegations except that it admitted that the levy as charged was made on all taxable property except intangible property.

The county board of equalization and the county of Douglas filed an answer which is in substance the same as that filed by the school district.

The case was tried to the court after which findings were made and a judgment duly rendered. The court found generally in favor of the defendants; that the court was without jurisdiction; that the evidence failed to prove the material allegations of the petition; and that the appeal should be dismissed. By the judgment the appeal of the plaintiff and the petition were dismissed.

The plaintiff duly filed a motion for new trial. This motion was overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

The active parties on this appeal are the named plaintiff and the defendant School District of Omaha. In consequence of this, in case of use of the term, defendant, this will have reference to the school district in the absence of other description indicating a reference to one of the other defendants.

As grounds for reversal the plaintiff has set forth in its brief several assignments of error. The first one asserts that the court erroneously found that it was without jurisdiction to entertain the appeal. The brief of the defendant advances more than one theory of lack of jurisdiction. The adjudication does not disclose on what theory lack of jurisdiction was found. It is therefore necessary to consider those which are pertinent. The first of these to be considered is that of whether or not statutes in terms confer upon the board of equalization the power to make a levy such as was made or attempted here and, after such levy has been made, jurisdiction on the district court to review it on appeal. A contention of the defendant is in effect that the levy is not made by the board of equalization but by the board of education of the school district, hence there is no right of appeal from the board of equalization.

This contention is without merit. The statutes by their terms clearly declare that the opposite is true. Section 77-1601, R. R. S. 1943, in defining the duties of the board of equalization and in declaring the duties with reference to school district funds, contains the following: "After making the levy for such purpose, the county board of equalization shall make the levy of taxes for county purposes. The levy shall include all county taxes necessary to cover the amounts required to be raised by taxation, as provided in the annual budget of said county for the current year, and shall include all

township, city, school district, precinct, village, road district, and other taxes required by law to be certified to the county clerk and levied by the county board of equalization; * * *." So that there may be no misunderstanding, the procedure followed leading up to and in the making of the levy was as follows: The board of education of the school district certified a budget to the county clerk which budget was presented to the board of equalization and on the basis of this budget the board of equalization made the levy. This on its face indicates that here was a levy of what was in law to be regarded as a county tax made and to be made by the board of equalization. In addition, specifically so declaring is section 77-109, R. R. S. 1943, as follows: "The term 'county tax' includes all taxes due to the county, school districts and other subdivisions of the county, which are levied and collected by the county."

As to the right of a taxpayer to appeal, section 77-1606, R. R. S. 1943, contains the following: "Any taxpayer may appeal from the action of the county board of equalization in making the levy, if in the judgment of such taxpayer the levy is for an unlawful or unnecessary purpose, or in excess of the requirements of a county, within the same time and in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county."

The insistence that the phrase "in excess of the requirements of a county" has the effect of limiting the right of appeal to a matter of levy, strictly speaking, of county taxes is not convincing in the light of the definitions quoted.

It is suggested that the action may not be maintained for the reason that the appeal was on behalf of a class and not by a person entitled to take an appeal. On its face it is an appeal by a single taxpayer and not by a class. The suggestion does not require further consideration.

The defendant's contentions that the court was without jurisdiction are without merit unless it may be said that the statute providing for appeal from the levy made by a board of equalization of a county for school district taxes is unconstitutional.

The assigned ground of unconstitutionality is that the Legislature, by conferring the right of appeal to the district court from a levy of taxes made by a county board of equalization for school funds violated Article II, section 1, of the Constitution of the State of Nebraska, which provides for the separation of the powers of state government. The provision is as follows: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." With particularity the contention made is that this grant of the power of review is a grant to the courts of legislative rather than judicial power.

It is elementary in the area of the constitutional interpretation of Article II, section 1, of the Constitution, that the Legislature may not impose upon the courts the performance of nonjudicial duties nor delegate to them any legislative power. See, State ex rel. Thompson v. Neble, 82 Neb. 267, 117 N. W. 723, 19 L. R. A. N. S. 578; Winkler v. City of Hastings, 85 Neb. 212, 122 N. W. 858; Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257.

This rule however does not bar the right of the Legislature to confer upon the courts the power to review the propriety and legality of legislative action, or of administrative or ministerial action taken pursuant to legislative grant of power. In truth, a legislative declaration denying such a right of review would itself be invalid.

The rule, its application, and the limitations thereof

are stated in Tyson v. Washington County, 78 Neb. 211, 110 N. W. 634, 12 L. R. A. N. S. 350.

In the opinion in that case appears by quotation from Cooley, Constitutional Limitations (7th ed.), p. 132, a definition of and distinction between judicial and legislative acts, as follows: " 'That which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions.' "

In the same opinion appears the following: "* * * whenever a judicial controversy does in fact arise, the courts have an inherent right to intervene without the permission, and even against the expressed will, of the legislature."

Also in that opinion appears the following: "Doubtless, however, it is competent for the legislature to prescribe whatever mode of procedure they may see fit for bringing judicial questions before the courts for determination, or for the multiplication of cumulative remedies, * * *."

In the light of these rules section 77-1606, R. R. S. 1943, discloses by its terms that the questions to be presented for review on appeal are judicial and not legislative. The questions are legality of purpose, necessity, and whether or not the levy is excessive. These are questions which were presented to the district court on appeal.

It is true that section 77-1608, R. R. S. 1943, permits the district court, in addition to what is provided for by section 77-1606, R. R. S. 1943, on facts presented, to determine the amount of a levy which is proper, legal, or necessary and to change the levy accordingly. It may be that this phase amounts to an authorization of invasion of another department by the judicial department, a question which does not require answering

herein since it has not been made apparent that any action was based upon it, and for the further reason, as has already been indicated, that the reference in section 77-1606, R. R. S. 1943, is to a judicial proceeding. The question has no controlling significance in the decision of this case.

It is suggested that since there was another remedy available for presentation of the contentions of the plaintiff other than by appeal the statute providing for appeal is invalid. As pointed out in Tyson v. Washington County, *supra*, multiple remedies are not condemned.

It must be said therefore that the attack based upon a claimed violation of Article II, section 1, of the Constitution, may not be sustained.

It becomes necessary now to turn to the question of whether or not the court erred in its finding that the evidence was insufficient as proof of the allegations of the petition and in the rendition of its judgment dismissing the petition.

The parties appear to accept the premise that there is no statutory restriction upon the amount or rate of tax to be levied for school purposes in school districts such as the one involved here, except that it shall be lawful, reasonably necessary for lawful purposes, and not excessive. That premise will be accepted for the purposes of this opinion.

The plaintiff in its petition asserts that the levy in excess of 20.4 mills is unlawful, unnecessary, or in excess of requirements. The sole theory of the presentation is that the amount is in excess of the needs of the district.

In dealing with a situation involving exercise of powers by school district officers, this court in Gaddis v. School Dist., 92 Neb. 701, 139 N. W. 280, said: "The presumption is that the officers acted within their authority and did not transgress its scope, and the burden is on the plaintiff to disclose facts which will justify the court in the issuance of the writ." This rule is applicable here. The burden was on the plaintiff to

show that the levy was in excess of the needs of the school district.

Factually the record discloses that under date of July 29, 1960, the school district presented to the county clerk of Douglas County, Nebraska, an estimate of resources likely to be received for school purposes. The estimated total for the general fund was $12,839,373. Estimates of other funds were also presented but they are of no concern here and hence will receive no further mention. Along with this was presented a certificate of the aggregate number of mills estimated to be necessary to be levied in order to raise by taxation money to support the schools for the ensuing year. Included in this was an estimated amount of 23.4 mills for the general operations fund or what is generally referred to in the record as the general fund. It was estimated that to produce the total of $12,839,373 would require a mill levy of 23.4 mills.

In the record is a stipulation of facts. By this stipulation it was estimated that on September 1, 1960, there would be in the general fund a balance of $1,819,378 out of the general fund levy for the previous year, which was for 22.4 mills, for use during the fiscal year beginning September 1, 1960. It is pointed out here that there is nothing in this stipulation or elsewhere in the record as to what part of this, if any, would be required to pay obligations contracted by or charges against the district during the year ending August 31, 1960.

In consequence of this the plaintiff by its presentation of the case here insists that the estimated needs for the year 1960-1961 were exceeded by $1,819,378, and that the mill levy of 23.4 mills was for that reason excessive. On this basis the plaintiff concluded that the true estimate was $14,206,751, instead of $12,387,373.

By the stipulation it was agreed that the school district estimated that there would be expenditures from the general fund for the fiscal year 1960-1961 of $13,830,450, and on the basis of a 22.4 mill levy there would

be a balance in the fund on September 1, 1961, of $376,301, and also that on the basis of a 23.4 mill levy there would be a balance on September 1, 1961, of $828,301.

In the record is evidence relating to levies and rates of levy made in earlier years, amounts of surplus produced in those years, allocations of funds, and sources of income, but there is nothing in the record upon which to base a finding and judgment that the levy of 23.4 mills for the general fund was excessive except the bare fact that this, on the basis of the assessed value of the taxable property in the district at the time of levy, would produce revenue of $828,301 in excess of the anticipated general fund needs of the district.

In the briefs are found hypothetical analyses and computations from which have been deduced conclusions, but it has not been found that from these flow conclusions which are in aid of a reasonably accurate determination of the question of whether or not the levy is excessive.

As is clearly apparent in a situation such as this the needs are not capable of exact ascertainment. In the very nature of things and as the pertinent statutes declare there may only be estimates, which of course negative any thought that accuracy must be attained. The true test is that there shall be a reasonable and approximate estimate and determination made in the light of the known and reasonably ascertainable facts and also in the light of known and fairly anticipated conditions.

In support of this proposition this court said in Kissinger v. School Dist. No. 49, 163 Neb. 33, 77 N. W. 2d 767: "The defendant argues that exact calculations as to the amount of taxes to be raised for school purposes were not contemplated and that consideration can be had for possible nonpayments of taxes and other similar contingencies. We are of the opinion that defendant's position is correct as a general proposition. * * * The tax levy is required to be a reasonable approxi-

mation of the amount required." See, also, Giliman v. Talley, 140 Iowa 718, 119 N. W. 144; People ex rel. De Rosa v. Chicago & N. W. Ry. Co., 391 Ill. 347, 63 N. E. 2d 401; Allen County Fiscal Court v. Allen County Board of Education, 242 Ky. 546, 46 S. W. 2d 1070; 16 McQuillin, Municipal Corporations (3rd ed.), § 44.97, p. 258.

It is not difficult, in the light of what has become apparent from the record as to the expense of the functions of the Omaha School District, and the possible if not even probable fluctuation in expense of operation and of revenue from the varied sources, to perceive, without evidence to demonstrate the contrary, that a levy which it was anticipated would produce an excess for all purposes of not to exceed $828,301 more than the total estimate was not an abuse of discretion and unreasonable.

The plaintiff has failed to sustain the burden of proving that the levy made by the board of equalization was excessive within the meaning of law.

The finding of the district court that it was without jurisdiction and the judgment in favor of the defendants on that ground is reversed.

The finding of the district court that the evidence failed as proof of the plaintiff's cause of action and the judgment of dismissal on that ground is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

THOMAS L. SPANI, APPELLEE, V. ALONOZO C. WHITNEY, APPELLANT.
110 N. W. 2d 103

Filed July 14, 1961. No. 35004.

1. **Evidence.** The admission of evidence under the provisions of section 25-1215, R. R. S. 1943, falls within the area reserved to the sound discretion of the trial court. The trial court must determine whether the evidence offered is on the same subject.

Its ruling will not be regarded as erroneous unless there is a clear abuse of discretion.

2. **Witnesses: Evidence.** If sufficient foundation is laid to show that the conditions they observed are the same as existed immediately following the accident, witnesses should be permitted to testify in regard to what they observed insofar as it is relevant and material to the issues involved.
3. **Highways.** Phrases used in section 39-7,110, R. R. S. 1943, relate to the center of and right-hand and left-hand sides of the main-traveled portion of the highway available to traffic at the time.
4. **Appeal and Error.** A party cannot complain of the giving of an instruction in harmony with one which he requested.
5. **Trial: Appeal and Error.** One who at the close of a trial admits that there is evidence to establish an issuable fact in accord with a requested instruction cannot afterward be heard to say that there was no evidence received tending to prove that fact.

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

McGinley, Lane, Mueller & Shanahan, for appellant.

Charles Evans Hughes and *Robert E. Roeder,* for appellee.

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

SIMMONS, C. J.

In this action plaintiff seeks to recover personal injury and property damage from the defendant. Plaintiff alleged some ten different acts of negligence of the defendant as the cause of his damage. Defendant by answer denied generally and alleged contributory negligence sufficient to bar recovery. Defendant by cross-petition alleged negligence in four particulars and sought a recovery for personal injury and property damage.

The cause was tried to a jury resulting in a verdict and judgment for the plaintiff. Defendant appeals. We affirm the judgment of the trial court.

There is ample evidence in the record from which the jury could readily determine the following facts:

U. S. Highway No. 6 going east from Imperial goes through a practically level country for several miles. It is a black-top, two-lane highway with the usual center marking dividing two lanes of travel. The point here involved, the "confusion" area, where the accident happened was visible 2 miles or more to the east and 2 miles or more to the west.

On the evening of August 11, 1958, about 8 p.m., a car caught fire about 4 miles east of Imperial and on the south side of the black-top, or on the black-top and the shoulder adjacent to it. An emergency unit and a firetruck went to the fire from Imperial. The emergency unit parked to the west of the burning vehicle. The firetruck, after stopping briefly at the side of the burning vehicle, was then moved to the east of the burning vehicle. Its hose was brought to the fire along the pavement.

The above three vehicles blocked a part of the traveled portion of the highway in what was the normal south or eastbound lane.

Other cars gathered behind the three principal vehicles, some in the borrow pit, and some on the north part of the highway or the westbound lane.

Some of the private cars had their lights on. The firetruck and emergency vehicle had their red lights and warning signals in operation.

Plaintiff coming from the west, driving his car, saw the "confusion" and lights for a considerable distance. He slowed down and then was signaled to go on east by one of the emergency unit personnel. He did so. There was congestion on his side of the highway and in effect the pavement at that place had been reduced to a one-lane road. He proceeded east slowly, driving in part in the north lane, and just about opposite the burning vehicle the lights of the defendant's car flashed on. Plaintiff stopped and tried to back up, but the collision occurred before he could do so.

The defendant had come from the east. By his own

testimony, he saw no lights or other indications of trouble on the highway until he was almost upon it. He justifies this by testimony that he was driving on his own side of the road at a speed of 45 miles per hour. When he saw the "confusion" he undertook to stop but was unable to do so. Both cars were largely on the normal north driving lane, but also slightly across the center line when they came to rest a short distance apart.

Defendant's first assignment of error goes to this situation. Three days after the accident plaintiff voluntarily wrote out a statement of his version of the accident and gave it to the sheriff. In longhand it covered one and one-third pages of legal size paper.

In direct examination plaintiff testified: "As we approached the confusion, why, of course, the closer we got to the point of confusion, we could see the emergency wagon of Imperial at the west end of the confusion with the red light flashing; seen a man with a flashing light, the flagman to the west, to this (indicating) side of the emergency wagon. * * * Yes, there were cars parked on both sides of the highway; also, people milling about."

On cross-examination defendant had the statement marked as exhibit 7, and asked plaintiff if he made this statement in the writing: " 'Upon arriving at congested area of which both sides of road were lined with cars and also noticed emergency wagon at west end and fire truck at east end of what turned out to be a burning car.' " Plaintiff said that he did.

Defendant then read him a part of a sentence in the statement and asked plaintiff if he made it. He said he did. The partial sentence was: " 'As I arrived at this point (almost directly beside the car) a car coming from the east appeared.' "

Defendant then asked if the plaintiff gave the sheriff no estimate of defendant's speed when he wrote up the statement. The plaintiff answered: "No estimate of miles. I estimated he was traveling at the highway

speed." This answer is, in effect, in the exhibit 7 writing.

Plaintiff offered the entire statement in evidence. Defendant objected and among other reasons stated: "* * * it is no item of contradiction." With this statement the trial court was given no information as to why the statement was read, unless for hoped-for impeachment purposes. The exhibit was admitted.

Defendant argues here that the written statement was only admissible on the basis of being an impeachment statement and that the statement did not impeach. He claims that hearsay self-serving statements and conclusions were admitted.

Defendant, however, invited the introduction of the exhibit.

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

The concluding sentence gives the reason for the rule. It requires no exposition on our part.

The rule is stated in 31 C. J. S., Evidence, § 375, p. 1159, as follows: "Where one party brings out part of a transaction, conversation, statement, writing, or course of conduct as an admission against interest, the other party may thereafter bring out the whole of it to offer his own explanation thereof and rebut its discrediting and damaging effect, even though proof otherwise incompetent is used." See, also, 20 Am. Jur., Evidence, § 551, p. 463.

It has been suggested that the questions asked were directed to the matter of a possible impeachment, and

no impeachment having occurred, the balance of the statement was not admissible and its admission erroneous. This argument would restrict the application of section 25-1215, R. R. S. 1943, to impeachment matters only.

A cursory examination of our decisions shows that we have not so limited it.

We have not undertaken to define the broad outline of the meaning of the clause "the same subject." It has, however, been applied in a number of different situations. "All the conversation on 'the same subject,' that is, the fact of whether there was a contract or not, was what plaintiff was entitled to call for; not all the conversation as to plaintiff's claim." Pettis v. Green River Asphalt Co., 71 Neb. 513, 99 N. W. 235.

In Struble v. Village of DeWitt, 89 Neb. 726, 132 N. W. 124, it was held to permit the admission of the whole of a confidential communication between patient and physician.

In Roeder v. State, 119 Neb. 116, 227 N. W. 446, the statute was held as authorizing the admission of a conversation between a sheriff and a third party. We held: "Since the defendant, himself, first introduced evidence of a part of the conversation in question, the court properly ruled that the state was entitled to give the whole of the conversation on the same subject-matter."

In Lindley v. Wabash Ry. Co., on rehearing, 120 Neb. 204, 233 N. W. 450, the defendant brought out the matter of repairs to a platform alleged to have been dangerous. Defendant contended that subsequent repairs were not admissible as evidence of negligence. We held: "When defendant went into the question of removal of the planks, we think it opened up the subject of repairs. * * * Defendant brought out a part of the transaction, and plaintiff was entitled to have the whole transaction disclosed to the jury."

In Jensen v. Romigh, 133 Neb. 71, 274 N. W. 199, letters touching upon a transaction were admitted in

evidence. Plaintiff offered to prove the contents of other letters. We held: "Plaintiff should have been permitted to prove the contents of these letters. They throw light on the transaction, would have made the letters written by defendants more understandable, and they are part of the correspondence, part of which had already been admitted."

In Snyder v. Lincoln, 153 Neb. 611, 45 N. W. 2d 749, we were presented with the question of prejudicial error in the admission of certain exhibits. Plaintiff put part of the exhibits in evidence. Defendant offered the complete exhibits and they were received. With direct reference to the statute we held that the exhibits were properly received.

We are here dealing with a subject of the admission of evidence. Heretofore we have considered it in an area reserved to the judicial discretion of the trial court. To constitute error prejudicial or otherwise, an abuse of discretion must appear.

In Struble v. Village of DeWitt, *supra,* we said: "A considerable latitude must be allowed a trial court in such matters, and we do not think that this was such an abuse of discretion as to require a reversal." We also said: "* * * The trial court must determine whether the evidence offered is on the same subject, and its ruling will not be regarded as erroneous unless there is a clear abuse of discretion." We followed this decision in Friesen v. Reimer, 124 Neb. 620, 247 N. W. 561.

Struble v. Village of DeWitt, *supra,* was likewise cited with approval in Leeds v. Prudential Ins. Co., 128 Neb. 395, 258 N. W. 672, 96 A. L. R. 1414.

We need go no further here than to hold that abuse of discretion of the trial court does not appear.

The first assignment of error is not sustained.

Defendant's next assignment of error goes to the admission of the evidence of the sheriff as to the condition of the accident site. The sheriff arrived there some 17 minutes after the accident. He described the location

of the burning car, the emergency unit, the firetruck, and the flashing lights of those units. He was then asked if he observed other cars parked there and their location. Over objection he was permitted to answer that cars were parked to the east and west on both sides of the road. He then proceeded to describe the location of the two cars involved in the accident, the absence of skid marks, the presence of debris on the pavement and its location, and other conditions. He made it quite patent that he was testifying as to conditions at the time and after his arrival. There is no material conflict as to what he described as existing after his arrival and what other witnesses had described as existing before his arrival except possibly there were more noninvolved cars parked along the highway on either side.

Defendant relies upon Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436. In that case the trial court admitted evidence of foot and tire marks observed at the scene of an accident some 15 or 16 hours after the accident and without a showing that conditions had not changed since the accident. The defendant contends that we held it to be error. He overlooks the fact that we did not hold the error to be prejudicial.

Defendant overlooks the holding in Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854, where we held that: "If sufficient foundation is laid to show that the conditions they observed are the same as existed immediately following the accident, the officers should be permitted to testify in regard to what they observed insofar as it is relevant and material to the issues here involved."

The evidence here falls within the area of trial court discretion. To establish a rule that would exclude such evidence as a matter of law could readily result in a denial of any evidence of what a witness arriving at a scene of an accident might have observed. We see no prejudicial error in the ruling here challenged.

Defendant next argues as error the refusal of the trial

court to give a requested instruction based on section 39-7,110(a), R. R. S. 1943, which is as follows: "No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to the right-hand side of the roadway before coming within one hundred feet of any vehicle approaching from the opposite direction."

The pavement here was 20 feet in width with a marked line down the center. It is undisputed in this case that the south or eastbound normal lane of traffic was at the time of the accident obstructed from 6 to 8 feet along the south side by vehicles, firefighting equipment, and men connected with their operation. This left a lane of from 12 to 14 feet for travel, assuming that there were no cars parked on the north side. There is evidence that there were cars so parked. Plaintiff was given a signal to proceed by a person directing traffic. At that time it is undisputed that the narrowed lane of traffic was clear for passage.

It is defendant's theory that the phrase "center of the roadway" and "right-hand side of the roadway" used in the statute refers to the center of the roadway and right-hand side of the highway as constructed and marked. He further seems to contend that he had the right to proceed westward regardless of eastbound traffic so long as he was using the right of the marked center of the highway. We had occasion to construe the phrase "right half of the highway," as used in other provisions of the statute, in Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839. We held that it meant the right half of the traveled portion of the high-

way that was available for traffic at the time. See, also, Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523. Consistent with that holding we hold here that the phrases used in section 39-7,110, R. R. S. 1943, relate to the center of and right-hand and left-hand sides of the main-traveled portion of the highway available to traffic at the time. The trial court did not err in refusing to give the requested instruction.

Defendant's final argument is that the trial court erred in instructing the jury that it could include in its verdict plaintiff's loss of earnings from the date of injury to the date of trial if it found that he had lost any such earnings. Defendant claims that the evidence was insufficient to sustain an award of any amount for the loss of earnings.

The record discloses that during the progress of the trial the defendant tendered to the court a number of instructions. One request was for an instruction as to the allowance of the present worth of future loss of earnings. A second request was for an instruction as to the requisite proof of future loss of earnings. A third request related to the loss of earnings which the jury may find "have been sustained."

At the close of the trial, without withdrawing his request for instructions referred to above, the defendant moved the court to take from the jury any question of loss of earnings on the ground that there was no evidence, particularly of past earnings.

The trial court advised the defendant that he was not going to submit the issue of loss of future earnings to the jury but was going to "submit the matter of any earnings lost up to the present time." The court then called attention to the evidence of lost earnings. The defendant agreed that there was evidence to sustain that issue.

The rule is that a party cannot complain of the giving of an instruction in harmony with one which he re-

quested. American Fire Ins. Co. v. Landfare, 56 Neb. 482, 76 N. W. 1068. In harmony with that rule it follows that one who at the close of a trial admits that there is evidence to establish an issuable fact in accord with a requested instruction cannot afterward be heard to say that there was no evidence received tending to prove that fact.

The judgment of the trial court is affirmed.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1961

CORN BELT PRODUCTS COMPANY, A CORPORATION, ET AL., APPELLEES, V. PAUL MULLINS ET AL., APPELLANTS, IMPLEADED WITH FARMERS BANK, COOK, NEBRASKA, APPELLEE.

110 N. W. 2d 845

Filed September 29, 1961. No. 34856.

1. **Trial: References.** Where no exceptions are filed to the findings of fact of a referee prior to confirmation by the trial court, the findings of fact are binding on all parties.
2. ———: ———. Objections to the appointment of a referee, or to the qualifications of the person appointed as referee, must be made at the time of the appointment and will not be considered when made for the first time after the report of the referee has been filed and confirmed by the court.
3. **Venue.** Venue in a transitory action is a matter which may be waived and is waived where timely objection is not made.
4. **Accounting.** The basis for equity jurisdiction in an action for an accounting is inadequacy of the remedy at law.
5. **Equity.** Where a court of equity has obtained jurisdiction of a case for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.
6. **Trusts.** When one person obtains property of another by theft or fraud, equity will raise a constructive trust in favor of the defrauded party.
7. **Payment.** Payments made or credits given under a mistake of fact may be rescinded.
8. **Homesteads.** A homestead right does not attach to the title or interest of a purchaser under a real estate contract as against the enforcement of the consideration provided for in the contract.

9. **Vendor and Purchaser.** Strict foreclosure of a real estate contract will be granted under peculiar and special circumstances, where in the exercise of a sound judicial discretion it would be inequitable or unjust to refuse strict foreclosure.

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

William L. Walker and *Earl Ludlam,* for appellants.

Herman Ginsburg and *Phillip F. Nestor, Jr.,* for appellees.

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

BOSLAUGH, J.

This is an action for an accounting and other equitable relief. The cause was referred to a referee to make findings of fact and conclusions of law, to hear evidence and report upon all of the issues, and to make a decision thereon as prescribed in section 25-1131, R. R. S. 1943.

The referee filed his report on February 25, 1960. By a decree dated March 28, 1960, the district court approved and confirmed the report of the referee and entered judgment in accordance therewith. The transcript does not contain exceptions or objections to the report of the referee filed by any of the parties. However, the decree which approved and confirmed the report of the referee recites that the plaintiffs filed a motion to confirm the report of the referee except for a modification in one particular and that no other objections were filed.

On April 5, 1960, the appellants Paul Mullins and Benita Mullins, who were the principal defendants, filed two motions for new trial. One of the motions, which was filed pro se, is largely an attack upon the report of the referee. The other motion, which was filed by the lawyers who represented the defendants at the hearing before the referee, complains only of alleged errors in the decree of the district court. Both motions for new trial were overruled.

A number of the defendants' assignments of error complain of the findings of the referee. The failure of the defendants to file objections to the report of the referee in the court trial prior to confirmation of the report by the trial court prevents consideration of objections to the report of the referee at this time. "The unchallenged findings of fact by a referee, when confirmed by the court, are binding on the party against whom they operate, and from the legal consequences flowing therefrom he can not escape." Chicago Lumber Co. v. Bancroft, 64 Neb. 176, 89 N. W. 780, 57 L. R. A. 910. See, also, McMurtry v. Brown, 6 Neb. 368; 45 Am. Jur., References, § 39, p. 570; 76 C. J. S., References, § 158, p. 278. Thus, for the purposes of this appeal, the findings of fact of the referee, except as modified by the trial court in the decree dated March 28, 1960, will be accepted as true. The only assignments of error which will be considered are those relating to alleged errors of law. There is no cross-appeal.

The appellees, who were the plaintiffs in the court below, are the Corn Belt Products Company and Erwin Equipment Company. Their petition alleged that the plaintiffs were corporations engaged in the sale of farm machinery, equipment, and supplies; that Paul Mullins was an employee of the plaintiffs; that on April 18, 1959, the plaintiffs discovered that Paul Mullins had converted personal property of the plaintiffs having a value of approximately $20,000; that proceeds from such property had been invested in certain other described property or deposited in a bank to the account of Paul Mullins; and that the defendants were insolvent. The petition prayed that the defendants be required to account for all of the plaintiffs' property then in the possession of the defendants and the proceeds from the sale of the plaintiffs' property; that the plaintiffs be adjudged to be the owners of property purchased by the defendants with the proceeds from the sale of the plaintiffs' property; that the defendants be enjoined from

further disposing of the plaintiffs' property; that a receiver be appointed; and that the plaintiffs have judgment for the amount due them.

The defendants filed an answer and cross-petition. The answer contained a general denial and alleged that in November 1953 the plaintiffs employed Paul Mullins as a twine salesman; that in March 1954 his employment was changed to that of warehouse manager at Tecumseh, Nebraska, and other points in southeastern Nebraska, northeastern Kansas, and northwestern Missouri; that Paul Mullins was to be reimbursed for all of his expenses and was to receive a bonus of one-half of the net profits from his operations; that the plaintiffs failed to account to Paul Mullins for the bonus due him; and that he retained the sum of $7,310.85 to apply upon the amount due him. The cross-petition alleged that there was in excess of $47,500 due Paul Mullins as bonus and the sum of $1,925 for other services; that the plaintiffs advanced money to the defendant Paul Mullins to purchase and modernize a residence property in Tecumseh; that all but approximately $500 of the money advanced had been repaid to the plaintiffs by deductions from the drawing account of Paul Mullins; that the plaintiffs had wrongfully caused the Corn Belt Products Company to become the record owner of the property; and that the property was the homestead of the defendants. The defendants prayed for an accounting, judgment for the amounts due them, and that the title to the residence property be quieted in them.

The plaintiffs filed a reply and answer to the cross-petition containing a general denial and alleging that the defendants had defaulted in their contract to purchase the residence property and that pursuant to the terms of the contract the defendants' rights in the property were forfeited; that in an action of replevin pending in the same court the plaintiffs had taken possession of property previously entrusted to Paul Mullins having a value of approximately $19,000; that it was necessary

that the ownership of the property taken in replevin be determined in this action; that after giving the defendants credit for this property there was more than $32,000 due the plaintiffs for property converted by the defendants; and that the defendants were given credits upon the purchase of the residence property without knowledge by the plaintiffs that the defendants had converted the plaintiffs' property.

The referee found that Paul Mullins was an employee of the plaintiffs and that there was no agreement for a bonus as alleged by the defendants; that the property taken in the replevin action was the property of the plaintiffs; that Paul Mullins had converted property of the plaintiffs having a value of $17,516.60; that of this amount $7,337.10 was represented by a bank account and other property purchased by Mullins which should be turned over to the plaintiffs; that the plaintiffs should have judgment against the defendant Paul Mullins for the balance of $10,179.50; that the plaintiffs purchased the residence property in Tecumseh and then entered into a contract to sell the property to the defendants for $4,500; that deductions from the salary of Paul Mullins had reduced the balance due on the contract to $841.20; that approximately $2,000 had been paid on the contract before any substantial conversion of the plaintiffs' property had occurred; that the defendants should be required to pay the plaintiffs $2,500 to receive title to the property; and that if the defendants fail to pay the $2,500, the plaintiffs should pay the defendants $2,000 and retain the title to the property. The referee recommended that judgment be entered in accordance with his findings.

The district court generally approved and confirmed the report of the referee. The court found and adjudged that the property taken in the replevin action was the property of the plaintiffs; that the plaintiffs should receive the bank account and other property which had been purchased by the defendants with the proceeds from the sale of the plaintiffs' property; that the plaintiffs

should have judgment against Paul Mullins for $10,179.50; that the plaintiff Corn Belt Products Company was the owner of the residence property in Tecumseh and that there was a balance of $2,500 due upon the contract; and that unless the defendants paid the sum of $2,500 within 60 days, the Corn Belt Products Company was entitled to strict foreclosure of the contract.

The assignments of error which require consideration are that the trial court erred in making a reference of the cause; in appointing Elmer F. Witte referee; in permitting hearings to be had both in Pawnee County and Johnson County, Nebraska; in not submitting the cause to a jury; in determining in this action the ownership of the property taken in the replevin action; in awarding to the plaintiffs the property which had been purchased by the defendants with proceeds from the sale of the plaintiffs' property; in finding that $2,500 was due upon the contract to purchase the residence property in Tecumseh; and in granting strict foreclosure.

There can be no question about the right of the trial court to make a reference in this case. Both of the parties requested an accounting. Section 25-1130, R. R. S. 1943, authorizes the court to direct a reference upon its own motion where the trial of an issue of fact shall require the examination of mutual accounts, and where the taking of an account shall be necessary for the information of the court before a judgment in cases which may be determined by the court.

The statute further provides that the parties may agree upon a suitable person and the reference shall be ordered accordingly; and that if the parties do not agree, the court shall appoint a referee who shall be free from exception. § 25-1132, R. R. S. 1943. The order appointing the referee in this case recites that Elmer F. Witte was wholly disinterested and was satisfactory to the parties in this case and their respective counsel. Thereafter, the parties proceeded to trial, participated in lengthy hearings before the referee, and made no ob-

jection until after the report of the referee had been filed and approved by the court. In the motion for new trial filed pro se the defendants alleged that the referee was disqualified because he had previously prosecuted Paul Mullins for selling mortgaged cattle and had represented the first wife of Paul Mullins in a divorce action against him. There is no evidence in the record to support these allegations. The defendants' failure to make timely objection to the appointment of the referee precludes any consideration of the objections made for the first time in the motion for new trial. In Morris v. Haas, 54 Neb. 579, 74 N. W. 828, the court said: "It is very clear that until the defendant was confronted with an adverse report he never sought to question the referee's authority, and now, after submitting to the proceeding and taking part therein for about two years, and after the taking of thousands of pages of proof, he cannot be heard to question it." See, also, 76 C. J. S., References, § 67, p. 218, § 87, p. 230.

The defendants complain that it was error for the referee to hold some of the hearings in Pawnee County, that the venue of the action was in Johnson County, and that all of the hearings should have been held in that county where the action was pending. Here, again, is a matter to which no objection was made until the motion for new trial. The general rule is that venue in a transitory action is a matter which may be waived and, generally, it is held to be waived where timely objection is not made. See, Baker v. Union Stock Yards Nat. Bank, 63 Neb. 801, 89 N. W. 269, 93 Am. S. R. 484; 92 C. J. S., Venue, § 124, p. 820; 56 Am. Jur., Venue, § 38, p. 42. We hold that the defendants' participation in the hearings held in Pawnee County without objection was a waiver of the right to object to the hearings being held in Pawnee County.

The defendants also complain that the trial court erred in failing to submit the case to a jury and that the court should not have determined in this action the

ownership of the property taken in the replevin action. This action began as a suit for an accounting. The matter in controversy involved a large number of transactions that took place over several years. The basis for equity jurisdiction in an accounting action is inadequacy of the remedy at law. Schmidt v. Henderson, 148 Neb. 343, 27 N. W. 2d 396. This case was a proper case for equity jurisdiction.

The ownership of the property taken in the replevin action became an issue in the accounting suit under the allegations of the answer to the cross-petition. It does not appear that the defendants sought to eliminate this issue from the case or made any objection to its being determined in this action until the motion for new trial. A complete accounting between the parties would not have been possible if the property taken in the replevin action had not been taken into consideration. Where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation. Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551. Thus, it was proper for the trial court in this action to determine the ownership of the property taken by the plaintiffs from the defendants in the replevin action.

The defendants further complain that the trial court erred in awarding to the plaintiffs the bank account and other personal property defendants purchased with the proceeds from the sale of the plaintiffs' property. The referee found that Paul Mullins had converted property of the plaintiffs having a value of $17,516.60, and of this amount $7,337.10 was represented by a bank account and other property purchased with the proceeds from the sale of the plaintiffs' property. The plaintiffs were entitled to follow the proceeds resulting from the sale of their property and recover from the defendants that property which had been purchased with the proceeds. When one person obtains the property of

another by theft or fraud, equity will raise a constructive trust in favor of the defrauded party. Logan v. Aabel, 90 Neb. 754, 134 N. W. 523. See, also, Lamb v. Rooney, 72 Neb. 322, 100 N. W. 410, 117 Am. S. R. 795; Tecumseh Nat. Bank v. Russell, 50 Neb. 277, 69 N. W. 763; Restatement, Restitution, § 202, p. 818. The trial court properly awarded to the plaintiffs the bank account and other property that Paul Mullins had purchased with the proceeds from the sale of the plaintiffs' property.

The remaining assignments of error which require discussion relate to the contract to purchase the residence property in Tecumseh. The defendants entered into a written contract to purchase the residence property in Tecumseh from the Corn Belt Products Company for the sum of $4,500. The contract called for a down payment of $500 and monthly payments of $100 thereafter until the balance of the purchase price with interest was paid. The defendants failed to make the down payment but deductions from the salary of Paul Mullins reduced the balance due on the contract to $841.20.

A part of the credits were given during the time that Paul Mullins was converting the property of the plaintiffs and embezzling collections which he made. The referee found that approximately $2,000 was paid on the contract before Mullins made any substantial conversion of the plaintiffs' property. The trial court found that the balance due on the contract was $2,500, in effect cancelling all credits except $2,000. This finding was proper because the plaintiffs were entitled to rescind the credits which had been given during the time that Mullins was converting their property and funds and they were not aware of his defalcations. Credits given under a mistake of fact may be rescinded. See Tarascio v. Mancuso, 141 Neb. 225, 3 N. W. 2d 400.

The defendants argue that Benita Mullins is entitled to a homestead interest as against the plaintiffs. They

point out that Benita Mullins did not participate in the conversion of the plaintiffs' property and that the judgment for such conversion is against Paul Mullins only. The important fact is that the consideration for the purchase of the property has never been paid. A vendor's lien is one of the exceptions in the homestead statute. § 40-103, R. R. S. 1943. A homestead right would not arise and attach to the title or interest of the defendants acquired under the contract with Corn Belt Products Company as against the enforcement of the consideration provided for in that contract. Jackson v. Phillips, 57 Neb. 189, 77 N. W. 683. See, also, City Savings Bank v. Thompson, 91 Neb. 628, 136 N. W. 992, 41 L. R. A. N. S. 89; Peterson v. Fisher, 85 Neb. 745, 124 N. W. 145, 133 Am. S. R. 688. The defendants have no homestead right in the residence property in Tecumseh as against the Corn Belt Products Company.

The defendants complain that the trial court erred in granting strict foreclosure of the contract for the purchase of the real estate. A court of equity will grant a strict foreclosure of a real estate contract where in the exercise of a sound judicial discretion it would be inequitable or unjust to refuse to do so. Swanson v. Madsen, 145 Neb. 815, 18 N. W. 2d 217. Courts of equity will decree a strict foreclosure of land contracts only under peculiar and special circumstances. Ruhl v. Johnson, 154 Neb. 810, 49 N. W. 2d 687.

Strict foreclosure has been granted where the purchaser did not have a substantial equity in the property. In this case the purchasers may be said to have an equity in the property only if the real estate contract is considered as a separate matter, detached from the other transactions between the parties. Such a view of the matter ignores the true factual situation.

The real estate contract in this case is between an employee and his wife, and one of his employers. The employee and his wife have had possession of the property for more than 5 years. During this time they have

paid a little over $300 in special and general taxes. The record does not show what other expenditures they may have made.

The only payments which have been made on the contract are credits resulting from deductions from the employee's salary. During his employment the employee has converted more than $17,500 of his employer's property.

It was proper for the trial court, in the exercise of a sound judicial discretion, to grant a strict foreclosure of the contract. The special circumstances in this case made it inequitable to refuse strict foreclosure. We conclude that strict foreclosure should be granted in this case.

The trial court taxed one-half of the referee's fee to the plaintiffs and taxed all other costs to the defendants. Section 25-1137, R. R. S. 1943, provides that referee's fees shall be taxed as part of the costs in the case. There was no error, prejudicial to the defendants, in the taxation of the costs in the district court.

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

AFFIRMED.

KENNETH COLLETT, A MINOR, BY JAMES C. COLLETT, HIS FATHER AND NEXT FRIEND, APPELLANT, V. ALLEN D. HENDRICKSON ET AL., APPELLEES.
110 N. W. 2d 851

Filed October 6, 1961. No. 34970.

1. **Trial: Judgments.** The court examines the evidence on a motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists.
2. ———: ———. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom.

3. ———: ———. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled.

APPEAL from the district court for Custer County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded.*

Haney & Walsh and *Lee & Huston*, for appellant.

Schaper & Schaper and *Beatty, Clarke, Murphy, Morgan, Pederson & Piccolo*, for appellees.

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

BOSLAUGH, J.

This is an appeal in an action for damages arising out of an automobile-pedestrian accident. The trial court sustained the defendants' motion for summary judgment and dismissed the action. The plaintiff's motion to vacate the judgment was overruled and the plaintiff appealed.

The plaintiff, Kenneth Collett, who was 6 years old at the time of the accident, was seriously injured in the accident. The action was brought by James C. Collett as his father and next friend. The defendant, Allen D. Hendrickson, who was 16 years old at the time of the accident, was operating the automobile involved in the accident. The defendant, Wallace Hendrickson, is the father of Allen D. Hendrickson and was the owner of the automobile involved in the accident.

The accident occurred north of the intersection of D Street and Eighth Avenue in Broken Bow, Nebraska. There is no traffic control at the intersection. The Hendrickson automobile had been proceeding east on D Street and had made a left turn to go north on Eighth Avenue. The plaintiff was crossing Eighth Avenue from west to east on foot. The evidence is in conflict as to where the plaintiff was with respect to the crosswalk at the time of the impact and as to what part of the

Hendrickson automobile came in contact with the plaintiff.

The petition alleged that the defendant, Allen D. Hendrickson, failed to keep a proper lookout, failed to yield the right-of-way to a pedestrian, failed to give any warning, and failed to apply his brakes to avoid the collision. Wallace Hendrickson was alleged to be liable for the negligent acts of Allen D. Hendrickson under the family-purpose doctrine. The answer consisted of a general denial and an allegation that the accident was caused solely by the negligence of the plaintiff.

The only question before the court upon a motion for summary judgment is whether an issue of fact exists. In considering a motion for summary judgment the evidence is viewed in the light most favorable to the party against whom the motion is directed, and that party is given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Schlines v. Ekberg, *ante* p. 510, 110 N. W. 2d 49. "In other words, the court can merely determine that an issue of fact does or does not exist. If such an issue does exist, the Summary Judgments Act has no application; if such issue does not exist, a motion for a summary judgment affords a proper remedy. The burden is upon the moving party to show that no issue of fact exists, and unless he can conclusively do so the motion for summary judgment must be overruled." Ingersoll v. Montgomery Ward & Co., Inc., 171 Neb. 297, 106 N. W. 2d 197.

It is unnecessary to summarize the evidence in detail. There is evidence that the left front fender of the Hendrickson automobile struck the plaintiff while the plaintiff was on or near the crosswalk north of the intersection; that the defendant Allen D. Hendrickson failed to see the plaintiff before the impact; and that the defendant did not sound his horn and did not apply his brakes before the impact. There is also evidence that the defendant Wallace Hendrickson purchased and maintained the Hendrickson automobile for the use of his son who

was operating it with his consent at the time of the accident.

The defendants produced a large amount of evidence which conflicts with the evidence that is favorable to the plaintiff. The defendants' evidence also tends to establish contributory negligence and questions the credibility of the testimony favorable to the plaintiff. However, so far as the motion for summary judgment in this case is concerned, this evidence establishes only that a question of fact does exist. The defendants have failed to prove conclusively that no issue of fact exists.

The defendants' motion for summary judgment should have been overruled. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CLARENCE R. OTTEMAN, APPELLEE, V. THE INTERSTATE FIRE & CASUALTY CO., INC., A CORPORATION, APPELLANT.
111 N. W. 2d 97

Filed October 13, 1961. No. 35007.

1. **Trial: Judgments.** The summary judgment procedure is not intended to be used as a device to prevent a trial of an action on the merits but is available only when no genuine issue of fact exists.
2. **Insurance.** Where waiver by denial of liability or coverage is involved, it is not necessary that the denial be express or unequivocal, it being sufficient that the facts and circumstances warrant the inference that liability was or would be denied.
3. ———. An insured may not be deprived of his rights by a narrow and technical construction of formal requisites by which that right is to be made available. On the contrary, a liberal and reasonable construction should be given.
4. ———. The provision against settlement by insured cannot be taken advantage of by an insurer where it unreasonably delays to take any action after notice of the claim.
5. ———. An unreasonable delay to process insured's claim will amount to a denial of coverage and will constitute a waiver of any policy provisions regarding defense or settlement of the claim.

6. ———. Where an insurer waives its right to defend, this leaves the insured free to defend the action to judgment or, in good faith, to make such settlement as ordinary and reasonable prudence and caution might indicate to be advisable.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Affirmed.*

William G. Line, for appellant.

Spear, Lamme & Simmons, for appellee.

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

SPENCER, J.

This is an action by Clarence R. Otteman, an insurance agent, hereinafter referred to as plaintiff, against Interstate Fire & Casualty Co., Inc., hereinafter referred to as defendant, upon a policy covering claims arising from errors and omissions the plaintiff might commit as an insurance agent. Trial was had to the court without a jury and judgment was entered for the plaintiff. Defendant appeals.

This case was previously before the court on the vacation of a summary judgment. Otteman v. Interstate Fire & Cas. Co., Inc., 171 Neb. 148, 105 N. W. 2d 583. The trial court originally sustained a motion filed by the defendant for summary judgment. At the same term of court, the judgment was vacated. An appeal was taken to this court by the defendant and was dismissed for the reason that the vacation of the summary judgment was not an appealable order. The defendant's first three assignments of error and much of the argument in its brief relate to the vacation of the summary judgment. The defendant apparently does not appreciate that the court examines the evidence on a motion for a summary judgment, not to decide any issue of fact present but *solely* to discover if any real issue of fact exists. If there is an issue of fact to be determined, a summary judgment cannot be entered. Healy v. Metropolitan

Utilities Dist., 158 Neb. 151, 62 N. W. 2d 543.

It will be apparent from what is said hereafter that a material issue of fact was present in this record. As already noted, the trial court found for the plaintiff on the evidence adduced. Suffice it to say that the summary judgment procedure is not intended to be used as a device to prevent a trial on the merits but is available *only* when no genuine issue of fact exists.

The plaintiff in 1953, through the Reynolds General Agency at Fremont, Nebraska, secured an insurance brokers and agents errors and omissions policy issued by the defendant. Through renewals, this policy was maintained in full force and effect until December 7, 1960. On January 22, 1957, one Voss applied to the plaintiff as an agent for the Farmers Mutual Insurance Company of Nebraska for the renewal of a policy of fire insurance in that company on certain personal property, including a tractor and a cornpicker. The plaintiff through error failed to send the application to the Farmers Mutual Insurance Company and the insurance policy then in force was not renewed. The plaintiff did not collect or remit a premium for the renewal. The plaintiff had been writing insurance for Voss for several years. The usual procedure was for the plaintiff to pay for the insurance when billed by the company at the end of the month. He would then bill Voss after the policy was issued. However, no bill was ever rendered to Voss in this instance.

On October 18, 1958, the tractor and the cornpicker owned by Voss were damaged by fire. Voss filed a claim for $1,433.37 with plaintiff as agent for the Farmers Mutual Insurance Company. When the claim was forwarded to the company the plaintiff discovered his failure to secure the renewal and subsequently found the original application in his office files. On November 20, 1958, the Farmers Mutual Insurance Company refused the claim for the reason that the Voss property was not insured. The plaintiff then notified the Reynolds

General Insurance Agency that Voss was making claim against him for the loss. On November 21, 1958, that agency wrote the managing agent for defendant about the loss and requested proper forms to process it. No reply was received. The agency wrote again on December 1, 1958, December 11, 1958, and June 15, 1959. The Reynolds General Insurance Agency never received a reply to any of its letters despite the fact that it also filed two complaints with the Department of Insurance of the State of Illinois because of the failure of the defendant to reply.

William G. Line, defendant's attorney, who was called as a witness on behalf of plaintiff, testified that he was appointed as attorney for the defendant on December 11 or 12, 1958, and that he wrote the plaintiff at once. The defendant's testimony indicates that the plaintiff visited Line's office 11 times about the claim between December 12, 1958, and July 18, 1959. Line testified that he never inspected the loss; that the plaintiff brought him two estimates on the loss; and that the plaintiff brought Voss to his office. He further testified that he wrote the defendant about the matter on eight occasions as follows: December 16, 1958; December 19, 1958; February 26, 1959; March 27, 1959; June 19, 1959; July 20, 1959; July 22, 1959; and September 30, 1959. The only replies he received were on February 23, 1959; July 16, 1959; October 14, 1959; and December 21, 1959. This action was filed December 12, 1959.

Mr. Line wrote plaintiff on February 24, 1959, as follows: "I received a letter from the company today and they would like to have estimates on the damage. I have estimates from Ladehoff's at North Bend and I will send that in today but I believe it would be helpful to get another independent estimate. The company is reserving its decision as to whether you are liable to Voss under the facts of the case but they would like to have me interview Voss to see if a possible settlement can be arranged. I can contact Voss, myself, or if you

would prefer, you can ask him to get in touch with me for an appointment."

The defendant lists 17 assignments of error. Excluding those assignments referring to the vacation of the summary judgment referred to heretofore, we find that the defendant's main contentions may be grouped as follows: First, the loss is specifically excluded from the policy because it was brought about by the failure to collect or to remit a premium; second, that the Farmers Mutual Insurance Company was liable for the loss and not the plaintiff; and third, that the plaintiff breached the policy conditions by an unauthorized settlement without notice to the defendant and without the defendant's consent. We will discuss these contentions in the order listed above.

Was the loss specifically excluded by the policy? The exception in the policy is as follows: "This Insurance shall not indemnify the Insured in respect of any claim * * * (d) brought about or contributed to by any commingling of or inability or failure to pay or collect premium, claim or tax moneys." The evidence is undisputed that in the plaintiff's dealings with the Farmers Mutual Insurance Company it was customary for him to send in the renewal application without money; that the policy would be renewed; and that he would be billed by the company for the premiums at the end of the month. When he received the renewal he would then bill the customer. We do not believe the exclusion applies in this case. It was not the failure to collect a premium but rather it was the failure to send in the renewal application which resulted in the failure to renew. If the defendant's policy has any meaning, this would be an error or omission within the terms of the policy.

The second contention may be disposed of very summarily. The evidence adequately establishes that by the terms of the fire insurance policy issued by the Farmers Mutual Insurance Company there could be

no liability on its part until the renewal application had actually been received and accepted by the company at its home office. It is admitted that the renewal application was never sent to the insurance company but was mislaid in the office of the plaintiff.

The third contention is the major one and, the record would indicate, the one which gave the trial court the most concern. The policy contains the following conditions: "The Insured shall not admit liability for or settle any claim or incur any costs or expenses in connection therewith without the written consent of the Company, who shall be entitled at any time to take over and conduct in the name of the Insured the defense of any claim.

"Nevertheless, the Insured shall not be required to contest any legal proceedings unless a lawyer (to be mutually agreed upon by the Insured and the Company) shall advise that such proceedings should be contested."

The plaintiff contends, and the trial court found, that the defendant by its conduct waived its right to insist upon the plaintiff's compliance with this provision. What is the purpose of the provision? Is it not to keep the insured from admitting liability until the company has an opportunity to fully investigate the claim and to determine its position? How long must the insured wait for the company to do so? Must he wait until after suit is filed or judgment secured or execution levied before he can settle, if ever, without the written consent of the defendant? There are annotations in 49 A. L. R. 2d 694 and 67 A. L. R. 2d 1086 covering the situation where an insurance company denies liability. All jurisdictions would appear to hold that the denial of liability relieves the insured from his contract obligation not to settle, and that he may do so even before suit.

In Barrett v. Northwestern Mutual Life Ins. Co., 124 Neb. 864, 248 N. W. 391, which involved the failure to file proof of loss after a denial of liability, we said at page 871: "Waiver by denial of liability is based largely

upon the principle that the law does not require a vain, useless, or unnecessary thing. The general rule is that a denial by the insurer, or its authorized agent, of liability under its policy, or any act or artifice to mislead the insured, and cause him to omit to perform a duty he would otherwise have performed, will operate as a waiver of a provision requiring proof. In fact, to effect a waiver by a denial of liability on the part of the insurance company, the denial must be of such a character, or made under such circumstances, as reasonably to induce the belief that the submission of proofs will be useless. Nor need the denial be express or unequivocal, it being sufficient that the facts and circumstances warrant the inference that liability was, and would be, denied. The insured may not be deprived of his rights by a narrow and technical construction of formal requisites, by which that right is to be made available. On the contrary, a liberal and reasonable construction should be given."

In Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623, we held that an insurer's denial of liability waived its right to defend and left the insured free to defend or in good faith to make such settlement as ordinary and reasonable prudence and caution might dictate.

In the instant case, there was no outright denial of liability until July 21, 1959, when Mr. Line wrote the plaintiff as follows: "The Interstate Fire & Casualty Company has asked me to advise you that they do not feel this loss is covered under your policy. Their position is that, by virtue of your agency agreement with the Farmers Mutual, you had authority to bind the Farmers Mutual and did bind them when you received Voss's application. They feel that the Farmers Mutual was in error in denying Voss coverage and the Farmers Mutual should properly bear this loss." The plaintiff had settled with Voss on May 21, 1959.

The plaintiff's position is that the defendant's unrea-

sonable delay to take action after notice of the claim released him from this provision of the policy even though the defendant had not specifically refused to act or defend him. Briefly reviewing the evidence, the defendant was advised of the claim November 21, 1958. It never acknowledged the letters from the insurance broker or ever communicated with the broker or directly with the plaintiff. It did contact Mr. Line who wrote the plaintiff about December 11. According to defendant's testimony, the plaintiff visited Line's office about the claim on December 12, 1958, and on January 10, February 16, February 24, March 13, March 27, April 27, May 15, June 18, July 17, and July 18, 1959. On February 24, 1959, Line wrote the letter set out heretofore stating that the company was reserving its decision on liability and asking for an interview with Voss. The plaintiff secured an additional estimate for Line and brought Voss to Line's office. Subsequent to that letter, and before settlement, the plaintiff visited Line's office four times. The plaintiff testified that on May 20, 1959, he informed Line that the Vosses wanted a settlement or they would have to do something about it, and that Line said, "let them sue." He then testified that he told Line he didn't want to do that, that he was going out and make a settlement with them, and that Line asked him to obtain a release and gave him a release form.

It should be noted that although Line wrote the defendant four times before settlement was made, he received only one reply, the one of February 23, which it can be assumed occasioned the letter of February 24 to the plaintiff. The next letter he received from the defendant was dated July 16, 1959, and it can be assumed this occasioned his letter of July 21.

The plaintiff was an insurance agent in a small community. He had failed to process a renewal for a customer and as a result that customer sustained a substantial loss to farm machinery. That loss occurred in

October 1958. The customer had every right to expect settlement within, at most, a few weeks. Plaintiff settled the claim in May 1959, 7 months after the claim arose. At the time he made the settlement it was evident that the defendant was not disposed to pay the claim. Defendant's attorney, Line, had said in effect, "let them sue." It is not too unreasonable to assume that under the facts in this case, if the plaintiff had refused to settle and had stood suit, he was risking serious potential harm to his future insurance business. His action was entirely reasonable under the circumstances. Our problem is, was the defendant's delay unreasonable under the circumstances, and if so, was it sufficient to amount to a waiver of the requirement of written consent.

In 45 C. J. S., Insurance, § 937, p. 1072, we find the rule stated as follows: "The provision against settlement by insured cannot be taken advantage of by insurer, where it unreasonably delays to take any action, after notice of the claim, * * *." The leading authority for the rule seems to be a 1915 Kentucky case, Interstate Casualty Co. v. Wallins Creek Coal Co., 164 Ky. 778, 176 S. W. 217, L. R. A. 1915F 958, which held a delay of 3 months was unreasonable. This case is quoted with approval in Thomas Kilpatrick & Co. v. London Guarantee & Accident Co., 121 Neb. 354, 237 N. W. 162, which case follows the general rule that denial of liability waives the compliance with a policy provision for the forwarding of process served on the insured. In that case at page 361 we find the following: "In Interstate Casualty Co. v. Wallins Creek Coal Co., 176 S. W. 217 (164 Ky. 778), it is said: 'A policy of employer's liability insurance provided that the insurer should not be responsible for settlements made by insured not specially authorized in writing by the insurer, and agreed to investigate all claims and defend all suits. The employer, having become liable to an employee for personal injuries, duly notified the in-

surance company, who investigated the case, but took no further steps in the matter, nor did it repudiate liability. After a delay of three months the employer settled the claim for a reasonable amount, and brought suit for reimbursement against the insurance company. Held, that the insurer was estopped to rely on the stipulation forbidding settlement.' "

We have no hesitancy in finding that the evidence amply discloses an unreasonable delay on the part of the defendant in processing the plaintiff's claim. We further find that such delay amounted to a denial of coverage and constituted a waiver of any right to insist on the policy provision regarding defense or settlement.

The defendant in its reply brief said: "In all of the cases cited by appellee, and appellant does not disagree with their holdings, only their materiality and similarity to the instant case, there appears to be a requirement that the insured's liability be established or the insured's liability to the claimant is unquestioned."

The defendant is questioning the legal liability of the plaintiff to Voss. Certainly if he is doing so on the grounds set out in his letter of July 21, 1959, we have summarily disposed of that point. In any event, we believe the proper rule to be the one suggested in what might be considered a comparable situation in Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623. If an insurer waives its right to defend, this leaves the insured free to defend the action to judgment or, in good faith, to make such settlement as ordinary and reasonable prudence and caution might indicate to be advisable. There can be no question in this record but that the plaintiff settled in good faith.

The trial court rendered judgment in favor of the plaintiff and against the defendant for the sum of $1,155.31 together with interest from May 21, 1959, attorneys' fee in the amount of $750, and court costs. The plaintiff settled the claim for $1,433.37. Under the

terms of the policy the plaintiff had agreed to pay the first $250.

Defendant questions the allowance of an attorneys' fee to the plaintiff. Section 44-359, R. R. S. 1943, provides as follows: "In all cases where the beneficiary, or other person entitled thereto, brings an action at law upon any policy of life, accident, liability, sickness, guaranty, fidelity, *or other insurance of a similar nature,* or upon any certificate issued by a fraternal beneficiary association, against any company, person or association doing business in this state, the court, upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings." (Italics supplied.) It is true that the errors and omissions policy is not one of those specifically enumerated in the statute. It is in effect, however, a liability policy. If the phrase "or other insurance of a similar nature" has any meaning we must hold that an errors and omissions policy is included within that phrase. The trial court properly allowed an attorneys' fee of $750.

Defendant also questions the allowance of interest from May 21, 1959, which was the date of the settlement. We find no merit to the defendant's contention.

For the reasons herein stated, the judgment of the trial court is in all respects affirmed, and plaintiff's attorneys are allowed an additional fee of $300 for services in this court.

AFFIRMED.

EDWARD STEVENS, APPELLANT, V. COUNTY OF DAWSON, STATE OF NEBRASKA, APPELLEE.
111 N. W. 2d 220

Filed October 20, 1961. No. 34994.

1. **Counties.** A county is not an insurer of the safety of the bridges it constructs and maintains upon highways for the use of the public.
2. **Counties: Negligence.** In an action to recover damages from a county under section 39-834, R. R. S. 1943, the burden is on the plaintiff to establish negligence on the part of the county.
3. ———: ———. In an action to recover damages from a county on account of injury or death caused by a defective bridge on a public highway, the plaintiff must prove by a preponderance of the evidence that the defect was known or that it existed for such a length of time that with reasonable diligence it could or should have been discovered by the county.
4. ———: ———. A county is not liable for negligence on account of latent defects in a bridge on a public highway but only for such as are patent and may be ascertained by reasonable inspection.
5. ———: ———. A county is not liable for negligence for injury or death on account of defects caused by climatic conditions beyond its control.
6. **Appeal and Error.** A party requesting instructions on a certain theory cannot be heard to complain on appeal that the trial court gave other instructions on the same theory.
7. ———. The refusal to give an instruction is not reviewable where it was not assigned as error in the motion for new trial.

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

William S. Padley, for appellant.

William A. Stewart, Jr., for appellee.

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

BOSLAUGH, J.

This is an action against Dawson County, Nebraska, for damages caused by a defective bridge. Edward Stevens, the appellant, was the plaintiff in the court below. The jury returned a verdict for the county.

The plaintiff's motion for new trial was overruled and he has appealed.

The plaintiff's assignments of error are that the verdict is contrary to the evidence and the law; that the court erred in submitting the issue of contributory negligence to the jury; and that the court erred in failing to give an instruction requested by the plaintiff relating to the assured clear distance rule.

The liability of a county for defective highways and bridges is statutory. § 39-834, R. R. S. 1943. The rules applicable to an action under the statute are as follows: The burden is on the plaintiff to establish negligence on the part of the county. The county is not an insurer of the safety of the bridges it constructs and maintains upon public highways. The plaintiff must prove by a preponderance of the evidence that the defect in the bridge was known or that it existed for such a length of time that with reasonable diligence it could or should have been discovered by the county. The county is not liable on account of latent defects in the bridge but only for such as are patent and may be ascertained by reasonable inspection. The county is not liable on account of defects in a bridge caused by climatic conditions beyond its control. Wittwer v. County of Richardson, 153 Neb. 200, 43 N. W. 2d 505.

The accident in which the plaintiff was injured occurred at approximately 8:30 p. m. on March 26, 1960. The plaintiff was driving his new Chevrolet pick-up truck south on a county road in Dawson County. At a point approximately 3½ miles north of Gothenburg, Nebraska, a bridge or box culvert across the highway had partially collapsed. There were no barricades or other warning devices posted on the road. The plaintiff approaching from the north did not see that the bridge was out in time to avoid driving onto the bridge and into and against the embankment at the south end of the bridge where the collapse occurred.

The evidence shows that the bridge in question was

constructed of concrete and was erected more than 25 years ago. The bridge consisted of a concrete deck or floor supported by two upright back walls. On each side of the back walls, wings ran back at an angle for approximately 5½ feet. The opening under the bridge was approximately 8 feet wide and 4 feet high. The bridge extended across the highway 17 or 18 feet and lengthwise in the traveled portion of the road for 10½ feet.

The creek that runs under the bridge drains an area of more than 30 square miles. Several days before the accident happened there had been a very heavy run-off of water from melting snow. One witness testified that all of the streams in the area were running at flood stage on March 22, 1960, 4 days before the accident happened. There was other testimony that the water had stopped running in the creek from 4 to 6 days before the accident happened.

The bridge was inspected by two employees of the defendant on March 23, 1960. One of the employees testified that at that time the opening of the bridge was about two-thirds full of water and the water outside the bridge was 50 or 75 feet wide and against the road. The inspection consisted of driving across the bridge in a pick-up truck and looking for holes or washouts. No effort was made to look under the bridge or ascertain the condition of the back walls supporting the deck or floor of the bridge.

On the afternoon of the accident the plaintiff went to town and returned home about 4:30 p. m. On this trip the plaintiff crossed the bridge twice and did not notice anything out of the ordinary about the bridge. Luella Stevens, the plaintiff's wife, was over the bridge at around 5 p. m. the same afternoon. She did not see anything wrong with the bridge. J. R. Auld, a farmer who lives just north of the bridge, was over the bridge with a farmhand at about 6:30 p. m. on the day of the accident.

On the morning after the accident the floor or deck of the bridge at the southwest corner was still intact and level with the surface of the road, but the southeast corner was 4 feet 9 inches below the surface of the road. A part of the south back wall of the bridge had fallen to the north and was lying under the deck of the bridge. The water had washed a deep hole under the south back wall of the bridge which resulted in its collapse.

The plaintiff's theory of the facts is that the south back wall of the bridge settled and fell to the north while there was water still running in the creek; that the south end of the floor or deck of the bridge was supported by only the earthen bank south of the back wall for some time before it collapsed; and that if the defendant had made an adequate and timely inspection of the bridge it would have discovered that the south back wall had collapsed, would have been able to warn the plaintiff, and, thus, avoided the accident.

There is no direct evidence as to when the back wall of the bridge may have collapsed. One witness, a brother-in-law of the plaintiff, testified that on the morning after the accident he saw that silt had been deposited upon the back wall by the washing water. No other witness so testified. A state safety patrolman testified specifically that he did not see any silt on the abutment. Other witnesses testified to the presence of mud and standing water under the bridge after the accident. The jury was not compelled to find that the back wall collapsed while there was water still running in the creek.

The plaintiff's other allegation of negligence had reference to a concrete "floor" at the bottom of the opening under the bridge which had washed away several years before the accident. There was a failure of proof as to this allegation. What evidence there was tended to prove that the floor was unnecessary and that the county was not negligent in failing to replace it.

The verdict of the jury is not contrary to the evi-

dence and the law. The assignment of error to that effect is not sustained.

On the second day of the trial the plaintiff filed a list of nine instructions to be submitted to the jury. Six of the requested instructions related to the rules of the road and the standard of care required of the plaintiff. The plaintiff did not withdraw any of the requested instructions and did not request that the issue of the negligence of the plaintiff, if any, be withdrawn from the jury. Clearly, the case was tried upon the theory that contributory negligence was an issue to be submitted to the jury. A party requesting instructions on a certain theory cannot be heard to complain on appeal that the trial court gave other instructions on the same theory. Ballantyne v. Parriott, *ante* p. 215, 109 N. W. 2d 164. The plaintiff cannot now complain that the trial court erred in submitting the issue of contributory negligence to the jury.

Two of the instructions requested by the plaintiff related to the assured clear distance rule. Of these requested instructions, one was given by the trial court and the other was refused. The plaintiff's motion for new trial did not assign as error the refusal of the trial court to give the instruction requested. To review alleged errors in refusing instructions, they must be called to the attention of the trial court in the motion for new trial. Schmitt & Bro. Co. v. Mahoney, 60 Neb. 20, 82 N. W. 99.

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

LUELLA STEVENS, APPELLANT, V. COUNTY OF DAWSON, STATE OF NEBRASKA, APPELLEE.
111 N. W. 2d 223

Filed October 20, 1961. No. 34995.

Trial. Instructions must be construed together, and if, when construed as a whole they properly state the law, they are sufficient.

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

William S. Padley, for appellant.

William A. Stewart, Jr., for appellee.

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

BOSLAUGH, J.

This is an action against Dawson County, Nebraska, for damages caused by a defective bridge and is a companion case to case No. 34994, Stevens v. County of Dawson, *ante* p. 585, 111 N. W. 2d 220. Luella Stevens, the appellant, was the plaintiff in the court below and is the wife of Edward Stevens. The plaintiff was a passenger in the truck operated by her husband and was injured when the truck collided with the embankment at the south end of a bridge which had partially collapsed.

By stipulation this case and case No. 34994 were consolidated for trial. Both cases were submitted to the jury upon one set of instructions. The jury returned a verdict for the county. The plaintiff's motion for new trial was overruled and she has appealed.

The plaintiff's assignments of error are that the verdict is contrary to the evidence and the law; that the court erred in submitting the issue of the negligence of Edward Stevens to the jury; and that the instructions were conflicting and contradictory.

There is but one bill of exceptions in this case and

case No. 34994. The facts and evidence necessary to the decision in this case are stated in the opinion in case No. 34994 and will not be repeated here. For the reasons stated in Stevens v. County of Dawson, *supra*, we conclude that the verdict in this case is not contrary to the evidence and the law and the assignment of error to that effect is not sustained.

The plaintiff contends that the trial court erred in submitting to the jury the question of whether the negligence of Edward Stevens was the sole proximate cause of the accident. On the second day of the trial the plaintiff filed a list of nine instructions to be submitted to the jury. Six of the requested instructions related to the rules of the road and the standard of care required of the driver, Edward Stevens. The plaintiff did not withdraw any of the requested instructions and did not request that the issue of the negligence of Edward Stevens, if any, be withdrawn from the jury. The case was tried upon the theory that the negligence of Edward Stevens was an issue to be submitted to the jury. A party requesting instructions on a certain theory cannot be heard to complain on appeal that the trial court gave other instructions on the same theory. Ballantyne v. Parriott, *ante* p. 215, 109 N. W. 2d 164. The plaintiff cannot now complain that the trial court erred in submitting the issue of the negligence of Edward Stevens to the jury.

The plaintiff contends that instruction No. 19 given by the trial court was erroneous in that it contradicted instruction No. 12. Instruction No. 12 related to the burden of proof of the plaintiff and advised the jury that before the plaintiff could recover she must prove by preponderance of the evidence, among other things, that the proximate cause of her injuries and damages was the negligence of the defendant or the concurring negligence of the defendant and Edward Stevens. Instruction No. 19 related to the measure of damage and advised the jury that the plaintiff could recover the damages shown

to be "the natural and proximate consequences of the negligence of the defendant proven." When instruction No. 19 is considered together with the other instructions given it does not appear that it was erroneous. By instruction No. 13 the court advised the jury that the negligence of Edward Stevens could not be imputed to the plaintiff, and that she could not recover if the sole proximate cause of the accident was the negligence of Edward Stevens. Instructions must be construed together, and if, when construed as a whole they properly state the law, they are sufficient. Pearson v. Schuler, *ante* p. 353, 109 N. W. 2d 537.

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

AFFIRMED.

INEZ HUTSELL, APPELLANT, V. REECE EDENS AND SYBIL R. EDENS, DOING BUSINESS AS EDENS SCHOOL OF HAIRDRESSING, ET AL., APPELLEES.

111 N. W. 2d 388

Filed October 27, 1961. No. 34967.

1. **Appeal and Error.** Where a case has been dismissed on the ground that the evidence did not sustain the cause of action in favor of the plaintiff, this court, on review, is required to resolve every controverted fact in his favor and to give him the benefit of every reasonable inference which may be deduced from the evidence.
2. **Negligence.** The plaintiff as an invitee seeking to recover damages on account of a fall on the premises of an inviter, in order to recover, is required to furnish proof of actionable negligence and of proximate cause.
3. ———. The fact alone that an invitee falls upon the stairway of an inviter does not raise a presumption of negligence on the part of the inviter, and in such instance the doctrine of res ipsa loquitur does not apply.

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

Hal W. Bauer, for appellant.

Groth & Biehn and *Cline, Williams, Wright, Johnson, Oldfather & Thompson,* for appellee Reece Edens.

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

YEAGER, J.

This action as originally instituted was an action for damages on account of injury sustained by Inez Hutsell, plaintiff, appellant here, against Reece Edens and Sybil R. Edens, doing business as Edens School of Hairdressing, and Community Development Company, a corporation, defendants. Before the trial of the case Sybil R. Edens died. As to her there was no revivor. The case was tried to a jury. At the conclusion of the evidence on the part of the plaintiff, the defendant Community Development Company moved in the alternative for a directed verdict or for dismissal of the petition for the reason that the evidence did not sustain a cause of action. This motion was sustained and no appeal has been taken from that adjudication. At the same time the other defendants filed a similar motion, ruling on which was at the time reserved. At the conclusion of all of the evidence this latter motion was renewed at which time it was sustained and the action of the plaintiff was by the judgment of the court dismissed. From this judgment the plaintiff has appealed. The only appellee, since there was no revivor as to Sybil R. Edens, is Reece Edens.

The action grows out of a fall by plaintiff on a flight of steps leading from the first or ground floor to the basement of premises at 230 North Thirteenth Street in Lincoln, Nebraska, occupied by the appellee and Sybil R. Edens as a school of hairdressing and beauty culture. The fall occurred on April 21, 1958. The plaintiff was a registered student at the school having registered on or about January 24, 1958, and having been in regular

attendance thereafter until her fall on April 21 of that year.

The action is predicated on negligence and proximate cause, and the question, in the light of the record, is that of whether or not there was evidence in the record on which to base a finding that the appellee was guilty of negligence which was the proximate cause of plaintiff's fall and of her injuries. The alleged grounds of negligence are in substance as follows: (1) Failure to have the stairway lighted; (2) failure to have proper handrails; (3) failure to have proper covering on the steps; (4) failure to have steps of sufficient width; (5) maintaining a stairway which was too steep for safety; and (6) neglecting to keep the stairway in repair.

It is of course true that the action having been dismissed on the ground that the evidence did not sustain the plaintiff's cause of action, this court on review is required to resolve every controverted fact in her favor and to give her the benefit of every reasonable inference which may be deduced from the evidence. See, Christ v. Nelson, 167 Neb. 799, 95 N. W. 2d 128; Wrona v. Schrawger, 171 Neb. 814, 108 N. W. 2d 95.

The description of the premises to the extent necessary to set it out herein and to the extent possible to state it in the light of the contents of the record is about as follows: This school was located on the ground floor at 230 North Thirteenth Street in Lincoln, Nebraska. It faced to the west. The number of rooms has not been made certain. There was however a partition extending from east to west. The area to the south of the partition was referred to as the professional side. On the north of the partition was the students' side. At the extreme east end on the students' side was a classroom the dimensions of which were about 12 by 15 feet. There were no windows in this classroom. There was an entrance to this classroom through a door from the north or students' side. The exact location of this door is not made known but obviously it was some distance west

of the east end of the classroom. At some point along the east wall of the classroom was an opening in the floor for a stairway which led downward and in a southerly direction along the east wall into a basement. The stairway was 2½ to 3 feet in width. There was a partial enclosure about the entrance to the stairway. This was the east wall of the building and what was called a railing which was some distance to the south of the entrance to the stairway and on the west side thereof. This was of solid paneling construction and was 3 or 4 feet high. This stairway extended downward into a basement which was used for storage of wraps worn by those in attendance at the school. About this there is no substantial dispute.

The pertinent evidence as reflected by the record on the question of negligence and proximate cause and the manner in which the accident happened, stated most favorably to the plaintiff, discloses that there were 11 steps from the top to the bottom of the stairway. The angle of descent was 44 to 45 degrees. The stairway was open back of the treads. The maximum tread width ranged from 6⅞ to 7¼ inches, although the usable portion on descent was somewhat less on account of necessary clearance of the step above. The vertical distance between the steps was 7 inches. There was one light and no windows in the classroom where the stairway was located. This was a bulb light. There is evidence on the part of the appellee that there were other lights, but this is disregarded here since this is unfavorable to the plaintiff. The upper part of the stairway was lighted a part of the way down, just how far is not disclosed, but over the area a shadow was thrown by the plaintiff and the railing. There was no other light. Somewhere on the ceiling of the basement near the top of the stairs was a basement light and light switch. The exact location has not been disclosed. This light was not on, at least at the commencement of the incident which is under inquiry here.

The pertinent evidence which reflects what actually happened is the following: The accident happened just after the plaintiff returned from lunch at about 1 p.m. The plaintiff entered on the students' side, spoke briefly to Sybil R. Edens, after which she went back to the classroom. After that she went directly to the stairs with her coat. When she reached the stairs she started down and descended "approximately" four steps. She then reached out to turn on the light in the basement ceiling over the stairway, the purpose of which was to furnish light to the stairway and to light the basement. She extended her arm to turn on the light. She fell. She said that "The steepness and the darkness of the stairs and no lighting down there and reaching for that light" caused her to fall.

There is no other or further evidence of probative value in the record relating antecedently or at the time to the proximate cause of the fall. The conditions that day were well known to the plaintiff and she was using these premises as had been her wont regularly since January 24, 1958.

In the evidence there is nothing to sustain plaintiff's burden of proving that any one or more of her allegations of negligence amounted to actionable negligence. There is nothing whatever to show directly or by reasonable inference that anything which the appellee did or failed to do was the proximate cause of her fall.

The plaintiff has proceeded on the theory that she was an invitee and that the appellee was bound by the duties owed to invitees. There is no doubt that the plaintiff was an invitee and that the appellee owed this duty to her. The appellee does not contend otherwise, but there was no obligation to respond in the absence of proof of actionable negligence and proximate cause.

In Broadston v. Beddeo Clothing Co., 104 Neb. 604, 178 N. W. 190, this court said in a case where a customer brought action: "The fact that a customer falls upon a stairway does not raise any presumption of negligence

on the part of the proprietor of the store, and the doctrine of res ipsa loquitur does not apply."

In the opinion in that case the following significant language appears: "It is not shown that she looked down where she was standing before turning to descend the stairs, and that because of poor light she was unable to see the floor or carpet." See, also, Thompson v. Young Men's Christian Assn., 122 Neb. 843, 241 N. W. 565; Annotations, 64 A. L. R. 2d, § 13, p. 451, 66 A. L. R. 2d, § 12, p. 473.

Nebraska cases, pro and con, bearing on the duty of an inviter to an invitee are collected in Rankin v. J. L. Brandeis & Sons, 135 Neb. 86, 280 N. W. 260. A perusal of the opinion in this case makes it clear that where there is a lack of evidence of actionable negligence and of proximate cause, as is true in this case, there is no question for determination by a jury.

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

AFFIRMED.

RONALD HENN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
111 N. W. 2d 385

Filed October 27, 1961. No. 34974.

1. **Criminal Law.** To justify a conviction on circumstantial evidence it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and when taken together must be of such character as to be consistent with each other and with the hypothesis sought to be established and thereby inconsistent with any reasonable hypothesis of innocence.
2. ———. The corpus delicti is the body or substance of the crime, the fact that a crime has been committed without regard to the identity of the person committing it.
3. ———. Corpus delicti may be proved either by direct or circumstantial evidence.

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

Bernard Ptak, for plaintiff in error.

Clarence A. H. Meyer, Attorney General, and *Dwain L. Jones,* for defendant in error.

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

CARTER, J.

This is a criminal action in which the defendant, Ronald Henn, was charged with the crime of motor vehicle homicide, as defined by section 28-403.01, R. R. S. 1943. The jury found the defendant guilty and he was sentenced to serve 1 year in the State Reformatory. The defendant seeks a review of the case by petition in error.

It is provided by section 28-403.01, R. R. S. 1943, that whoever shall cause a death without malice while engaged in the unlawful operation of a motor vehicle shall be deemed guilty of the crime of motor vehicle homicide. The State specified the following acts as constituting the unlawful operation of defendant's automobile which resulted in the deaths of Leonard Bahm and Helen Bahm: (1) By driving his automobile at an excessively high rate of speed under the existing circumstances, (2) by failing to keep a proper lookout and in driving his automobile into the rear of the automobile of the deceased, (3) by driving his automobile at a rate of speed in excess of the lawful and posted rate, and (4) by driving his automobile in such a manner as to indicate a willful and wanton disregard for the safety of persons and property on the highway. It is the sole contention of defendant that the evidence of the State is insufficient to sustain a verdict and that the trial court erred in not sustaining defendant's motion for a directed verdict.

The accident occurred on October 31, 1959, near the entrance to Ta-Ha-Zouka Park on U. S. Highway No.

81 south of Norfolk. The exact locale of the accident is not set forth in the record but we infer from the evidence that it is about 2 miles south from the center of the city of Norfolk and approximately ½ mile south of the viaduct south of that city. It was stipulated that the speed limit over the highway involved was 45 miles per hour, and properly so posted. The highway from the foot of the viaduct to the park entrance and beyond was a level, 24-foot, blacktop road. The entrance to the park was on the east side of the highway. The south side of the driveway into the park was lined with guard posts, beyond which is a body of water referred to in the record as the park lagoon.

At about 7:30 p.m. on the day in question, defendant, accompanied by two other young men, drove his automobile south over the viaduct on U. S. Highway No. 81. Close to the entrance to the park defendant's automobile collided with something on the highway which was later determined to be the automobile of the Bahms. Defendant's automobile went into the ditch on the left side of the road and lodged in the park fence. From the point of impact to the point where defendant's car left the blacktop was 43 feet as shown by skid marks. Defendant's car left skid marks for a distance of 94 feet north of the point of impact. The three young men riding in the car were injured and were unable to state what they had struck or what had actually happened. The front end of defendant's car suffered great damage, indicating that it had hit something head-on with great force.

Two gouge marks in the south-bound traffic lane were determined to be the point of impact. It was 315 feet from the gouge marks to where defendant's car came to rest after the accident. In the attempt to find with what defendant's car had collided, skid marks leading across the park entrance to the guard posts were discovered. One guard post was down and another bent. Approximately 2 hours after the accident the automo-

bile of the Bahms was found completely submerged in the lagoon about 50 feet from the bank. A wrecker removed the automobile from the lagoon and the bodies of Leonard and Helen Bahm were found therein. The rear end of the Bahm car was badly damaged by a force applied to its rear. All the circumstances indicate that the Bahm car was struck in the rear by the defendant's car.

There is evidence in the record by Mrs. Harry Tiedtke that she was driving south on the downward side of the viaduct just prior to the accident. A light green car passed her on the viaduct at a speed she estimated at 75 miles per hour. She saw the car by its lights until it veered from the road at the point of the accident. While her testimony was somewhat impeached by the testimony she gave at the inquest and preliminary hearing, her credibility was for the jury. Her evidence as to speed and the nature of the damage to the two cars involved in the collision, together with the circumstances adduced, were sufficient to go to the jury on the question of speed. See, Rimpley v. State, 169 Neb. 171, 98 N. W. 2d 868; Olney v. State, 169 Neb. 717, 100 N. W. 2d 838.

It is the contention of the defendant that the proof is largely circumstantial and insufficient to bring the case within the rule stated in Rimpley v. State, *supra,* as follows: "To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence."

The defendant relies upon certain statements adduced on cross-examination to establish a theory inconsistent with a reasonable hypothesis of guilt. The evidence shows that the Bahm car when taken from the water had serious front-end damage. The defendant contends that

the damage to the front end was such that it indicated a front-end collision with the rear of a truck or trailer of a type in common use. The investigating highway patrolman stated that the damage indicates it could possibly have been caused by running into such a vehicle. On cross-examination he was permitted to state that in his opinion the damage was caused when the Bahm car plunged into the lagoon. We point out that there is no evidence that such a truck or trailer was in the neighborhood when the accident occurred, nor was there any evidence that the front-end damage to the Bahm car was not incurred prior to this accident and that the car was being driven in its damaged condition. There is no evidence that if the Bahm car was driven into such a truck or trailer in a head-on collision it would result in the car plunging into the lagoon, nor is there any evidence as to what defendant's car struck if the assumptions advanced by the defendant are correct. The contention of the defendant is based on pure speculation and conjecture. It does not support a reasonable hypothesis of defendant's innocence. While it was admissible as tending to create doubt in the minds of the jury as to the guilt of the defendant, it does not create such a doubt as a matter of law under the circumstantial evidence rule hereinbefore stated. The question was one for the jury.

The defendant contends also that there was no evidence to prove the corpus delicti. It is the rule of course that the corpus delicti must be established by evidence beyond a reasonable doubt. It may be proved either by direct or circumstantial evidence. The corpus delicti is defined as the body or substance of a crime, the fact that a crime has been committed without regard to the identity of the person committing it. Andersen v. State, 141 Neb. 306, 3 N. W. 2d 447. The evidence shows that the Bahm car came to rest in the lagoon a considerable distance south of defendant's car. The skid marks on the pavement point in the direction of

the defendant's car and the Bahm automobile. The rear-end damage to the Bahm car and the front-end damage to defendant's car, when considered in connection with the skid marks on the pavement and the location of the cars after the accident, establish that defendant's car hit the rear end of the Bahm car. When tested, after the Bahm car was taken from the water, its lights were found to have been on and operating, indicating that they were on and operating before the collision. A bumper guard was found at the scene of the accident which was later discovered to have come off the Bahm car. The evidence is sufficient to sustain a finding by the jury that defendant drove his automobile at an excessive rate of speed into the rear of the Bahm car, causing it to plunge into the lagoon and resulting in the deaths of Leonard and Helen Bahm. From this the jury could find that the corpus delicti was established.

The defendant offered no evidence in the case. The transcript does not contain the instructions of the court pursuant to the direction of defendant that they be omitted. We must assume that they were in all respects correct and that there was evidence to support them. The case was for the jury and, there being sufficient evidence in the record to support the verdict of guilty, a judgment of affirmance is required.

AFFIRMED.

YORK COUNTY RURAL PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLANT, V. RALPH E. O'CONNOR ET AL., APPELLEES.

111 N. W. 2d 376

Filed October 27, 1961. No. 34990.

1. **Equity.** An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
2. **Electricity: Corporations.** The Legislature gave to public pow-

er districts all the usual powers of a corporation organized for public purposes. § 70-625, R. R. S. 1943. These are more fully set forth in § 70-626, R. R. S. 1943, and § 70-655, R. R. S. 1943. They are intended to permit the business of the district to be operated in a successful and profitable manner.

3. ———: ———. The reasonableness or unreasonableness of rates charged or action taken by the board of directors of a public power district is a proper matter for judicial examination and review.

4. Declaratory Judgments. The Uniform Declaratory Judgments Act is applicable where there is a present controversy, all interested persons are made parties, and justiciable issues are presented.

5. ———. The Uniform Declaratory Judgments Act is available to a public power district organized and existing under and by virtue of the provisions of sections 70-601 to 70-679, R. R. S. 1943, to secure a declaration as to the reasonableness of rates or charges where a controversy has arisen between the district and its customers.

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

John R. Brogan and *Herman Ginsburg,* for appellant.

John E. Dougherty, for appellees.

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

SPENCER, J.

In this action the appellant, York County Rural Public Power District, hereinafter called the plaintiff, seeks to establish the validity and propriety of a rate charged for electrical services furnished by the plaintiff to Ralph E. O'Connor and Paul O'Connor, appellees, hereinafter called the defendants. It also seeks a declaration that the defendants are obligated to pay the rate established by the plaintiff, and for other appropriate consequential relief. The trial court sustained a demurrer to plaintiff's second amended petition, and when the plaintiff refused to plead further, entered an order of dismissal. Plaintiff appeals.

The plaintiff sets out 10 assignments of error. We will

group them into two categories: First, whether the trial court committed prejudicial error in sustaining the demurrer; and second, whether the Uniform Declaratory Judgments Act is available under the facts pleaded. Only the allegations in plaintiff's second amended petition necessary to understand the questions involved will be summarized herein.

The plaintiff brings this action for declaratory judgment, for an injunction, and other equitable relief under and pursuant to the provisions of sections 25-21,149 to 25-21,164, R. R. S. 1943. Plaintiff is a public power district and a political subdivision of the State of Nebraska, duly organized and existing under and by virtue of the applicable provisions of sections 70-601 to 70-679, R. R. S. 1943, with its principal place of business in the city of York, York County, Nebraska. Defendants are customers of the plaintiff, and their dwelling houses are in close proximity to each other in a rural area in Fillmore County. For a considerable period of time prior to 1959, the defendants were supplied with electrical power and energy through one meter for the two dwelling houses. In February 1959, the board of directors of the plaintiff, by appropriate action and for good and sufficient reason, changed the policy of the district to provide that where two dwellings were supplied with electrical power and energy through the same meter, separate meters would be installed, or, if the customers preferred, a different rate schedule, called the multiple dwelling rate, would apply. The defendants objected to the new policy, refused to permit the installation of separate meters, and refused to recognize the multiple dwelling rates as applicable to them. Plaintiff's bills are payable monthly. The defendants for the period from September 20 to October 20, 1959, a billing period, consumed 1,729 kilowatt hours of electrical energy. The amount due the plaintiff from the defendants for said electrical energy under the rate fixed by the plaintiff is $46.58. The amount which would have been due under

the previously existing rate would have been $38.95. The defendants remitted the sum of $38.95 to the plaintiff and refuse to pay more than said amount for the electrical energy furnished. Plaintiff contends that to permit the defendants to pay the old rate would be to grant the defendants a discriminatory rate and rebate in violation of the plaintiff's obligation to its other customers and would be contrary to law. Plaintiff alleges that the defendants threaten the plaintiff with an action for all consequential damages if the plaintiff should discontinue the furnishing of electrical energy for their appliances.

Plaintiff also alleges that it has no adequate remedy at law because the relationship between the parties is a continuing one and a multiplicity of actions would be required in order for plaintiff to recover at each billing period for the amount due plaintiff under its applicable rate. Plaintiff further alleges that this cause is a justiciable controversy between the parties and that the plaintiff is entitled to a declaratory judgment finding that the rates and regulations adopted by the plaintiff are in all respects proper and applicable to the defendants. The prayer of the plaintiff's petition, which we set out verbatim, is as follows: "WHEREFORE, plaintiff prays for declaratory judgment herein, finding and adjudging that the defendants are obligated to pay to the plaintiff for electrical energy furnished by the plaintiff to defendants' premises, the multiple dwelling rate assessed by the plaintiff, and that the court find further that the multiple dwelling rates established by the plaintiff is applicable to defendants' dwellings and is a just, valid and proper rate which the defendants are obligated to pay to the plaintiff; that the court enter judgment against the defendants and each of them for the amount lawfully due the plaintiff under the multiple dwelling rate, and that the defendants be enjoined from interfering with the discontinuance of electric service to the defendants' premises upon the failure or refusal

of the defendants to pay the amount due the plaintiff under its said rate; that the court determine the controversy between the parties and uphold the validity of the rate assessed and asserted by the plaintiff; that judgment be entered against the defendants for all sums lawfully due the plaintiff; that the cost of this action be assessed against the defendants; and for such other, further and different relief as may seem just and equitable to the court in the premises."

The demurrer filed by the defendants stated only one reason, "* * * that said petition does not state facts sufficient to constitute a cause of action against the defendants or either of them." The trial court sustained the demurrer and rendered judgment dismissing the action when the plaintiff refused to plead further.

The sole question is, did the petition in its essentials set forth that the plaintiff was entitled to any relief whatsoever? This question must be answered in the affirmative. Even if the petition could be held defective for declaratory judgment purposes, it did state a cause of action as against a general demurrer for the recovery of a sum of money for electrical energy furnished to the defendants by the plaintiff. The defendants so admit in the following from their brief: "When this petition is boiled down in its final analysis, it is nothing more than an action at law to recover upon an account for electricity furnished to the defendants at their special instance and request." This requires a reversal. However, we believe the question as to the applicability of the Uniform Declaratory Judgments Act to the facts pleaded herein should also be determined.

Defendants urge that plaintiff has an adequate remedy at law; that every possible issue that could be litigated in this case could be litigated in a case at law; and that where this is the case, the Uniform Declaratory Judgments Act will not be employed. We have no quarrel with defendants' conclusion if their premise were correct. We cannot, however, accept their premise.

Plaintiff's petition alleges that the electrical energy furnished the defendants was charged at regular billing periods. Each billing period would constitute a separate cause of action. Beck v. Devereaux, 9 Neb. 109, 2 N. W. 365. If the allegations herein for declaratory judgment relief were stricken and this action presented as one at law for the recovery of one month's electrical energy, would that judgment be res judicata as to the next billing? Would that judgment be a final determination of the reasonableness of the charge for future billings? The answer is obvious. It would not. An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N. W. 2d 150.

Plaintiff does have a remedy at law. However, we agree with the plaintiff that the remedy at law is not adequate and that plaintiff's petition states a cause of action for equitable relief.

Plaintiff, by virtue of section 70-602, R. R. S. 1943, is designated as a public corporation and political subdivision of this state. Section 70-655, R. R. S. 1943, requires the board of directors to fix, establish, and collect adequate rates for electrical energy or other services furnished by the plaintiff. Such rates are required to be fair, reasonable, and nondiscriminatory. We said at page 793 of United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576, which involved the Omaha Public Power District: "The Legislature gave to public power districts all the usual powers of a corporation organized for public purposes. § 70-625, R. R. S. 1943. These are more fully set forth in section 70-626, R. R. S. 1943, and section 70-655, R. R. S. 1943. They are intended to permit the business of the district to be operated in a successful and profitable manner."

If the plaintiff district is to be operated in a successful and profitable manner, someone must determine the

rate necessary to permit it to do so. Section 70-655, R. R. S. 1943, requires plaintiff's board of directors to make that decision. It also provides that the rates be fair, reasonable, and nondiscriminatory. In the case of a dispute between the plaintiff and its customers as to the reasonableness of the rates charged, who has the authority to review the action of the board of directors? Section 70-656, R. R. S. 1943, provides: "The Nebraska State Railway Commission shall have no jurisdiction over the rates, tolls, rents and charges of districts organized under sections 70-601 to 70-679." If the railway commission does not have authority, who does? We have previously answered this question. At page 659 of Erickson v. Metropolitan Utilities Dist., 171 Neb. 654, 107 N. W. 2d 324, we said: "In the performance of the functions under the power granted by the statute the district in the matter of service rendered and rates to be charged therefor, the question of whether or not the district has acted unreasonably and arbitrarily has been recognized as a matter proper for judicial examination and review. The case of Keystone Investment Co. v. Metropolitan Utilities Dist., 113 Neb. 132, 202 N. W. 416, 37 A. L. R. 1507, is one wherein there was such a review. No case has been cited or found to the opposite effect." We find that the reasonableness or unreasonableness of rates charged or action taken by the board of directors of a public power district is a proper matter for judicial examination and review.

In the instant case, plaintiff has in effect determined that a higher rate for the type of service enjoyed by the defendants is essential to permit it to operate profitably. Defendants refuse to recognize the right of the plaintiff to raise its rates. Defendants would certainly have had a right, if they cared to invoke it, to enjoin the enforcement of the multiple dwelling rate if they could prove that it was arbitrary, discriminatory, or unreasonable. American Water-Works Co. v. State ex rel. Walker, 46 Neb. 194, 64 N. W. 711, 50 Am. S. R. 610, 30 L. R. A.

447; Keystone Investment Co. v. Metropolitan Utilities Dist., 113 Neb. 132, 202 N. W. 416, 37 A. L. R. 1507; Erickson v. Metropolitan Utilities Dist., 171 Neb. 654, 107 N. W. 2d 324. Is the plaintiff without a reciprocal right?

We have said that the Uniform Declaratory Judgments Act is applicable where there is a present controversy, all interested persons are made parties, and justiciable issues are presented. Graham v. Beauchamp, 154 Neb. 889, 50 N. W. 2d 104, and cases cited therein. The allegations of plaintiff's petition appear to meet this test. Essentially, the plaintiff's petition is seeking a judicial determination of its right to establish a multiple dwelling rate and to require defendants to permit the installation of separate meters or to require them to pay the multiple dwelling rate, and for a determination of the reasonableness of the rate. The very purpose of the Uniform Declaratory Judgments Act is to provide the relief that plaintiff seeks, a declaration of the rights of the parties.

For the reasons stated, the trial court was in error in sustaining defendants' demurrer to plaintiff's petition. The judgment of dismissal is hereby reversed and the cause remanded for further proceedings, in harmony with this opinion.

REVERSED AND REMANDED.

EDNA ACTON, APPELLANT, V. WYMORE SCHOOL DISTRICT NO. 114 ET AL., APPELLEES.
111 N. W. 2d 368

Filed October 27, 1961. No. 35040.

1. **Workmen's Compensation. An injury sustained by an employee while going to and from his work does not arise out of and in the course of his employment.**
2. **———. Walking on the employer's premises to and from the street and a building where one is employed is a necessary inci-**

dent of employment, and an injury sustained in so doing is compensable.

3. **Municipal Corporations.** The word "street" is a generic term and embraces the entire width of the public way as delineated or described on the plat. It embraces everything from property line to property line.
4. ———. As so defined, a sidewalk in the public way is a part of the street.
5. **Workmen's Compensation.** McDonald v. Richardson County, 135 Neb. 150, 280 N. W. 456, and De Porte v. State Furniture Co., 129 Neb. 282, 261 N. W. 419, construed and distinguished.

APPEAL from the district court for Gage County: ERNEST A. HUBKA, JUDGE. *Affirmed.*

McCown, Wullschleger & Baumfalk, for appellant.

Cline, Williams, Wright, Johnson, Oldfather & Thompson, for appellees.

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

SPENCER, J.

This is a proceeding under the Workmen's Compensation Act. The appellant, Edna Acton, hereinafter called the plaintiff, was an employee of the appellee, Wymore School District No. 114, hereinafter called the defendant. Following a hearing before a single judge of the Nebraska Workmen's Compensation Court, the action was dismissed. The plaintiff then appealed directly to the district court for Gage County, which also entered an order of dismissal. The plaintiff's motion for new trial was overruled and the plaintiff perfected her appeal to this court.

The only issue involved in this appeal is whether the injury sustained by the plaintiff arose out of and in the course of her employment by the defendant.

The undisputed evidence would indicate that on and previous to February 2, 1960, the plaintiff was employed by the defendant as a cook. On her way to work on the early morning of February 2, 1960, plaintiff slipped on

an icy sidewalk bordering the school in which she was employed, broke her ankle, and incurred considerable medical expense. The sidewalk completely surrounds the school and it is not possible for anyone to enter the building or the school grounds without at some point passing over the sidewalk. Exhibit 13 establishes that the sidewalk on which the plaintiff fell is on city property, is 1.78 feet north of the defendant's property line, and is a public walk. However, the evidence is undisputed that the defendant removed all snow from the sidewalk and kept it free from obstruction. Further, the melting snow which formed the ice on which the plaintiff slipped had been pushed to the side of the sidewalk by an employee of the defendant. The defendant did not take any measures to keep ice from forming from the melting snow. The superintendent of schools testified that no one else did anything with reference to the sidewalk except the defendant or its employees. The evidence is also undisputed that the defendant paid for all repairs made to the sidewalk by the city.

The plaintiff contends that walking to and from the street and the building where one is employed is a necessary incident of employment, and an injury sustained in so doing is compensable. Plaintiff slipped on a sidewalk less than 2 feet from her employer's property, which sidewalk she contends was under the employer's control. The ice which caused her fall was formed by runoff from the employer's property, and when she slipped she fell partly on that property.

It is well established in this jurisdiction that an injury sustained by an employee while going to and from his work does not arise out of and in the course of his employment. Siedlik v. Swift & Co., 122 Neb. 99, 239 N. W. 466; Richtarik v. Bors, 142 Neb. 226, 5 N. W. 2d 199, 142 A. L. R. 881; Lincoln Traction Co. v. Reason, 143 Neb. 512, 10 N. W. 2d 344; Fidelity & Casualty Co. v. Kennard, 162 Neb. 220, 75 N. W. 2d 553.

The plaintiff contends that the present case constitutes

an exception to the general rule, and relies primarily on the case of McDonald v. Richardson County, 135 Neb. 150, 280 N. W. 456. In that case, the plaintiff, a county employee, slipped on a driveway leading from the courthouse to the street. This driveway was customarily used by pedestrians to enter or leave the courthouse. In that case, we quoted with approval from Kasari v. Industrial Commission, 125 Ohio St. 410, 181 N. E. 809, 82 A. L. R. 1040, as follows: " 'Traversing the zone between the entrance of the employer's premises and the plant where an employee is employed is one of the hazards of the employment.' A well-recognized annotator, in considering this case, states: 'By the weight of authority injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment within the workmen's compensation acts, and this rule is supported by the later cases.' 82 A. L. R. 1044."

At page 234 of Fidelity & Casualty Co. v. Kennard, 162 Neb. 220, 75 N. W. 2d 553, we said as follows: "In McDonald v. Richardson County, 135 Neb. 150, 280 N. W. 456, this court recognized an exception to this general rule. The exception as stated in that case is to the effect that an employee, leaving the premises of the employer in the usual and customary way after the work period has ended, is within the course of the employment within the meaning of the Workmen's Compensation Act. * * *

" 'The reason upon which the exception is grounded is that the hazards of entering or leaving the place of employment while on the property of the employer are hazards of the employment which must be assumed by the employer. The employer is obliged to provide safe ingress and egress to and from the place of employment for employees entering or leaving its property in the performance of the work of the employment. * * * But this is on the theory that the employer has control

of the premises and the employee and that the risks of entering or leaving the place of work are incidental to the employment.' "

The defendant, however, argues that the instant case is controlled by our holding in De Porte v. State Furniture Co., 129 Neb. 282, 261 N. W. 419, which was decided by this court in 1935, 3 years earlier than McDonald v. Richardson County, *supra.* In that case, the plaintiff fell on the sidewalk in front of her employer's premises, a few feet from the entrance, as she was leaving for her noonday lunch. Her fall was caused by ice formed by water dripping from the canopy maintained by the employer over the sidewalk. We held the injury in that case occurred on a public sidewalk which was not a part of the employer's premises, and where the employee was exposed to no other or different hazard than the general public. We there said at page 285, quoting a portion of what is now section 48-151, R. R. S. 1943: " 'Without otherwise affecting either the meaning or interpretation of the abridged clause, "Personal injuries arising out of and in the course of employment," it is hereby declared: Not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen.' Hence, to be compensable, the accident must have arisen out of and in the course of the employment as limited by the above definition. The plaintiff here, when injured, was not actually engaged in any duty of her employment nor upon the premises where the work of her employer was carried on, unless by construction we can hold that passing over the sidewalk in front of her employer's place of business, on her own time for which she was not paid, at the noon hour to get her lunch and to do a personal errand brings her within the scope of the compensation law."

Plaintiff argues that the De Porte case is not con-

trolling herein because it was modified by the adoption of the exceptions to the general rule in the McDonald case. We do not accept the plaintiff's premise. The De Porte case was referred to in the McDonald case at page 151 in the most general terms, as follows: "It is of course the general rule that if an employee is injured while going to or from his work to his home (Siedlik v. Swift & Co., 122 Neb. 99, 239 N. W. 466), or is injured while absent from the employment for lunch (De Porte v. State Furniture Co., 129 Neb. 282, 261 N. W. 419), * * * the injury does not arise out of nor in the course of the employment." However, the distinction between the cases is apparent in the next paragraph, a portion of which is as follows: "In the instant case the employee was not engaged in the business of her employer. She was leaving the place of employment, *but she was still upon the premises of the employer. She was on the courthouse grounds in the course of going home.*" (Italics supplied.)

It is true that in McDonald v. Richardson County, *supra,* we said: "Walking to and from the street and a building where one is employed is a necessary incident of the employment, and an injury sustained in so doing is compensable."

The use of the term "street" may at first appear to give substance to the plaintiff's claim. The difficulty is that the term is not confined to that portion of the public way which is devoted to vehicular traffic, which in the instant case would be the paved area to the north of the parking which borders the sidewalk on the north. The word "street" is a generic term and ordinarily embraces the entire width of the public way as delineated or described on the plat. Or, in other words, it embraces everything from property line to property line. This would include, in the area involved in the instant case, the paved portion used by vehicular traffic, the parkway, the sidewalk, and an area 1.78 feet between the sidewalk and the defendant's property line. See deci-

sions cited in 40 Words and Phrases (Perm. ed.), p. 277 et seq. It was in this light that the term "street" was used in the McDonald case. It was not our intention to extend the exception beyond the actual limits of the employer's premises. We now say walking on the employer's premises to and from the street and a building where one is employed is a necessary incident of employment and an injury sustained in so doing is compensable. So construed, there is no conflict between the De Porte case and the McDonald case. In the former, the employee was on the sidewalk *off* the employer's premises. In the latter, the employee was still on a driveway *on* the employer's premises.

It was stipulated that the school where plaintiff was employed is located in Block 28, Ashby's Addition in the city of Wymore. Exhibit 2, offered by the plaintiff, is a plat of the area on which the school is located, showing the street. Exhibit 13 locates the sidewalk in the street, and shows it to be 1.78 feet north of the defendant's property line. In the instant case, therefore, it is evident that the plaintiff had not yet reached her employer's premises, and consequently the exception to the general rule in the McDonald case is not applicable.

The plaintiff calls our attention to the fact that it has long been the policy of this state to give a liberal construction to the workmen's compensation law so that its beneficient purposes might not be thwarted by a technical refinement of interpretation. This is still the policy. However, it has no application in the instant case. The plaintiff sustained an unfortunate accident less than 2 feet away from her employer's premises. If we were to interpret the employer's premises to extend beyond the employer's property line, how far should we go? Should we stop at the north end of the sidewalk? Should we stop at the north end of the parkway where the parkway joins the portion paved for vehicular traffic? Should we go to the middle of that paved portion, or should we include all of the street?

To hold that a sidewalk, which is a part of the street and which is beyond the defendant's property line, is a part of the defendant's premises as that term is used in the Workmen's Compensation Act, would not be interpretation but legislation. It is not the function of the court to create a liability where the law creates none.

Plaintiff also argues that the water which ran onto the sidewalk came off the defendant's premises; that the defendant exercised control of the sidewalk; and that the defendant was responsible for the condition of the sidewalk. If control is a factor, there is no evidence in this record that the control exercised by the defendant over the sidewalk was other or different than that exercised by any landowner over the sidewalks bordering his property. Certainly, however, the plaintiff was exposed to no other or different hazard than the general public using the same sidewalk. In any event, this is an action under the Workmen's Compensation Act and not a tort action. The Workmen's Compensation Act does not provide the coverage. The injury sustained by the plaintiff did not arise out of and in the course of her employment.

For the reasons given above, the judgment of the trial court in dismissing the plaintiff's appeal must be affirmed.

AFFIRMED.

IN RE APPLICATION OF MELVIN EARL WILSON FOR A WRIT OF HABEAS CORPUS.
MELVIN EARL WILSON, APPELLANT, V. THOMAS S. SOLOMON, SHERIFF OF CASS COUNTY, NEBRASKA, APPELLEE.
111 N. W. 2d 372

Filed October 27, 1961. No. 35043.

1. **Habeas Corpus. The sufficiency of evidence adduced at a preliminary examination to hold an accused to answer for a crime**

with which he is charged may be raised and tried in habeas corpus proceedings.

2. ———. In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of evidence taken at a preliminary examination to require a person to be tried on a criminal charge, the court will not weigh the evidence but will only inquire as to the existence of evidence to sustain the charge.

3. **Criminal Law.** While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with slight corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation.

4. ———. A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of Article I, section 11, of the Constitution of Nebraska.

APPEAL from the district court for Cass County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Francis M. Casey, for appellant.

James F. Begley, for appellee.

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

MESSMORE, J.

The petitioner, as relator, sought release and discharge from custody of the respondent Thomas S. Solomon, sheriff of Cass County, by habeas corpus action filed in the district court upon the alleged ground that there was no sufficient or competent evidence adduced at the preliminary hearing that the crime of forcible rape had been committed, or that there was probable cause to believe the relator committed the alleged offense.

At the hearing upon the merits of the habeas corpus action there appears a bill of exceptions of the evidence taken at the preliminary hearing, including a voluntary statement made by the relator to the sheriff about 9:45 a.m., November 8, 1960. Thereupon, the trial court denied the writ and refused to release the relator who, for clarity, will be hereinafter called defendant. Thereafter the defendant's motion for new trial was over-

ruled, and an appeal was taken to this court.

The defendant assigns as error, in substance: (1) The trial court erred in finding that the evidence adduced at the preliminary hearing was sufficient to hold the accused for trial in the district court; (2) the trial court erred in finding there was sufficient evidence adduced at the preliminary hearing to prove a corpus delicti; and (3) the trial court erred in failing to release and discharge the defendant from custody pursuant to his request for a writ of habeas corpus.

The following rules of law are applicable in the instant case.

In Birdsley v. Kelley, 159 Neb. 74, 65 N. W. 2d 328, this court held: "The sufficiency of evidence adduced at a preliminary examination to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings. * * * In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of evidence taken at a preliminary examination to require a person to be tried on a criminal charge, the court will not weigh the evidence but will only inquire as to the existence of evidence to sustain the charge."

In Gallegos v. State, 152 Neb. 831, 43 N. W. 2d 1, in dealing with a trial on the merits in the district court, we held: "While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with slight corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation." In that opinion we quoted with approval the following from Limmerick v. State, 120 Neb. 558, 234 N. W. 98: " 'The rule that the corpus delicti cannot be proved by the confession of the defendant is true as a general proposition, yet confessions or admissions may be considered in connection with the other evidence to establish the corpus delicti. It is not necessary to prove the corpus delicti by evidence entirely

independent and exclusive of the confession or admissions. Groover v. State, 82 Fla. 427; 26 A. L. R. 380; 17 R. C. L. 64, sec. 69.' " Thereafter, citing Egbert v. State, 113 Neb. 790, 205 N. W. 252, Whomble v. State, 143 Neb. 667, 10 N. W. 2d 627, and Clark v. State, 151 Neb. 348, 37 N. W. 2d 601, we said: "This principle has often been reaffirmed by this court."

In Lingo v. Hann, 161 Neb. 67, 71 N. W. 2d 716, we said: " 'A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of section 11, art. 1 of our Constitution.' Roberts v. State, 145 Neb. 658, 17 N. W. 2d 666.

"The functional purpose of the preliminary hearing is stated in section 29-506, R. R. S. 1943, as follows: 'If upon the whole examination * * * it shall appear that an offense has been committed and there is probable cause to believe that the person charged has committed the offense, the accused shall be committed to the jail of the county in which the same is to be tried, there to remain until he is discharged by due course of law; * * *.'

" 'It is in no sense a trial of the person accused. Its purpose is to ascertain whether or not a crime has been committed, and whether or not there is probable cause to believe the accused committed it.' Roberts v. State, *supra.*

"The effect of the foregoing, if found to exist, is to hold the accused for trial in the district court, which has jurisdiction to try him. See Dobrusky v. State, 140 Neb. 360, 299 N. W. 539." That is what the county court of Cass County did. See Cotner v. Solomon, 163 Neb. 619, 80 N. W. 2d 587.

The record shows that Carol Sindelar is 20 years of age and lives at 1204 South Fourth Street in Plattsmouth; that she is a married woman, separated from her husband; and that she has one child, a little girl, and is expecting another child. This witness works at the Western Electric plant. Her hours are from 3:30

p.m., until midnight. Prior to November 7, 1960, she rode to work with a Mr. Ellingson and other employees of Western Electric. On November 7, 1960, the defendant Wilson took over the transporting of this witness and other employees of Western Electric to and from work. This witness testified that she had not been acquainted with the defendant before that time; that there were two other ladies and Mr. Ellingson who rode with the defendant; and that she did not know what the ladies names were, but she referred to one as Janet and the other as Gertie. They left Plattsmouth about 2:30 p.m. She got off work at midnight. All of the same people rode back to Plattsmouth in the defendant's car, and they drove straight through to Plattsmouth. Gertie was let out first at her home, Mr. Ellingson was let out second, and Janet was let out next. After these people left the car, the defendant drove his car over a hill and started to take her home. Just after they got around the corner about 2 or 3 blocks from her home, the defendant stopped as though something was the matter with the car. There were no houses real close in the vicinity where the defendant stopped the car. She was seated in the back seat of the defendant's 1956 4-door black Ford. The defendant had been seated behind the steering wheel of the car. When the car stopped, it must have been 10 or 15 minutes before 1 a.m. She was unable to remember whether or not the defendant shut off the motor of the car. She did remember that the defendant jumped out of the car and she asked him what the trouble was. He replied that he did not know. The defendant went to the front of the car and looked down, then he went to the back of the car and looked down. He then opened the left rear door of the car and looked in. She said: "What's the matter?" The defendant, by the use of foul and revolting language, informed her he intended to have sexual intercourse with her. She did not realize or know what he was saying, and could not believe him. Then the defendant got

into the car and pushed her over. She started to scream and the defendant put his hands around her throat, pulled her clothes down, and had intercourse with her. She attempted to fight him by struggling, throwing her arms, kicking her legs, and trying to hit him with her purse. The defendant grabbed the purse and threw it on the floor of the car. She was wearing slacks, a girdle, and panties. The defendant pulled her clothes down below her hips. The defendant threatened her, told her not to scream, that he did not want to hurt her, and asked her why she kept saying "no." She further testified that she is 5 feet 3 inches tall and weighs 100 pounds; that she did not consent to having intercourse with the defendant; that she told him at all times to stop; and that she was afraid of him. After the act was completed, the defendant jumped out of the car, got back into the front seat, and drove to within half a block of her home. The defendant said: "You're not going to tell any one, are you?" He said: "Don't tell any one, because if my wife finds out about this * * *." Then he said nothing more. This witness jumped out of the car and ran to her home. She awakened her mother and father and told them what had happened. After she got home her throat was red.

On cross-examination this witness testified that when the defendant stopped his car he pulled over to the right side of the road. She did not remember whether or not he shut off the lights on his car. When he pulled her clothes down he kept one hand against her throat. She was trying to push him away and trying to fight him off. She screamed two or three times "fairly loud." She fought him off all the time, trying to get him away from her, and she was crying. She further testified that she did not "black out," but was close to it, and remained conscious all the time; that she was trying to hit him and was swinging her arms and was bound to hit him sometime but not hard enough to do any good; and that she arrived home about 1:15 a.m.

There is testimony to the effect that when she saw the doctor there were no marks or bruises on her, and there were no marks or bruises on the defendant.

The sheriff testified that he received a report from Mrs. Sindelar's father by telephone close to 3 a. m.; that her father told him that when his daughter arrived home there were marks on her throat; that the father, mother, and daughter came to his office the next morning about 8 a.m.; that after a conference with them he contacted the county attorney who came to his office; and that he sent a deputy to find the defendant and ask him to come to the sheriff's office.

When the defendant arrived at the sheriff's office he made a statement, a part of which we set forth in substance. The defendant stated that he had known Carol Sindelar for several years, but he had not visited personally with her other than when they were riding in the car pool; that he had never asked her for a date during their association in the car pool rides; and that he got out of the driver's side of the car and went to the left rear door and opened it. Carol was sitting on the left side of the back seat. He told her he was going to have intercourse with her. She screamed and started kicking. He had his hands around her waist and pushed her down on the seat. He used both of his hands to pull her clothing down. Prior to the time the act of intercourse was finally consummated, Carol stopped fighting. After completing the act, he told her not to tell anyone about the incident. He had never touched any part of Carol's body prior to that time.

In the light of the evidence heretofore set forth and the authorities cited here, we conclude that the judgment of the trial court should be and is hereby affirmed.

AFFIRMED.

EMIL A. BAME, JR., APPELLANT, V. LIPSETT, INCORPORATED, ET AL., APPELLEES.

111 N. W. 2d 380

Filed October 27, 1961. No. 35085.

1. Statutes. Where a right has been created by statute which did not exist at the common law, the Legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the act and must be fully complied with in the manner therein prescribed.
2. **Workmen's Compensation.** In case of a latent injury the employee, in order to avail himself of the benefits of the Workmen's Compensation Act, must commence action within the statutory period of 1 year after he has knowledge that the accident has caused a compensable injury.
3. ———. In case of payments of compensation having been made the limitation shall not take effect until 1 year from the time of making the last payment.
4. ———. A plaintiff employee in a workmen's compensation case who seeks to toll the statute of limitations contained in section 48-137, R. R. S. 1943, by payments made by an employer as therein provided, must affirmatively show in his petition that the payment was made within the space of 1 year from commencing action in order to state a cause of action as against a general demurrer.
5. ———. There is no exception provided by the statute of limitations in section 48-137, R. R. S. 1943, of the Workmen's Compensation Act for the tolling thereof because of the incapacity of the employee's attorney and the courts can read none into it.
6. **Pleading: Limitations of Actions.** A petition showing on its face that the cause of action stated therein is barred by the statute of limitations is subject to general demurrer.

APPEAL from the district court for Cedar County: JOHN E. NEWTON, JUDGE. *Affirmed.*

Olds & Reed, for appellant.

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

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

BROWER, J.

This is an action by the plaintiff and appellant Emil A. Bame to recover of the defendants and appellees Lipsett, Incorporated, and Employers Mutual Liability Insurance Company of Wisconsin, compensation under the Nebraska Workmen's Compensation Act for injuries alleged to have occurred growing out of an accident arising in the course of plaintiff's employment by defendant Lipsett, Incorporated.

Plaintiff filed his petition in the Nebraska Workmen's Compensation Court on November 28, 1960. Defendants filed therein an answer containing a general denial and alleging that more than a year had passed since the date of the pretended accident and more than a year had elapsed since the payment of any compensation or similar benefits. A trial was had and that court held that the cause was barred by the statute of limitations and dismissed the case.

Thereupon the plaintiff waived rehearing before the compensation court and filed his petition by way of appeal in the district court for Cedar County, Nebraska. The defendants demurred to the petition on the grounds that the petition failed to state a cause of action and that it showed on its face that any right of action was barred by the statute of limitations. The district court sustained the demurrer and dismissed the petition.

The plaintiff thereupon appealed to this court from the order sustaining the demurrer and dismissing the cause and therefore the matter is to be decided here on the record as disclosed by the transcript without a bill of exceptions.

The pertinent allegations of the petition filed in the district court are now set out and summarized. It alleged the accident occurred while plaintiff was driving a truck in the course of his employment by the defendant Lipsett, Incorporated, on March 12, 1957; that the injury incurred by this accident aggravated a prior injury of March 28, 1955, while working for the same

employer; and that for the injury of March 12, 1957, he was hospitalized over night and treated by one Dr. Clark F. Johnson. Plaintiff was off work for 1 week and returned to doing supervisory work until July 17, 1957, when surgery was performed for an injury to his neck. He did not work again until August 4, 1957. He again was hospitalized on November 9, 1958, prior to which time he had done supervisory work which did not require heavy lifting; that he was off work from November 1958, until April 1959. He was asked by defendants to travel to Sioux City, Iowa, from Yankton, South Dakota, to submit to an examination by Dr. Arch O'Donahue and in February 1959, made the trip but has failed to receive his expenses therefor.

The plaintiff alleged he first consulted an attorney, John F. Walsh, in November 1958, after defendants had failed to make payments of compensation, although the defendant Employers Mutual Insurance Company had paid $1,071.49, and other expenses of which plaintiff has no personal knowledge. The petition stated attorney Walsh was admitted to the Yankton State Hospital, Yankton, South Dakota, for a short period in the summer of 1959; and that on July 5, 1960, said attorney was declared mentally ill and committed to said hospital by the Board of Commissioners for the Mentally Ill. It is alleged that the attorney was not mentally competent to handle plaintiff's claim during the period. Subsequent to the time he consulted this attorney he first learned and was advised by his attending doctor that he now has a residual traumatic arthritic condition that was probably permanent. Plaintiff, after he learned the nature and extent of his injuries on or about September 1958, and, for the first time, that he had a compensable disability, made demands for payment of compensation upon the defendant employer. His demands were denied, except that the company paid certain medical and hospital bills incurred by plaintiff as to which no time or dates of payment were given. The rest of the peti-

tion sets out the expenses incurred by plaintiff, likewise without dates.

This petition it will be seen alleges that the plaintiff learned the nature and extent of his injuries and that he had a compensable disability on or about September 1958. This was more than a year after the injury. However, this court has held that: "An employee, sustaining accidental injury arising out of and in the course of his employment, will not be denied compensation for failure to give notice of claim within 6 months or to commence his action within 1 year from the date of the accident when it appears from the evidence that the injury was latent and did not result in compensable disability until after the expiration of the time for giving notice of claim and commencing action, provided notice is given and action commenced within the statutory period after the employee has knowledge that the accident has caused a compensable disability." Webb v. Consumers Cooperative Assn., 171 Neb. 758, 107 N. W. 2d 737. In this instance the action was not filed in the compensation court until November 28, 1960, more than 2 years thereafter. In case of a latent injury the employee, in order to avail himself of the benefits of the Workmen's Compensation Act, must commence action within the statutory period of 1 year after he has knowledge that the accident has caused a compensable injury.

If the claim of the plaintiff is treated as an action to recover additional compensation for an increased disability the same rule would apply. Scott v. State, 137 Neb. 348, 289 N. W. 367.

According to express terms of the statute, section 48-137, R. R. S. 1943, in case of payments of compensation having been made, the limitation shall not take effect until 1 year from the time of making the last payment. Hill v. Hinky-Dinky Stores Co., 133 Neb. 147, 274 N. W. 455. Though the petition alleged that certain payments of compensation and expenses had

been made, no dates of such payments are given. The only inference of the time of making such payments contained in the statement in the petition is that when "plaintiff first consulted an attorney, * * * in November of 1958 after the defendants had failed to make any payments of compensation, although the defendant, Employers Mutual Insurance Company, had paid medical expenses totaling $1,071.49, and other expenses of which plaintiff had no personal knowledge; * * *." The payments are referred to in the past tense and must have preceded the consultation 2 years prior to bringing action. A plaintiff employee in a workmen's compensation case who seeks to toll the statute of limitations contained in section 48-137, R. R. S. 1943, by payments made by an employer as therein provided, must affirmatively show in his petition that the payment was made within the space of 1 year from commencing action in order to state a cause of action as against a general demurrer. The necessary allegation is wholly lacking.

This court has held that the furnishing of medical services constitutes payment of compensation sufficient to toll the running of the statute. Gourley v. City of Grand Island, 168 Neb. 538, 96 N. W. 2d 309. The cited case is one where the city physician of the employer treated the plaintiff workman without charge. In the instant action the petition alleges that the plaintiff was requested to submit to examination by a doctor at Sioux City, Iowa, in February 1959, and that he made the trip and was examined but was never reimbursed his expenses incurred in making the trip. This trip and examination were likewise more than a year before action was brought and could not toll the statute.

Finally, the petition alleged the employment of an attorney in November 1958, almost 2 years before bringing action; that the attorney was incapacitated and was first admitted to the Yankton State Hospital for observation in the summer of 1959 and later was declared mentally ill and committed as such on July 5, 1960. The

plaintiff's petition alleged the attorney was not mentally competent or capable of handling plaintiff's claim which was unknown to plaintiff. Nothing is set out to show any diligence of the plaintiff in consulting or attempting to consult or keep in touch with this attorney. At any rate in Ray v. Sanitary Garbage Co., 134 Neb. 178, 278 N. W. 139, this court, in construing this Workmen's Compensation Act in regard to the statute of limitations, therein said: " 'Where a right has been created by statute which did not exist at the common law, the legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the act and must be fully complied with in the manner therein prescribed.' " It further states: " 'Where no exception is provided by the statute, the requirement for the filing of a claim within a specified time applies to a minor dependent of an employee, whose failure to comply with the act precludes him from recovering compensation.' " It would appear that if minor defendants of a deceased employee are not excepted from the running of this statute, certainly the statute would run as against an employee who, while fully competent himself, placed his affairs in the hands of an incapacitated attorney.

There is no exception provided by the statute of limitations in section 48-137, R. R. S. 1943, of the Workmen's Compensation Act for the tolling thereof because of the incapacity of the employee's attorney and the courts can read none into it.

From an examination of the petition it appears that the action was barred by the statute of limitations when the petition was filed. Nothing has been alleged to show that the period of limitation had been tolled, which was incumbent on the plaintiff to show by proper allegations.

"A petition showing on its face that the cause of action stated therein is barred by the statute of limitations is subject to general demurrer." Dunlop Tire & Rubber Corp. v. Ryan, 171 Neb. 820, 108 N. W. 2d 84.

The judgment of the district court in sustaining the demurrer to the plaintiff's petition and dismissing the action was proper and is affirmed.

AFFIRMED.

HAROLD BUICK, APPELLEE, V. WELDON E. STOEHR ET AL., APPELLANTS.
111 N. W. 2d 391

Filed October 27, 1961. No. 34981.

1. **Witnesses.** It is an elementary rule that credibility of witnesses and the weight to be given their testimony are for the jury's consideration.
2. **Trial.** In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
3. ———. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law, rather than submit it to a jury for determination.
4. ———. Where undisputed physical facts demonstrate that a collision out of which injuries arose was not caused by negligence of defendant, the evidence is not sufficient to support a verdict for plaintiff.
5. **Negligence: Trial.** In an action based on negligence to which the comparative negligence rule has application wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or a verdict directed.
6. **Trial.** In a case where a motion was made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case submitted to a jury which returned a verdict contrary to the motion, and thereafter a motion for a judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict.

APPEAL from the district court for Cass County: JOHN

M. DIERKS, JUDGE. *Reversed and remanded with directions.*

Fraser, Wenstrand, Stryker, Marshall & Veach, for appellants.

Silverman & Silverman and *Richard A. O'Connor,* for appellee.

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

BROWER, J.

This is an action to recover damages to person and property sustained in a collision between a 1950 Studebaker automobile driven by the plaintiff and appellee Harold Buick, and a 1959 Plymouth automobile driven by the defendant Weldon E. Stoehr and owned jointly by him and his father Elmer L. Stoehr, who is also a defendant, both of whom are appellants here.

The petition alleged that the defendants' car was operated in a negligent manner, and at an excessive rate of speed considering the existing circumstances; that the driver failed to keep a proper lookout, failed to have the car under proper control, or to stop his car, or alter or divert its course; and that he drove his car on the plaintiff's right side of the road instead of his own right side.

The answer admitted the accident; denied the negligence asserted by plaintiff; and alleged that the accident and resulting injuries and damage sustained by plaintiff were through no fault of defendants, but were caused solely by the negligence of plaintiff which negligence was more than slight and directly contributed to and caused the accident.

A cross-petition was also filed by defendants which claimed negligence on the part of the plaintiff in that he failed to have his vehicle under proper control or to use the instrumentalities in his control to avoid the accident, in driving on his left-hand side of the road

into defendant's lane of travel, and in failing to see defendant's car or taking action to avoid colliding therewith. The reply was a general denial.

A trial was had before a jury which found for the plaintiff on his cause of action against both defendants and assessed his damages at $27,500, and further found in favor of plaintiff on the defendants' cross-petition.

The defendants moved for a directed verdict at the conclusion of plaintiff's case and again at the close of all the evidence, which motions were overruled, and after verdict moved for judgment notwithstanding the verdict and for a new trial. These motions being overruled the defendants appealed to this court.

They assign as errors the court below overruling the motions for a directed verdict at the conclusion of the plaintiff's case and at the conclusion of all the evidence; the overruling of defendants' motion for judgment notwithstanding the verdict; and that the verdict and judgment were contrary to law and contrary to and against the weight of the evidence. Other assignments were made which, in view of our decision, will not be necessary to discuss.

The disposition of the case requires us to consider carefully the evidence concerning the collision. In discussing it when we speak of the defendant, we refer to the defendant Weldon E. Stoehr, he being the only defendant present at the time of the accident.

The collision occurred on Saturday, September 5, 1959, at approximately 1:15 p.m. It occurred on what is known as the Cedar Creek Road about 4 miles west of Plattsmouth, Nebraska. Plaintiff had been fishing at what is called Four Mile Creek about a half mile west of the scene of the accident. He was returning from fishing and was driving easterly on this road which runs east and west. The road was surfaced with gravel and loose rock. The traveled portion of the road was 22 feet wide. The terrain of the country was rolling. The collision occurred at an intersection formed by a county

road coming into the Cedar Creek Road from the south and a private road leading off to the north at the same point. Prior to that day plaintiff had not been familiar with the road. The intersection mentioned was at the crest of a hill. The photographs introduced in evidence show that the road as it runs easterly falls away both to the east and west. The plaintiff was, immediately prior to the accident, driving up the hill from the west. It was not a very sharp hill from that direction. He was alone in his car. It was a clear, sunshiny day. The defendant Weldon E. Stoehr was approaching this hill from the east. In the car with him was one Kenneth Kizer.

Concerning the happening of the collision itself the evidence is as follows: Plaintiff Buick said that he had been fishing in Four Mile Creek; and that when he left there he went south a short distance, turned east on the Cedar Creek Road, and proceeded about a quarter of a mile prior to the accident. He approached the point of impact at 35 to 40 miles an hour. He drove on the south side, being his right side of the road; that after turning on the Cedar Creek Road he got his car up to 40 miles an hour and put it in overdrive. At the top of the hill he said he was traveling 30 to 35 miles an hour. Right at the crest of the hill he said, "all of a sudden, here is Stoehr's car, right in front of me, it seemed — appeared to be right in the middle of the road"; that at the time he was on his own side of the road; that the graveled portion of the road was 22 feet wide with shoulders of 4 feet on each side; and that after the accident he remembered nothing at the scene. Also he identified several photographs taken at the scene of the accident, most of which were admitted without objection. The rest of his testimony was with respect to his injuries, which were severe, and the treatment and expenses thereof.

On cross-examination he was questioned as to testimony in a deposition he had previously given. It was

taken on April 30, 1960. He admitted that in his deposition he had given the distance from where he turned onto the Cedar Creek Road to the accident as three-quarters of a mile; that at the time the road was pretty well deserted; that he had testified his car was going about 45 miles an hour when he put it in overdrive; that the car stayed in overdrive up to the time of the accident; and that in his deposition he had stated he did not "remember too well" how far the right side of his car was from the south edge of the road. When asked whether he maintained his car in the same general position on the road at all times he had answered, "I couldn't tell you for sure." When asked if he could tell the position of the car as it arrived at the crest of the hill with relation to the south edge of the road he then said, "Oh, I can't say for sure." To the question, "Well let me ask you this, did you at any time ever see this other vehicle that you had a collision with? Answer: I can remember just vaguely seeing it, that's all." His further cross-examination in regard to the testimony given previously is as follows: " 'Question: Would it be fair to say it was sort of a fleeting glimpse of the car? Answer: Well, I don't remember too well.' Do you recall that? A. I remember that, yes. Q. The very next question again: 'Question: When you observed what appeared to be a vehicle, have you any impression as to how far away from you it was? Answer: I couldn't tell for sure.' Do you recall that? A. Yes, I remember that. Q. Do you have any impression, Mr. Buick, as to what side of the hill or where with relation to the crest of this hill the collision itself took place? A. It took place right on top of the hill, right at the crest of the hill. Q. Do you know that or did you learn that, sir, from a photograph that you have looked at since? A. No, I know it, I have been out to the accident scene since then and a lot of things have come back to me. Q. Well, on page 19, line 5: 'Question: Do you really know anything about the collision itself, sir? Answer: I

don't remember anything about it.' Do you recall that? A. Yes, I remember that, at the time. Q. Now, on cross-examination your attorney, Mr. Silverman, on page 22, line 15, did he ask you this question: 'Question: When Mr. Fraser was asking you about the position of the car with relation to the south edge of the road, you recognize that the south edge as being to your right and your answer was, "Yes?" Answer: Yes.' So you understood that? A. Yes. Q. Now, lastly on page 23, Harold, do you remember my asking you this question: 'Question: Do you have any impression as to whether or not you, at any time, ever applied your brakes? Answer: I don't remember.' Do you recall that? A. I didn't have time to apply the brakes, I remember the question. 'Question: Or swerve? Answer: I don't remember whether I did or not.' Do you recall that? A. I remember the question, yes. Q. And that is your present impression today, isn't it? A. I didn't have time to. Q. But the point is, you didn't, did you? A. I didn't have time to swerve or hit the brakes or anything. Q. And yet you have no impression as to how far away from you this car was, is that correct? A. He was right on top of me when I seen him."

On redirect he reasserted that the first time he saw the Stoehr car it was directly in front of him and that he had no time to apply his brakes or sound his horn.

The only other witness on behalf of the plaintiff in regard to the accident itself was Thomas S. Solomon, the sheriff of Cass County. He stated that he went to the scene of the accident, getting there 10 or 15 minutes thereafter; that the 2 cars were still there; that the occupants, the drivers, were still there; and that he didn't talk to other witnesses who actually saw the accident aside from the occupants of the 2 cars. Harold Buick was in his car on the south side of the road headed east. He identified exhibit 16 as a photostat of diagram or drawing made by him of the scene of the accident on

the day of the accident. The diagram showed the width of the road to be 22 feet. He placed on the drawing the location of the skid marks of the Stoehr car which were 50 feet in length. He stated that the left wheel of the Stoehr car was close to the center of the road. He identified likewise a photograph of the scene of the accident upon which he had made markings and identified and explained these also. Both the diagram he made of the scene and the photograph thus identified were introduced in evidence by the plaintiff. The photograph was taken while the camera was pointed west and showed the road and both vehicles. They found the road at the scene of the accident to be 22 feet wide. The point of impact he found to be in the "dead center" of the road. It was marked on the surface of the road itself by a rod with a red flag thereon, which are shown in the photographs. The measurements were 11 feet from this point to the edge of the road on either side. The skid marks of the Stoehr car are shown thereon and marked by the sheriff. They also appear in the photographs. They approach very closely to the center of the road. They appear also on the sheriff's diagram as near the center of the road.

On cross-examination he stated that he talked to Harold Buick while he was still in the automobile; that he told him he did not see the Stoehr car coming; and that he talked to Weldon Stoehr at the scene of the accident and that he said as soon as he saw the plaintiff's car coming he let up on the foot feed and applied his brakes. He stated he saw the skid marks of the Stoehr car which were straight in line and the left wheel marks were in the middle of the intersection as near as could be determined. The witness stated that from the examination, measurements, and photographs taken at the scene of the accident he got the impression that the Buick (Studebaker) car was pulling to its right at the time of the accident. He thereafter identified other photographs previously admitted without objection as

having been taken by him; and stated that they reflected the conditions of the road and the location and condition of the cars of plaintiff and defendant at the time. He stated he had not measured from the left skid mark of defendant's car to the edge of the road. He stated further that the photograph of the Stoehr car appeared to him to show the impact to that car would be on the left front of the car and that the impact on the plaintiff's Studebaker was likewise on the left front of the car. He said also his report showed that he learned from the drivers that the cars were both going approximately 45 miles an hour.

Weldon Stoehr, one of the defendants, testified that he lived near Plattsmouth and he was an employee of Allied Chemical but did odd jobs at times; that the morning of the accident he had been chopping hay for a farmer; and that he had had his car with him. He took the car to Plattsmouth to a filling station to be serviced and cleaned up during the noon hour. Because he had to go back to work, Kenneth Kizer, an employee of the station, rode out with him intending to take the car back for service. Kizer sat with Stoehr in the front seat. They drove west on the Cedar Creek Road; that he had been driving at about 45 or 50 miles an hour and slowed up about one-half a mile east on an "S" curve and then resumed his prior speed; and that he was familiar with the road. It was a two-lane road. He said the hill where the accident occurred was not long but has a rather sharp peak; that at the bottom of the hill before the accident he was going 45 to 50 miles an hour; that he was traveling on the right side of the road; that he was sure he never drove except on the right side; that he was within 3 feet of the north curbline; that the car was about 6 feet wide; that he saw the Buick (Studebaker) car before the impact coming over the hill; that his car was about 100 feet down the hill when he first saw it; that then the plaintiff's car was to the east of the crest; that when he saw it he released the foot feed,

applied the brakes, and tried to swerve to the right; that due to the fact the wheels were locked the car didn't swerve; and that his brakes took hold. He said when he saw the Studebaker it was "right square" in the center of the road and if anything it was headed across the road into his lane. When he first saw it he could only see the front grille and bumper. When the brakes locked he went straight up the road. From the time he first saw it until the impact was only momentary. After the collision his car was turned completely around, continued past the point of impact, and stopped in the north ditch. He identified the position of both cars as shown in the photographic exhibits as correct. He said that Kizer who was riding in his car went for help; and that thereafter Ruben Jensen and Frank Bierl came to the scene of the accident. They remained there until the sheriff arrived. Defendant was only slightly bruised. One of the neighbors took him and Kizer to town. He recognized the plaintiff when he went over to talk to him as they were working at the same place, but they did not talk about the accident. He identified the skid marks on the photographs as his. He said he never went over the centerline of the road.

On cross-examination he stated the road was somewhat wider at the intersection than south of it; that the shoulder was 3 feet from a bank and that the 3 feet sloped to the bank; that his brakes were on and locked and the car skidded because of that; and that the road was steeper from the intersection east but was more level to the west. He was able to see the plaintiff's car about 100 feet away. There was a shallow ditch in the shoulder 6 inches to a foot deep. He said the photographs showing the flag set at the point of impact and the skid marks were approximately correct; that the skid marks were straight and went right up to and past the flag placed at the point of impact but didn't go into the south side of the road; and that there was an overhang of about 4 inches on his Plymouth.

On redirect examination he testified that when he saw the Studebaker car the imaginary centerline of the road would have split it; and that his car was damaged on the left front corner, mainly the left front wheel area, headlamps, and left front wheel.

Kenneth Kizer testified that he was in 1959 a member of the Air Force at Offutt Air Force Base but had a part-time job as a filling station attendant at Plattsmouth; that defendant Weldon Stoehr brought the Plymouth automobile to the station on the day of the accident involved in the suit around 12:45 p.m.; that he went with him to take him back to work, intending to bring back the Plymouth for service; that he knew Stoehr only from coming to the station; that the road at the scene of the accident was 22 feet wide; and that Stoehr was driving not over 50 miles an hour and probably slightly under that. He said the hill where the accident occurred was not too steep until the last few feet when it angled up rather sharply; that defendant was driving on his own side of the road; and that he was seated next to the right front door of the car. The Plymouth was driven approximately 2 to 2½ feet from the north edge of the road. He saw plaintiff's car from 100 feet to 125 feet away; that it appeared "right smack in the middle of the road"; and that when he saw it he wrapped his arms around his head and ducked his head down. He saw Stoehr apply the brakes and felt the car slide. It appeared to him the car went straight. After ducking his head he did not see the Studebaker again; that the point of impact was just east of the crest of the hill; that the Stoehr car was never across the centerline; that he went to call help and found Ruben Jensen who took him in his car to his house where he telephoned the sheriff and doctor; that when he came back with Jensen, Frank Bierl was already there; and that he thought he was back in 10 minutes. He stated the photographs then in evidence and shown to him correctly showed the scene of the accident and the condition of the cars. He

knew the cars were going to hit when he ducked his head and was glad they had a padded dash; that there were ditches along the north side of the road but he would say they were shallow; and that he looked at the skid marks of the Stoehr car on the road and that they went straight up the road. These skid marks appeared on the north side of the center of the road.

Frank Bierl stated he was a farmer living a half mile north of the intersection. He testified as follows: A party came to his home to have him call the doctor and sheriff, but his neighbor Jensen was already calling on the party line. He and his 12-year-old son then went to the scene of the accident. Stoehr's car was headed east on the north side of the road. The Studebaker was in the southwest part of the intersection headed northwest. The photographs in evidence show the position and condition of the cars and they reflected the true condition. Bierl left the scene of the accident at Stoehr's request to get in touch with Stoehr's father. He notified his wife in Plattsmouth to get in touch with Stoehr, Sr., and returned to the scene of the accident in 10 or 15 minutes. The sheriff was there when he arrived. He helped the sheriff take measurements by holding the end of a tapeline. He observed the condition of the road. The road going west from the intersection was good but from the west going east the county road maintainer had pulled the fresh ground up on the road and then had smoothed it back down, and that the traffic was swinging away from the graded road a little bit. That was on the south side of the road west of the intersection and he could tell no one had driven on it. The skid marks of Stoehr's car on the road were noticed by him but not measured. He said you could tell where he hit the brakes; that the skid marks were in a straight line; and that the flag was placed at the gouge marks in the road. He pointed them out on a photograph and stated the sheriff said the road was 22 feet wide when measured; that Stoehr's north skid

marks were 2 or 3 feet from the north edge of the road; and that his south skid marks were to the north of the flag set at the point of impact.

Reuben Jensen, a farmer, who lived a half mile north just west of Bierl's place testified that Kizer came to his place and phoned the doctor and sheriff. He went right over to the scene of the accident and saw the cars. He identified the photographs of the cars and said that they properly showed the damage to them and their correct position in the road. Stoehr's skid marks were north of the center of the road from east to west in pretty straight lines. Sheriff Solomon came later. Bierl and the sheriff measured the marks and he assisted. They were parallel to the road or perhaps headed a little bit northwesterly. The northern-most skid mark was about 3 feet from the north edge of the road except the road was a little wider at the point of impact; that the southern skid marks were just a little north of the center of the road; and that the skid marks were shown in the photographs shown to him and that they were to the north of the center of the road from his remembrance.

Plaintiff on rebuttal testified that there was not enough dirt scraped up on the south side of the road to cause him to divert his course away from it; and that he had noticed it, but it was fairly smooth and he had driven right over it.

This constitutes a summary of the evidence in this case having a bearing on the accident itself.

The following rules of law which have been laid down by this court are applicable to this case.

It is an elementary rule that credibility of witnesses and the weight to be given their testimony are for the jury's consideration. Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367.

"In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon

which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Palmer v. McDonald, 171 Neb. 727, 107 N. W. 2d 655. See, also, Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531.

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

"Where undisputed physical facts demonstrate that collision out of which injuries arose was not caused by negligence of defendant, the evidence is not sufficient to support a verdict for plaintiff." Hessler v. Bellamy, 128 Neb. 571, 259 N. W. 514. See, also, Anderson v. Altschuler, 125 Neb. 853, 252 N. W. 310.

In an action based on negligence to which the comparative negligence rule has application wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or a verdict directed. Hickman v. Parks Construction Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040; Dodds v. Omaha & C. B. St. Ry. Co., 104 Neb. 692, 178 N. W. 258.

"In a case where a motion was made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case submitted to a jury which returned a verdict contrary to the motion, and thereafter a motion for a judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict." Jarosh v. Van Meter, *supra*. See, also, Corbitt v. Omaha Transit Co., *supra*.

With these rules in mind we will briefly discuss the

evidence which has already been summarized at length. The plaintiff was driving east coming up over a hill. Defendant was proceeding west approaching the same hill. The ascent was more abrupt from the east. Both cars were proceeding at a legal rate of speed. There was testimony from which the jury could have believed that the defendant's speed was greater than he asserted but none that it was unlawful. The plaintiff called sheriff Solomon as his witness. He identified and plaintiff introduced a sketch made by him which showed the point of impact of the cars testified to by him. It was in the exact center of the road. The testimony of the sheriff and of two disinterested farmers was that the skid marks of the left wheels of the defendant's car were at most only up to this point. Most of the witnesses said they were to the north of this point which was shown to be the point of impact. The jury could however have properly inferred from the evidence that they came up to it. In that event they might have further inferred that the overhang of the defendant's car was on the south of the center of the road a matter of inches. This might have shown negligence on the part of the defendant driver. His skid marks showed he had applied his brakes and gone straight or, according to one witness, slightly towards the center of the road.. The driver Stoehr said his brakes locked. This was the testimony of Kizer also. There was no testimony to the contrary. Whether this was an additional fact which the jury might have considered and drawn conclusions as to what the defendant driver should have done is a question which we find unnecessary to decide.

This being a case where the comparative negligence rule applies it is necessary for us to determine what the plaintiff did, giving him every reasonable inference that the evidence might show.

His testimony on direct examination is that he came over the hill on his right side of the road. That "all of a sudden, here is Stoehr's car right in front of me,

it seemed—appeared to be right in the middle of the road." He testified several times that his car was on his own side of the road. He stated the graveled portion of this road was 22 feet wide. At the scene of the impact he remembers nothing further. The testimony of his witness, the sheriff, and the defendant's witnesses, Bierl and Jensen, show that the defendant's skid marks shown on the sheriff's plat and several photographic exhibits at the most came only up to the center of the road. It would appear that the plaintiff had plenty of room on the right side of the road to have safely gone past. Neither could the defendant's car have loomed up suddenly directly in front of him and at the same time in the middle of the road if his car was on its right side. The direct testimony of the plaintiff was seriously shaken on his cross-examination by his previous testimony as set out heretofore in the following respects: He had said he could not remember how far the right side of his car was from the south edge of the road; and that he could not tell for sure whether he had maintained his car in the same general direction or not. He couldn't say for sure the position of his car at the crest of the hill with relation to the south edge of the road and that he could only remember vaguely seeing the defendant's car. He didn't remember of applying his brakes or whether he swerved or not or that he didn't have time to swerve or hit the brakes. At the time of the trial he did not testify to the contrary with respect to his previous testimony except to assert he was on his right side of the road.

Both the defendant Stoehr and the other occupant Kizer testified the plaintiff's car was right in the middle of the road. The witness Kizer said he knew they were going to hit when he ducked his head. They both testified defendant applied his brakes at once. The oral testimony of the parties would seem to indicate that the plaintiff's car was also at least to some extent across the center of the road. There might have been enough

conflict to have allowed the jury to find differently if the oral testimony was alone considered. However, the physical facts of the skid marks of the defendant as established by plaintiff's proffered evidence only going to the center of the road seems positively to show the defendant over but a slight distance. This is established not only from the witnesses but from the photographs in evidence. These photographs also show the condition of the cars. They were both damaged by the impact on their left front. The defendant's car then went to its right and the plaintiff's to its right, each to or near the edge of the road. Examination of the photographs introduced in evidence showing the fronts of these cars discloses that the defendant's car sustained its damage more to the extreme left of its front than the plaintiff's car and that plaintiff's car at the front had most of the left side damaged and a considerable more area of the front badly crushed than the defendant's car. It seems inescapable that more of the front of the plaintiff's car was on his left side of the road considering all the evidence, including the point of impact as established by plaintiff's own witness and the condition of the cars from the photographs.

We find the defendant's car was over the center of the middle of the road and on its left side. This was established at the trial from the testimony and the physical facts shown. Under the circumstances disclosed by the record, it appears the plaintiff's car was driven over the hill and proceeded to the point of impact while a considerable portion of his car was on its wrong side of the road. Indeed it would seem established that more of his car was to the left of the center of the road than the defendant's car and that he did nothing towards controlling his car to avoid the accident either because he failed to do so or because of his car being on the wrong side of the road at the hill crest prevented him from so doing in the time given him to control it.

Under these circumstances he was himself guilty of contributory negligence and that such negligence was more than slight as compared to the negligence of the defendant, and that under the evidence presented no other reasonable conclusion could be reached by reasonable minds than that the plaintiff was guilty of contributory negligence more than slight as a matter of law and the motion to direct a verdict and, thereafter, to enter judgment notwithstanding the verdict should have been sustained.

The judgment is reversed and the cause remanded with directions to enter judgment for the defendants notwithstanding the verdict dismissing the plaintiff's cause of action.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. ELVEN A. BUTTERFIELD, RESPONDENT.
111 N. W. 2d 543

Filed November 10, 1961. No. 34597.

1. **Attorney and Client.** A suspension from the practice of law differs from disbarment in that the latter is the severance of the status and privileges of an attorney, whereas the former is the temporary forced withdrawal from the exercise of office, powers, prerogatives, and privileges of a member of the bar.
2. ———. A suspended lawyer is under the same obligation to comply with the Canons of Professional Ethics as is a lawyer in the active practice.
3. ———. The preparation of deeds, mortgages, releases, and income tax returns is a province of a lawyer and constitutes the practice of law, whether or not, under some circumstances, such service might properly be performed by persons not admitted to the bar.
4. ———. Advertising in the public press for income tax work by a suspended lawyer is violative of Canon 27 of the Canons of Professional Ethics adopted by this court.
5. ———. The drafting of a will and the supervision of its execu-

tion constitutes the practice of law since it requires legal training and skill.

6. ———. The drafting of a power of attorney constitutes the practice of law since it also requires legal training and skill.

7. ———. The character of the respondent in a disciplinary proceeding and the question of his reformation as to his previous unethical conduct are of great importance in determining whether or not a reinstatement should be granted.

8. ———. The burden is upon a suspended lawyer seeking reinstatement to show his present fitness to again exercise the privileges and functions of an attorney in view of his previous conduct, the discipline imposed, and any reformation of character wrought thereby, or otherwise, as shown by his more recent conduct.

Original action. On motion of respondent for reinstatement to practice law. See 169 Neb. 119, 98 N. W. 2d 714, for original opinion. *Reinstatement denied. Respondent disbarred.*

Clarence A. H. Meyer, Attorney General, and *Gerald S. Vitamvas*, for relator.

Chambers, Holland, Dudgeon & Hastings and *Jesse L. Dougherty*, for respondent.

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

CARTER, J.

This is a proceeding to secure the reinstatement of an attorney to the practice of law after the termination of a suspension order issued by this court in a disciplinary action.

The respondent was suspended from the practice of law on October 23, 1959, the order becoming effective 30 days thereafter. State ex rel. Nebraska State Bar Assn. v. Butterfield, 169 Neb. 119, 98 N. W. 2d 714. In accordance with the order respondent on June 1, 1960, filed his application for reinstatement. On June 7, 1960, the Attorney General filed a report suggesting that respondent had engaged in the practice of law during the period of his suspension and had not therefore complied

with the order of suspension, and that he was not therefore entitled to be reinstated. The matter was referred to Donald F. Sampson, referee, for hearing, with instructions to report his findings of fact and conclusions of law. The referee filed his report with this court on January 20, 1961, finding against the respondent and recommending that this court make such further order as it deemed appropriate. The matter is before this court on the record made before the referee, the referee's report, and the exceptions taken thereto.

Two questions are for the determination of the court in this proceeding. The first is whether or not respondent has violated the order of suspension by engaging in the practice of law, and the second is whether or not respondent has made a sufficient affirmative showing that he will not in the future, if reinstated, engage in any practice offensive to the profession of the law.

Relator contends that respondent has not complied with the order of suspension in that he has engaged in the practice of law during the period that it was in effect. The record shows and the respondent admits that he drew deeds, mortgages, and releases. The record shows that he made out income tax returns and advertised his availability for such work. The record also shows that he on one occasion drafted a will and supervised its execution. It further shows that on one occasion he drafted a power of attorney. Relator contends that the doing of these acts during the period of respondent's suspension, when previously performed in his capacity as a lawyer, constitutes the practice of law. Respondent contends that the conveyances and releases were made in his capacity as a licensed real estate broker, notary public, abstracter, and loan agent.

The Supreme Court of this state has the inherent power to define and regulate the practice of law in this state. State ex rel. Johnson v. Childe, 147 Neb. 527, 23 N. W. 2d 720. While an all-embracing definition of

the term "practicing law" would involve great difficulty, it is generally defined as the giving of advice or rendition of any sort of service by a person, firm, or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill. State ex rel. Hunter v. Kirk, 133 Neb. 625, 276 N. W. 380. In an ever-changing economic and social order, the "practice of law" must necessarily change, making it practically impossible to formulate an enduring definition. Grand Rapids Bar Assn. v. Denkema, 290 Mich. 56, 287 N. W. 377. In determining what constitutes the practice of law it is the character of the act and not the place where the act is performed that is the controlling factor. State ex rel. Hunter v. Kirk, *supra*. Whether or not a fee is charged is not a decisive factor in determining if one has engaged in the practice of law. State ex rel. Wright v. Barlow, 131 Neb. 294, 268 N. W. 95.

The drafting of a will and the supervising of its execution constitutes the practice of law. Gardner v. Conway, 234 Minn. 468, 48 N. W. 2d 788; People ex rel. Committee on Grievances of Colorado Bar Assn. v. Denver Clearing House Banks, 99 Colo. 50, 59 P. 2d 468; Biakanja v. Irving, 49 Cal. 2d 647, 320 P. 2d 16, 65 A. L. R. 2d 1358; Grand Rapids Bar Assn. v. Denkema, *supra*. The drafting of a power of attorney constitutes the practice of law since the drafting of such an instrument involves the exercise of legal skill and training. The respondent clearly engaged in the practice of law in these two instances.

Disbarment is the severance of the status and privileges of an attorney, whereas suspension is the temporary forced withdrawal from the exercise of office, powers, prerogatives, and privileges of a member of the bar. In re Oliver, 97 Utah 1, 89 P. 2d 229; State ex rel. The Florida Bar v. Evans (Fla.), 109 So. 2d 881. A suspended lawyer is therefore under the same obligation to comply with the Canons of Professional Ethics as is a

lawyer in the active practice. The conduct of the respondent, in advertising in the public press his availability to prepare income tax returns, is therefore violative of Canon 27 of the Canons of Professional Ethics adopted by this court.

The respondent admits that he prepared deeds, mortgages, releases, and income tax returns during the period of his suspension. Admittedly respondent performed such work prior to his suspension. Some were performed in relation to real estate transactions in which he was the real estate broker, but in others he was not. It seems clear to us that the doing of such work is within the province of a lawyer to do. It is properly identified as the practice of law, whether or not it might under some circumstances be properly performed by others not admitted to the bar. An order of suspension deprives the suspended lawyer from performing any service recognized as the practice of law and which is usually performed by lawyers in the active practice of law. It is the contention of respondent that these services were performed in his capacity as a licensed real estate broker, notary public, abstracter, and loan agent. It is not necessary for us to determine in this case if and under what circumstances others might perform such services, although not admitted to the bar. A suspended lawyer, who in connection with his law office engages in other activities, is in no different position than the active lawyer who confines himself solely to the practice of law in determining if the suspension order was violated. Where one is generally known in a community as a lawyer, it might well be impossible to divorce two occupations closely related if the rule were otherwise. A suspended lawyer will not be heard to say that services recognized as within the practice of law were performed in some other capacity when he is called to account.

It is contended that the violations, if any, were isolated in character and cannot be said to constitute the

practice of law within the meaning of the order of suspension. In this respect we point out that one objection to the reinstatement of respondent is that he engaged in the practice of law in violation of the order of suspension. Even if the violations were isolated ones, and the record shows they were not, they constitute the practice of law and are violative of the court's suspension order. People v. Ring, 26 Cal. App. 2d 768, 70 P. 2d 281.

A suspended lawyer is required to affirmatively show, as the order of suspension provides, that he will not in the future engage in any practice offensive to the practice of law. Whether or not such a showing is sufficient is dependent upon the record before us and his prior conduct as reflected in the records of this court. See In re Riccardi, 80 Cal. App. 66, 251 P. 650. The character of the respondent in a disciplinary proceeding, and the question of his reformation as to his previous unethical conduct, are of great importance in determining whether or not a reinstatement should be granted.

The records of this court show that respondent was punished for contempt in 1944. Butterfield v. State, 144 Neb. 388, 13 N. W. 2d 572, 151 A. L. R. 745. The opinion in that case shows that respondent abstracted a page of a pleading and substituted another with intent to deceive and mislead the court. Respondent also made false statements to the court in that case with intent to deceive the court. Respondent was found guilty of the foregoing charges and punished for contempt. The respondent denied the charges throughout the trial. So far as the records show, respondent has never admitted any wrongdoing, but has in fact explained it as the work of fellow lawyers who bore him ill will, with the implication that he had done no wrong.

Discipline was imposed in the instant case for unprofessional conduct in that respondent falsely acknowledged a warranty deed and testified falsely in court with reference to the same. On June 1, 1960, respondent

filed his application for reinstatement, asserting that he had complied with the suspension order and if reinstated in the practice of law he would not engage in any practice offensive to the legal profession. We find nothing in his application that indicates that he had any feeling of wrongdoing on his part, or that he was repentant of his conduct. His application is supported by many affidavits, most of them by laymen. Most of these affiants assert the high character and good reputation of respondent and state that the discipline imposed by this court was the result of the personal animosity of other lawyers in Antelope County. While the record does not disclose who prepared these affidavits, respondent attached them to his application, thereby adopting their contents as being in support of his application.

On the hearing of the matter of respondent's reinstatement before the referee, respondent excused his conduct by asserting that certain attorneys and a district judge in a neighboring district were after him and were working for his disbarment. Several of the affiants who had made similar statements in their affidavits were called as witnesses at the hearing before the referee. Neither the respondent nor these affiants were able to disclose one shred of evidence as to the truth of these statements. Three lawyers gave supporting affidavits. One lawyer from a neighboring county stated that respondent was of good character, was a good lawyer, and in his opinion should be reinstated. The other two lawyers merely stated that so far as they knew the respondent had not practiced law during the period of his suspension.

The evidence shows that at the hearing before the referee the respondent did at one time state that he realized what he had done was wrong and that if readmitted to the practice he would do his best to comply with the rules of court and the ethics of the profession. At no time prior to the hearing, and not until the last day of the trial, did respondent express any regret for

his conduct. We point out that his attitude can best be arrived at from his acts rather than his self-serving declarations required by the exigency of the occasion.

The record discloses that on the morning of the effective date of the suspension order respondent made certain changes on the windows of his law office. From the sign "Law Office" he removed the letters "L" and "w" from the word "Law." On another window he removed the letters "At" and "ey" from the word "Attorney." The signs thereafter read "a Office" and "torn." While we do not say that what he there did was in violation of the suspension order, it indicates the intent and state of mind of respondent. When a friend called it to his attention that the bar association would question the manner in which the signs were left, he assumed an attitude of defiance. The effect of what he did was to make light of his suspension and to taunt other members of the bar. At no time did respondent, prior to or at the hearing before the referee, apologize for or express any regret for the manner in which he left these signs throughout the period of his suspension.

There are many affidavits by laymen stating that his general reputation for honesty and good character in the community was good. Lay witnesses at the hearing before the referee likewise testified to this fact. Not one, however, had any knowledge of the acts committed by the respondent. They appeared to accept the statement of respondent that he was the victim of jealous, greedy, and unprincipled fellow lawyers and judges. By this method he excused his own misdeeds and cast aspersions upon reputable fellow lawyers. Such affidavits can have little weight, if any, in determining the issues before this court in the present case. Personal popularity does not purge professional delinquency.

We find that respondent has not affirmatively shown that he would in the future abstain from unethical practices and conduct himself as an ethical member of the profession. The contempt proceeding brought against

him in 1944 indicates a complete disregard for honesty and ethics. The proceeding resulting in his suspension in 1959 showed that he executed a false acknowledgment of a deed and testified falsely in court when the deed became involved in litigation. And now, in the proceeding for his reinstatement he admits to the performance of acts which constitute the practice of law, contends that he is the victim of jealous lawyers, and infers that this is the sole cause of his troubles without fault on his part. It is evident that respondent has never admitted any dereliction on his part, and has justified and condoned his conduct in his home community by asserting that certain judges and lawyers are out to get him because of jealousy and personal dislike. During the period of his suspension he has maintained an attitude of defiance, he has held up his suspension to public ridicule, and he has taunted other members of the bar by his affirmative acts. He has been willing to justify his own unethical conduct by falsely charging that judges and other members of the bar engaged in a conspiracy to deprive him of his right to practice. His success in thus capitalizing upon his own misconduct is evidenced by the numerous affidavits of laymen who testify to his good character and reputation, some of which appear almost fanatical in their approach. Not until the last day of the hearing before the referee, and after many opportunities to do so, did respondent ever acknowledge any wrongdoing on his part or express any regret therefor. The record shows that he has no regrets for what he has done, except when the exigencies of litigation require, and is willing to condone his acts by false countercharges against others. His attitude is one of defiance rather than submission to the final judgment of this court. He has chosen to flaunt his suspension and to demonstrate contempt for other lawyers and the courts of which he is an officer. He has shown that previous proceedings against him have been ineffective as corrective measures. It cannot be over-

looked that this is the third time that respondent has been called upon to answer as to his conduct before this court. We submit that the evidence shows respondent has no regard for the ethics of the legal profession and if he is reinstated we have no reasonable assurance that he would conduct himself any differently than he has in the past.

A primary question for determination on an application for reinstatement to the bar of one suspended from active practice under a suspension order such as we have here is the present fitness of the applicant to again exercise the privileges and functions of an attorney, as an officer of the court and confidential adviser in the affairs of others entrusted to his care and keeping, in view of his previous conduct, the discipline imposed, and any reformation of character wrought thereby, or otherwise, as shown by his more recent conduct. Respondent's previous conception of the serious nature of his acts and, what is more important, his subsequent conduct and attitude toward the courts and the practice of law do not appear to have undergone any change. He must affirmatively demonstrate his reformation. Lawyers are regarded as officers of the court. A lawyer has an obligation to uphold the integrity and dignity of the courts. He has a responsibility to the public to assist in bringing about the proper administration of justice. It is of utmost importance that the honor and integrity of the legal profession should be preserved and that its members be without reproach. The malpractice of one reflects dishonor not only upon the legal profession but upon the courts themselves, and creates among the people a distrust of the courts and the bar. One proven to have violated these conditions of good behavior and professional integrity, in applying for reinstatement, has the burden of overcoming by persuasive evidence the former judgment of his disqualification. In re Stump, 272 Ky. 593, 114 S. W. 2d 1094; In re Smith, 220 Minn. 197, 19 N. W. 2d 324; In re Egan, 52 S. D.

394, 218 N. W. 1. There is nothing in this record tending to show an appreciation by the respondent of the serious nature of his misconduct, or any acknowledgment of error, except in the one instance when it appeared necessary for the success of his case. We cannot in good conscience certify to the bench and bar and to the public generally that respondent has shown himself worthy of reinstatement.

The application for reinstatement is denied and, pursuant to the terms of the order of suspension, respondent is disbarred and his name ordered stricken from the roll of attorneys in this state.

REINSTATEMENT DENIED.
RESPONDENT DISBARRED.

BROWER, J., concurring in part and dissenting in part.

I must respectfully dissent from the opinion of the court herein though I agree in the result as applied to the respondent.

The record shows that the respondent during the period of suspension drew a will. He was first consulted at his office by a nephew of the deceased husband of the testatrix concerning its execution. The testatrix had been his former client. He went to her home and consulted her in the presence of relatives in regard to the will's contents. He made notes there and took them to his office. Thereafter he drew the will, procured the witnesses, and attended to its execution. Respondent claims it was largely copied from a previous will which is not in the record. In any event a new will, which because of her husband's death was a different will, was drawn by him. Respondent also drew, attended to its execution, and took the acknowledgment on a power of attorney for this same lady after consultation with her and her relatives. It was written on a blank form but it was necessary to set out, prescribe, and delineate the power conferred. The drawing of a will has been held by the cases cited in the court's opinion and by the referee in his report as practicing law. Under the

circumstances the drawing of the power of attorney was likewise practicing law. It is true that these instruments were only two in number, but the court in its opinion ordering the suspension particularly provided in State ex rel. Nebraska State Bar Assn. v. Butterfield, 169 Neb. 119, 98 N. W. 2d 714, as follows: "However, if he fails within a reasonable time to make such showing or fails to strictly comply with this order of suspension, then his suspension shall become permanent and an order of disbarment will necessarily follow." Respondent contends he did not charge for the services and that they were isolated incidents which the court should overlook. The charging of fees is not essential to the practice of law as shown in the court's opinion. It seems apparent that he sought to perform legal services for these clients whom he considered valuable clients and whose work he desired to do in the future. Under these circumstances he was consciously practicing law and his showing, even considering these cases alone, did not show strict compliance with the court's order. If more is necessary his general attitude as set out in the court's opinion, and which it is unnecessary for me to again detail here, shows that he has no conception of his own wrongdoing and blames his plight on others whom he states have sought to injure him but without having any tangible reasons therefor. He has not met the burden of proof required of him to show that he is entitled to reinstatement. I concur with the court in its refusal to reinstate the respondent and in ordering him disbarred.

In my own opinion this was about all that was necessary to decide in this matter. Generally speaking, I feel the court should restrict its opinion to the matters necessary to decide the case at hand and that such a rule is very salutory and is appropriate here.

I cannot agree with the opinion of the court holding that a suspended lawyer may not do those things which might properly be performed by persons not admitted to the bar. No authorities are cited which sustain this

proposition. The referee in his report could find none.

The court's opinion cites In re Oliver, 97 Utah 1, 89 P. 2d 229, and State ex rel. The Florida Bar v. Evans (Fla.), 109 So. 2d 881, on the proposition that a suspended lawyer is still a lawyer. It then states that a suspended lawyer is still obligated to comply with the canons of the profession. It does not necessarily follow of course that the suspended lawyer could not do that which a layman, broker, real estate agent, tax accountant, abstracter, or notary could lawfully do. The first of these cases merely holds that immoral acts in private life which would have barred admission might be considered on a question of reinstatement. The second of the cases holds that under Florida practice a suspended attorney at the end of the period of suspension might resume practice without doing anything.

The majority opinion concedes that a definition of the term "practicing law" involves great difficulty. It implies that the preparation of deeds, mortgages, releases, and income tax returns may be performed by persons not admitted to the bar. An examination of the authorities in the note cited by the referee in 53 A. L. R. 2d 788, as well as the previous notes therein mentioned, 111 A. L. R. 19, 125 A. L. R. 1173, and 151 A. L. R. 781, would indicate that in many instances real estate agents, brokers, managers, or accountants, and, in some instances, even laymen, could properly prepare them.

The court held that because these acts are also a proper part of the practice of law, they cannot be performed in any other capacity by a suspended lawyer if he is ever to be reinstated.

In some instances one's law practice is his principal occupation and the other occupations are but incidents to it. In others the occupation of a broker, land agent, and income tax accountant constitute the major portion of one's business. I cannot believe that one must desist from vital matters in such other occupations in which he is engaged to permit hope of reinstatement,

and that he must seek an entirely different avocation and permit his established business in other lines to deteriorate also.

It would appear these rules need not have been adopted to decide this case and that they have only prospective value. That being true, they should, if necessary, have been either promulgated in proper rules of the court or Canons of Professional Ethics or the court should have awaited cases where their application became necessary and when others interested beside the respondent could be heard.

YEAGER, J., dissenting.

I think I am no less jealous of the integrity, learning in the law, and the ethical standards which should obtain and be maintained by the individual members and by the bar as a whole than those who joined in the majority opinion in this proceeding.

I think also that I am as zealous as these in my desire to protect the profession and the public from admission of those who are not clothed with the high standards which have been traditional from the beginning in this jurisdiction, and my desire for the dismissal or discipline of any and all of those who have become violators of these standards and this tradition.

In arriving at a conclusion as to whether or not a member of the bar has acquitted himself in conformity generally with his duties and obligations or as applied to a situation such as the present inquiry whether or not he has transgressed and continues to transgress his professional obligations, I commit myself to the unalterable view that where there has been, as here, transgression and suspension with a declaration of the right to restoration in due time on conditions prescribed, with which conditions there has been a compliance by the party, restoration should be allowed in the absence of a showing of overt significance that there is or has been during the period of suspension demonstration that the

right of the party to return to the practice of his profession should not be restored.

By a showing of overt significance I mean statements of fact evidentiary in and of themselves or statement of charges sustained by some character of evidence, as distinguished from mere generalizations, hearsay, and personal unsupported beliefs.

The record in the present proceeding discloses that the respondent in response to the requirements of the order of suspension made application for reinstatement supported by a showing that he was entitled thereto. It cannot be well said that on its face this showing was not in all respects sufficient.

After this showing was made protests were filed in resistance to his application. These protests were for the most part generalities, opinions based upon hearsay, even in large part without a disclosure of the source of the hearsay, and personal unsupported beliefs. This portion of the protests, in the terms I have used, was without any overt significance.

If this portion had been disregarded by this court it would be of no consequence here. The majority opinion however makes it clear that it had a substantial if not a major influence upon the decision which was rendered.

I assert that it was entitled to no consideration whatever. Its consideration was violative of one of the paramount and basic principles of American jurisprudence. That principle is that evidence such as this, if it may indeed be regarded as evidence, is not acceptable as proof of wrongdoing.

It is quite true that this action is sui generis and is neither civil nor criminal in a true sense, but in it the respondent is charged as a wrongdoer. I doubt if anyone to whom this is a matter of concern would contend for a moment that the respondent was not entitled to reinstatement without the charges made being sustained by evidence of probative value. See, State v. Fisher, 103 Neb. 736, 174 N. W. 320; State ex rel. Nebraska State

Bar Assn. v. Price, 144 Neb. 542, 13 N. W. 2d 714; State ex rel. Nebraska State Bar Assn. v. Gudmundsen, 145 Neb. 324, 16 N. W. 2d 474; State ex rel. Nebraska State Bar Assn. v. Pinkett, 157 Neb. 509, 60 N. W. 2d 641; State ex rel. Nebraska State Bar Assn. v. Richards, 165 Neb. 80, 84 N. W. 2d 136.

There are but four incidents or types of incident relative to practice of law during the period of suspension. Three of these will be discussed as one. In these are included the drafting of deeds, mortgages, releases of mortgages, drawing contracts, making out income tax returns, and drawing a power of attorney. There can be no doubt about his doing these things. Of course he did.

It does not follow however that when he did so he was engaged in the practice of law. While it is true that these things bear a close relationship to the practice of law, each and all of them may be done without engagement in the practice of law, even though done by one learned in the profession. The only evidence in this record in these areas is that he did these things but there is nothing to contradict his evidence that in doing so he did not engage in the practice of law, except a suspicion that he was not telling the truth.

As to the matter of the will the evidentiary situation is the same as it is with the incidents involved in the other areas including the declaration by the respondent that he did not under the circumstances engage in the practice of law. Without going into detail, the effect of the evidence of the respondent is that he prepared the will under the direction of the maker. There is no denial of this. The majority opinion points out that the drafting and supervision of a will constitutes the practice of law. The evidence does show making but not supervision. The evidence indicates that the supervision was that of the maker pursuant to the provisions of another will which had been drafted and supervised, it is true, by the respondent but while he was in good

standing as a member of the bar. By the measure declared in the majority opinion this was not practicing law and the charge, like the others mentioned, is supported only by suspicion.

There is no clear line as to what may and what may not be declared the practice of law in the making of wills. This being true it ought not to be said on this record that what he did was practicing law and on that account he had forfeited his right to a restoration of his license to practice law.

In the record is evidence of incidents of display of temperament, anger, disappointment, and resentment, which represented in some measure a contemptuous attitude on the part of respondent, but I am constrained to conclude that this was not sufficient upon which to base a refusal of this court to restore his license to practice law.

SIMMONS, C. J., concurring in dissent.

I concur in Judge Yeager's dissent. I desire to add a bit thereto.

In connection with Judge Yeager's discussion of the evidence, I desire to direct attention to the standard of quality of evidence which we have stated is applicable in this type of case. It is: "The findings to sustain disbarment must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal action." State ex rel. Nebraska State Bar Assn. v. Richards, 165 Neb. 80, 84 N. W. 2d 136.

It now appears that when the respondent was suspended we left him with a sword of Damocles hanging over his head in that we deprived him of all the rights of a lawyer while suspended but now hold him subject to all the standards of a lawyer during that period.

A suspended lawyer has to live and do and earn. Respondent is now being disbarred for doing those things which it is common knowledge are done by laymen without citations for contempt for practicing law. He

should not be held to have forfeited being restored to the status of a lawyer because of it.

BARBARA ANN BLAND, ADMINISTRATRIX OF THE ESTATE OF AUSTIN L. BLAND, DECEASED, APPELLANT, V. MARCUS D. FOX ET AL., APPELLEES.
111 N. W. 2d 537

Filed November 10, 1961. No. 34961.

1. **Municipal Corporations.** When used as a measurement of distance, and nothing appears to the contrary, the commonly accepted meaning of a block is 300 feet.
2. **Trial.** A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence.
3. **Automobiles: Negligence.** A violation of statutes regulating the use and operation of motor vehicles upon the highways 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.
4. **Evidence.** Direct evidence is evidence which if believed proves the existence of the fact in issue without any inference or presumption; while circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist.
5. ———. Admission of facts by a defendant tending to establish a civil liability is generally considered direct and not circumstantial evidence.
6. **Witnesses: Evidence.** 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. In other words, a party who offers the evidence of a witness cannot subsequently object that it should not have been received or that it is insufficient to sustain a judgment based thereon. But a party calling a witness is not necessarily bound by his testimony. This is true where the testimony is contradicted, either expressly or by inference, by evidence

that would justify the trier of facts in arriving at a different conclusion.

7. **Trial.** In an action wherein 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.
8. **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.

APPEAL from the district court for Red Willow County: VICTOR WESTERMARK, JUDGE. *Reversed and remanded.*

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

Russell & Colfer, for appellees.

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

SIMMONS, C. J.

This is a damage action for wrongful death arising as a result of a collision between a car driven by one Austin L. Bland and a semitrailer truck owned by the two defendants and driven by the defendant, Marcus D. Fox, hereinafter referred to as defendant Fox. Bland was killed instantly. Defendant Fox was injured and taken to the hospital where he made two statements to officials to which we will refer later.

The accident occurred on a paved two-lane highway some 4½ miles west of McCook.

Issues were made and trial had. At the close of evidence for the plaintiff in chief, the trial court on motion directed a verdict for the defendants. Plaintiff appealed. We reverse the judgment of the trial court and remand the cause for a new trial.

The issues of negligence upon which the case was tried involved allegations that defendant Fox failed to keep a proper lookout; failed to have his vehicle under proper control; failed to stop in time to avoid the collision; drove on to the north side of the highway im-

mediately prior to the collision; and failed upon meeting Bland to keep the vehicle to the right of the center of the highway and drove on to the north side of the highway just prior to the collision. These allegations must be read in the light of the undisputed fact that the Bland car was traveling west and the defendants' vehicle traveling east.

Before we discuss the facts, it becomes necessary to state some applicable rules of law.

Witnesses used the terms "block" and "blocks" as descriptive of distances. The rule is: "When used as a measurement of distance, and nothing appears to the contrary, the commonly accepted meaning of a block is 300 feet." Gorman v. Dalgas, 151 Neb. 1, 36 N. W. 2d 561, followed in Wolfe v. Mendel, 165 Neb. 16, 84 N. W. 2d 109. In view of the limited distances involved, we state the evidence of distance in terms of feet under the above rule.

We restate the established rule: "A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." Wrona v. Schrawger, 171 Neb. 814, 108 N. W. 2d 95.

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."

" 'A violation of statutes regulating the use and operation of motor vehicles upon the highways 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.' " Carter v. Chicago, B. & Q. R. R. Co., 170 Neb. 438, 103 N. W. 2d 152.

The plaintiff contends that, under the above rule, the evidence presented a jury question.

The defendants rely in large part upon two contentions. First, that the evidence as to the accident is entirely circumstantial and under the necessary requirements of the circumstantial evidence rule is insufficient to present a jury question.

In 31 C. J. S., Evidence, § 2, p. 505, the rule is stated as follows: "Direct evidence is evidence which if believed proves the existence of the fact in issue without any inference or presumption; while circumstantial evidence * * * is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist. The distinction between these two classes of evidence is of little practical value, especially in view of the obvious necessity that all evidence be direct with respect to its own subject matter, for the law will not permit the drawing of an inference from a supposed fact of whose existence there is no direct proof."

In 20 Am. Jur., Evidence, § 4, p. 35, the rule is stated as follows: "Other terms used to designate different forms of evidence are 'direct' and 'circumstantial,' direct evidence being that which proves the fact in dispute directly, and circumstantial evidence being that which relates to a series of facts other than the fact in issue, which series of facts has been found, by reason of experience, to be so associated with the fact in issue that, in relation of cause and effect, they lead to a satisfactory conclusion."

The Supreme Court of Missouri in State v. Famber, 358 Mo. 288, 214 S. W. 2d 40, states the rule as follows: "Direct evidence is said to be 'evidence which if believed proves the existence of the fact in issue without inference or presumption; while circumstantial evidence is evidence which, without going directly to prove the ex-

istence of a fact, gives rise to a logical inference that such fact does exist.' And it is also said that direct evidence is that coming from an 'eye witness'; or one who speaks directly 'of his own knowledge' on the main or ultimate fact to be proven; or who 'saw or heard' the factual matters concerning which he testifies."

We held in Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349, that: "Admission of defendant of facts tending to establish a criminal charge against him is generally considered direct and not circumstantial evidence." Quite properly the above rule would apply to admissions of a defendant of facts tending to establish civil liability for negligence. We so hold. The above rule applies to the evidence offered by the plaintiff as to statements made by defendant Fox while at the hospital after the accident.

It becomes apparent, as will be developed later, that a large part of the evidence offered by plaintiff was direct evidence instead of circumstantial evidence.

Defendants make another contention which requires attention. Conceding that the statements made by the defendant Fox came "from the lips of the only living eye witness" it is argued that the plaintiff is bound by that testimony and "dispels the effect of plaintiff's wholly circumstantial evidence which suggests inferences not sufficient in themselves to establish any negligence on the part of" defendant Fox.

In Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112, we examined our decisions and restated this rule: "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. In other words, a party who offers the evidence of a witness cannot subsequently object that it should not have been received or that it is insufficient to sustain a judgment based thereon. But a party calling a witness is not necessarily bound by his testimony. This is true where the testimony is contradicted, either expressly or

by inference, by evidence that would justify the trier of facts in arriving at a different conclusion."

The difficulty with defendants' contention, however, is that plaintiff did not offer the defendant Fox as a witness. Fox did not testify. His credibility was not put in question as a witness. The rule above stated would prevent the plaintiff challenging the credibility of the highway patrolman and the county attorney. Plaintiff vouched for their credibility as to what Fox told them. Plaintiff did not vouch for the credibility of Fox or the truth of what he said.

In Dryer v. Malm, 163 Neb. 72, 77 N. W. 2d 804, we restated this rule: "In an action wherein 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."

We now review the evidence of the plaintiff in the light of the above rules and state conclusions which we think a jury could reasonably have reached.

The accident happened about 8 p.m., November 14, 1959. The pavement was clear. The weather was cloudy. It was cold and a wind was blowing.

As heretofore stated, the Bland car was proceeding west, he being alone in the car. The defendants' truck was going east with the driver alone in the cab.

There was one eyewitness who testified to the movements of the Bland car up to a few moments before the impact. Bland was driving west on the north side of the highway with his lights on and at a speed of 40 or 45 miles an hour. A witness, Mr. Guzman, was proceeding west following the Bland car at a distance of about 600 feet. During the distance from McCook and before the accident, three cars from the west going east passed the Bland and Guzman cars. Guzman would lose sight of the Bland car when his courtesy dim lights were on and regain sight of the Bland car when he restored his driving lights. Guzman testified that Bland was driving on the "right-hand side." Guzman dimmed

his lights when the last car went by and when he restored them he saw a roll of smoke like steam and dust and then discovered that the accident had happened. Guzman dimmed his lights about 300 to 450 feet east of a turnoff to a farm. The cars came to rest across the road and slightly west of this turnoff. A map in evidence shows the distance to be about a road's width west of the turnoff to the farm where the cars came to rest. Guzman said that he met an eastbound car a little before he came to a sort of "S" curve in the highway. This "S" curve in the highway would turn a westbound car following the contour of the road slightly south of west. It is a matter of common knowledge that the main beam of headlights follows the direction of a car. So, at that point for two reasons Guzman could have momentarily lost sight of the Bland car.

Now then, what happened to the Bland car in the interval between the time Guzman momentarily lost sight of it and of equal importance what happened to the defendants' truck?

There is direct evidence that a car coming east passed the Bland car before the accident. That car is shown to have been on its own or south side of the highway. The distances testified to by Guzman would put the Bland car at about the point this eastbound car passed near the eastbound truck of defendants. The jury could have concluded that the Bland car was on the north or its own side of the highway at that time.

There is other direct testimony, under the above authorities, of the movements made by the Bland car and defendants' truck during the period that Guzman did not observe the Bland car. There is evidence of admissions made by defendant Fox of facts and circumstances.

Defendant Fox was injured but it does not appear that his injuries were serious. The first interview was had at the hospital with a highway patrolman some 30 to 45 minutes after Fox had left the scene of the accident. The patrolman testified from memory and related Fox's

statement as follows. Fox said he saw only one car approaching him, although at that time, there were the Bland and Guzman cars approaching him. Neither did Fox see the three cars that Guzman testified passed him (Guzman) going east. Fox told the patrolman that the car he was meeting "was in his lane and seemed to be going to make a turn into a driveway." So Fox pulled "to the left" to give the car more room "and then the car, instead of turning, swerved back over into the north lane again," and the collision occurred. Here Fox puts himself at least turning toward the north lane and puts the Bland car in "the north lane" before the collision.

The second statement of defendant Fox was made in a conversation with the county attorney and others, although testified to only by the county attorney. This conversation took place at the hospital about 2 hours after the accident.

Defendant Fox said that he observed a car coming toward him from the east and when "some distance from him, it crossed into his lane of traffic." He further said that "the left wheels of the car went onto the south shoulder of the highway." This occurred east of the driveway to the south but how far east is not shown. Fox said he "thought that the car was going to turn onto this driveway," so he turned his truck slightly to the north and then the car turned "towards the northwest" and the car and truck collided. The jury could rationally have found that this movement of the Bland car could reasonably have occurred where Bland swung into and out of the "S" curve as he approached the graveled highway. Fox, in this interview, said, "he did not, *to his knowledge,* cross the centerline of the highway into the northbound lane until after the two vehicles came in contact."

The Bland car came to rest headed north, slightly west, with its rear over 7 feet off the pavement.

The Fox tractor was off the pavement headed northeast with the trailer on the pavement headed northeast.

The right rear wheels of the trailer were across the centerline of the pavement.

There were skid marks for a short distance behind the trailer made by the Fox vehicle although their length and what wheels made them does not appear. They are mostly north of the centerline of the highway.

The pictures taken of the wreckage indicate that the Bland car was struck on the left side and was literally smashed. They also indicate that the main blow to the tractor was on its left front fender, wheel, and mechanism in that area.

What evidence there is of debris on the highway shows it all to be north of the centerline of the highway. There is no evidence of gouging of the pavement or shoulder by movement of either of the two vehicles. Neither is there evidence of either driver slackening speed or using brakes save that indicated by the sketchy evidence as to the skid marks.

Such is the evidence which the trial court held insufficient to submit the issue of negligence to the jury.

Under section 39-748, R. R. S. 1943, and the authorities heretofore cited, and without examining into the other allegations of negligence, we conclude that there is sufficient evidence to take the issue of negligence in driving on the wrong side of the highway to the jury.

There is one further matter to be determined. Plaintiff offered in evidence the testimony of an expert witness and undertook to have him testify, as stated in her brief, "for the purpose of interpreting the effects of the forces and stresses to the metals of the vehicles by the impact, to determine from photographs admitted in evidence, the witness' personal examination of the vehicles after the collision, his examination of the highway at the scene, and the location where the vehicles came to rest, for the purpose of determining, if possbile from this testimony, the location on the highway of the vehicles at the point of impact, the manner of their com-

ing together, and the distance and route they traveled after impact."

The trial court excluded the proposed evidence. Plaintiff made no offer of proof. Error is assigned here. The rule is: "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." Parker v. State, 164 Neb. 614, 83 N. W. 2d 347.

The matter of error assigned is accordingly not here for review.

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

REVERSED AND REMANDED.

DOROTHY ATTEBERY, APPELLANT, V. VIRGIL ATTEBERY, APPELLEE.
111 N. W. 2d 553

Filed November 10, 1961. No. 35017.

Divorce. A husband who waits for more than 20 years after a decree of divorce is obtained by his wife against him with timely knowledge of the proceeding in which it was entered, during which time his wife after waiting 3 years is remarried, and the husband leaves his children of tender years to be, in part, cared for and nurtured till maturity by the divorced wife and her second husband, and who himself during that time remarries, is guilty of laches and comes into court with unclean hands and is estopped to question the validity of the decree.

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

Maupin, Dent, Kay & Satterfield, Thomas O. David, and *James J. Duggan,* for appellant.

Sam S. Diedrichs, for appellee.

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

BROWER, J.

The present proceeding was brought by Virgil Attebery, defendant and appellee herein, to set aside a decree of divorce obtained by the plaintiff and appellant Dorothy Attebery, whose name is now Dorothy Hulett, in the district court for Lincoln County, Nebraska, on August 15, 1935. The defendant's petition to vacate was filed in the original action May 8, 1959. The grounds urged to set aside the decree were that the only allegation of the original petition for divorce given as grounds for divorce was that the defendant, after a plea of guilty to the crime of jail breaking, was sentenced to the State Reformatory for Men at Lincoln, Nebraska, for the term of 1 to 2 years. At the time of the divorce action and at all other times the statutes of Nebraska required a minimum sentence of 3 years in the state reformatory or penitentiary as grounds for divorce; that no other ground was set out either in the petition or decree; and that the action of the court in granting the divorce was null and void from its inception because no ground for divorce authorized by the statute was stated.

Plaintiff filed an answer which contained a general denial and also alleged that the defendant was estopped to deny the validity of the divorce decree because of his acceptance of the benefits thereof by his subsequent marriage; and that he was guilty of laches in waiting more than 20 years before instituting proceedings attacking the validity thereof. It contained other allegations which in view of our decision will be unnecessary to discuss. The reply was a general denial.

The transcript shows the allegations of the plaintiff's original petition and findings in the decree of 1935 were as alleged in the defendant's petition to vacate. An absolute divorce was granted with provision for defendant to pay $20 a month child support. The defendant Virgil Attebery was personally served with a summons

in Lancaster County, Nebraska, on July 9, 1935, which summons was endorsed "Absolute Divorce and Equitable Relief."

The evidence at the trial was brief. Defendant who was present at the trial was first called. He stated he was married after the divorce on December 27, 1946, at Greenville, Georgia; and that he returned to Nebraska in 1951 for a short time and then in 1953 to stay. No issue was born of the marriage.

Plaintiff's deposition taken before trial was then read in evidence. She testified she had resided continuously in California since early in 1937. She married her present husband Duard W. Hulett on December 18, 1938. The two children of her marriage with defendant lived with her and her second husband until their maturity. Both children attended high school and thereafter went to college, the son for 5 years and the daughter for 2 years. Their maintenance and education had been paid for by her second husband. The defendant had paid nothing for the support of the children or herself except a gift of one dollar to the children occasionally on their birthday. She had received nothing from the court. When the daughter was 18 years of age she had asked for financial assistance from defendant for an operation for the daughter and likewise on one occasion for shoes for the son, but defendant did not comply.

After the deposition was read the defendant testified in rebuttal that at certain periods after the divorce and prior to plaintiff's remarriage, he and plaintiff had lived together as husband and wife; that on those occasions he had rendered financial assistance; that he gave her money "right along"; and that he had contributed to the children. At one period he sent $5 a week to the daughter for ballet lessons; that he always sent the daughter $25 per month; and that if she had saved her money she could have paid for her operation. He also sent the boy $50 per month while he was in San Diego

over an undisclosed period of time.

The trial court held for defendant that the decree of divorce was void ab initio and entered an order setting it aside.

Plaintiff's motion for new trial was overruled. She then brought the matter to this court on appeal.

Plaintiff assigns as error that the order vacating the decree is not sustained by the evidence and is contrary to law; and that the court below erred in not finding the defendant estopped by virtue of the acceptance of the benefits of the decree by remarriage, and in not finding him guilty of laches in waiting 23 years before instituting proceedings to set aside the decree. Other assignments of error are made which are not necessary to discuss.

We sustain the assignments as to those errors mentioned.

The only conflict in the evidence is in regard to the extent of the payments of defendant made to the plaintiff and the children. It is to be observed that in the defendant's testimony the time and method of payments alleged to have been made to the wife are not disclosed. Also the length of the periods over which he contributed to the children are not given, and it would appear that the payments to them must have been made when they were at least approaching maturity.

Much space is given in the briefs filed as to whether the divorce decree was void or voidable. We do not feel this is necessary for the court to decide. It seems that the disposition of the matter in controversy turns on the question of whether the defendant under the admitted facts is in position to maintain the proceeding or whether he is barred by estoppel and laches under the circumstances from attacking the decree in either event.

The general rule with regard to estoppel as applied to the present proceeding is set forth in 17 Am. Jur., Divorce and Separation, § 516, p. 612, as follows: "One

seeking relief from a divorce decree may, by reason of his conduct subsequent to the rendition of the decree, be estopped from attacking it. Thus, one cannot be relieved from a judgment of divorce after using the privileges which it confers; in other words, one cannot accept benefits of a decree and not be bound by its burdens. * * * Generally, it is held that if one against whom a divorce decree has been granted remarries, he or she is thereafter estopped to assail the validity of the divorce, but even this rule may be subject to exception, as in a case where it appears that the divorce was obtained by a fraud upon the court and with the purpose to keep the defendant in the divorce action uninformed as to the suit and the granting of a decree."

Also the party against whom the divorce is obtained may be barred if he delays proceedings to assail the decree after he has knowledge thereof and allows the other party to remarry and involve innocent persons. These rules are set out in 17 Am. Jur., Divorce and Separation, § 517, p. 613, as follows: "Notwithstanding the existence of the power to vacate a decree after the marriage of the plaintiff, it has been said that there is a manifest reluctance to do so and that the power should be exercised with great caution. This does not mean that the granting of relief is entirely within the uncontrolled discretion of the trial court, but it does mean that the court will scrutinize the case carefully to determine whether laches affects the right to relief, and that the petitioner is required to show that he is acting from good motives, and not from any expected personal advantage, and that he must establish the grounds for setting aside the default decree 'by the clearest and most satisfactory evidence.' On the other hand, the conduct of the second spouse may be such that she or he is not entitled to any consideration in determining whether to vacate or set aside the divorce decree, as where the second wife lived with the husband before he

obtained a divorce, or knew of the important facts before marrying him."

There are not many Nebraska cases brought long after decree seeking to set aside a divorce. Most of them are proceedings either to vacate or modify them within term as was done hitherto or within the 6-month period now provided before the divorce becomes final under section 42-340, R. R. S. 1943. Some of them are matters that have proceeded under sections 25-2001 to 25-2009, R. R. S. 1943, to vacate or modify judgments at a subsequent term. Many of the cases are not applicable here.

However, this court has held that independently of all of these methods of attacking a decree of divorce the courts of general jurisdiction in this state have power in an appropriate case to open up such judgments. Smithson v. Smithson, 37 Neb. 535, 56 N. W. 300, 40 Am. S. R. 504; Wisdom v. Wisdom, 24 Neb. 551, 39 N. W. 594, 8 Am. S. R. 215, the latter case cited and approved in Shinn v. Shinn, 148 Neb. 832, 29 N. W. 2d 629, 174 A. L. R. 510.

In Wisdom v. Wisdom, *supra,* our court held that a divorce decree could under the circumstances described therein be set aside. The cited case was tried on demurrer. The facts stated in the petition are set out in detail in the report. They are such that any court of equity would heed. They recite a case of gross fraud; fraud in deserting an incompetent wife and running away with a neighboring woman with whom the defendant became enamoured and had illicit relations. They came to this state and each secured a divorce on false and fraudulent averments and evidence, and after the second divorce were immediately married, leaving the innocent and incompetent first wife and children without support. The facts in the cited case are only briefly outlined here. They are mentioned so that the import of the remarks of the court towards the close of the opinion may be better understood. The court

there said: "We are not unmindful of the fact that courts will always hesitate to set aside a decree of divorce, and especially so where a second marriage has intervened, under which children have been begotten, or rights may have become vested, but it is equally true that cases have arisen, even under the circumstances named, where courts have not refused to set aside decrees of divorce.

"We are not embarrassed by these conditions in this case, for there are no children by the second marriage, and if the allegations of the petition are true, which must be assumed, Mrs. Knox is in no sense an innocent party and can claim no rights as such."

The case of In re Estate of Nelson, 81 Neb. 363, 115 N. W. 1087, involved a claim for widow's allowance made in probate court by one claiming to be the surviving spouse. A divorce decree from the claimant had previously been had by the decedent who had remarried before death. Claimant contended the divorce was void because the petition did not state facts sufficient to constitute a cause of action and the decree was obtained by fraud and collusion. The court held that the decree was not void and that the petition was not a test of jurisdiction. However, the following remarks of the court in regard to the question of estoppel are quite pertinent: "The record shows that plaintiff appeared in the divorce suit, filed her answer, and ratified the decree entered by accepting the provision made for her therein. She subsequently acquiesced in that decree, and permitted her former husband to marry another woman on the strength of it. She never performed, or attempted to perform, any marital duties after the entry of the decree, and never asserted any claim that she was the wife of Nelson until after his death, when she thought she saw a chance to obtain another slice of his estate. To permit her to come into court at this time and disgrace the memory of her former husband and fasten the crime of bigamy upon an innocent woman, in order to

entitle her to obtain a moiety of his estate, would be a travesty upon justice; and, even if there were not ample authority to sustain us, we would not hesitate to hold, as a case of first impression, that plaintiff is estopped."

There are very few other cases of our own court touching the situation that we have here, but we are favored by many from sister states and will discuss a few of them.

Swift v. Swift, 239 Iowa 62, 29 N. W. 2d 535, is a case where the wife procured the divorce. The court held that the decree was void because the husband had not been served with process before decree; that the husband however knew of the decree within 15 days thereafter; that he knew his former wife was keeping company with and intended to marry a man whom she had not met until after the divorce; and that he did nothing for 6 months but after the marriage he then brought action to set aside the decree. The Iowa court held that the plaintiff was precluded by laches and estoppel and lack of good faith from seeking annulment of the decree for want of jurisdiction.

Packer v. Packer, 6 App. Div. 2d 464, 179 N. Y. Supp. 2d 801, was an action to vacate decree brought by the wife where the husband secured a divorce in Virginia. He never established a valid residence there of any kind let alone sufficient duration to satisfy the divorce laws. She was neither served nor did she appear. She later knew of it and there was some evidence that she participated in procuring it. Seven years later she remarried and the husband remarried and had a child. The syllabus, amply borne out by the opinion, states briefly: "Mail order divorce obtained in foreign country does not have even sufficient vitality to create an estoppel against spouse who obtains it in an action to establish marital status; but it may suffice to preclude spouse from asserting a private claim or demand arising out of marriage.

"Even if plaintiff had not participated in divorce ar-

rangements, she would be precluded, by reason of her subsequent marriage to another, from obtaining relief sought in her action to have divorce decree declared void and annul her subsequent marriage to another."

In Patterson v. Patterson, 164 Kan. 501, 190 P. 2d 887, the wife sought in 1947 to set aside a divorce obtained by her husband in 1934. She had remarried twice thereafter. The court said: "* * * plaintiff has treated the divorce decree which Leroy L. Patterson procured from her March 30, 1934, as valid on at least three important occasions. It is well settled that one who takes the benefit of a decree of the court is estopped thereafter from questioning its validity."

The Supreme Court of Arizona in Green v. Green, 77 Ariz. 219, 269 P. 2d 718, in an action brought by the party against whom the decree had been entered to set it aside where the prevailing party had remarried, said: "Clearly, under this finding, the court in fact had no jurisdiction over the subject matter of the action and as to an innocent party it would no doubt be set aside. Under certain circumstances, however, the parties may be estopped to question the validity of a judgment for lack of jurisdiction. As applied to a divorce decree, the general rule is that if one's conduct has led to the obtaining of the decree, or if his conduct for any other reason has been such as would make it inequitable to allow him to deny the validity of the decree, the courts will not listen to his pleas of invalidity. Restatement of the Law, 1948 Supplement, Conflict of Laws, section 112, comment (c). Under such circumstances, equity closes the door and refuses to disturb the situation thus created. This is not the equivalent of allowing parties to confer jurisdiction by consent; it is merely saying the court refuses to grant relief to a guilty party."

The following cases from the jurisdictions shown are to the same effect but it will not be necessary to discuss them at length. Wendell v. Wendell, 111 Cal. App. 2d 899, 245 P. 2d 342; Littlefield v. Littlefield, 199 Mo.

App. 456, 203 S. W. 636; Joy v. Miles, 190 Miss. 255, 199 So. 771. Further discussion of authorities is needless. Many other cases are gathered together in the analysis in the note to Bussey v. Bussey, 95 N. H. 349, 64 A. 2d 4, 12 A. L. R. 2d 151. They are separately grouped in different numbered portions of the note as affected by whether the party seeking to set aside the decree is guilty of laches or is by his actions estopped, a great many holding that under the facts of the particular case the applicant is barred by reason of both.

It is worthy of note that no question of collusion, concealment, or fraud of the plaintiff appears in this proceeding. The defendant was served with a summons that was endorsed "Absolute Divorce and Equitable Relief." He had the usual time in which to answer and the time allowed to him by our code in which to seek reversal, vacation, or modification of the decree. He chose to do nothing for over 20 years.

After waiting 3 years the plaintiff in this case remarried. She has lived with her second husband ever since December 1938. The defendant's children given by the decree to plaintiff have been nurtured and cared for by the plaintiff and her second spouse from tender years to maturity. They appear to have been supported at least in part by the second husband, an innocent person in all events. So now after 23 years this defendant, who likewise has remarried, for the first time comes into court and asks to have the decree of divorce entered in 1935 vacated and held for naught.

A husband who waits for more than 20 years after a decree of divorce is obtained by his wife against him with timely knowledge of the proceeding in which it was entered, during which time his wife after waiting 3 years is remarried, and the husband leaves his children of tender years to be, in part, cared for and nurtured till maturity by the divorced wife and her second husband, and who himself during that time remarries, is guilty of laches and comes into court with unclean hands and is

estopped to question the validity of the decree. These are the only questions necessary for this court to decide.

The judgment of the trial court is reversed and the cause is remanded with directions to set aside the order vacating the decree of divorce and to reinstate the decree at the defendant's costs.

REVERSED AND REMANDED WITH DIRECTIONS.

FAY SMITH & ASSOCIATES, INC., A CORPORATION, APPELLANT, V. CONSUMERS PUBLIC POWER DISTRICT, A CORPORATION, APPELLEE.

111 N. W. 2d 451

Filed November 10, 1961. No. 35034.

1. **Trial: Judgments.** In considering a motion for summary judgment the court should view the evidence bearing on the question of whether or not there is a genuine issue of material fact in the light most favorable to the party against whom it is directed.
2. ———: ———. In order for the movant to obtain a summary judgment it must be shown first, that there is no genuine issue as to any material fact in the case and, second, that movant is entitled to a judgment as a matter of law.
3. ———: ———. Summary judgment is effective and serves a separate useful purpose only when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged.
4. ———: ———. The evidence offered on a motion for summary judgment is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, and affidavits which constitute only a part of the evidence available on a trial on the merits.

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

Cassem, Tierney, Adams & Henatsch, for appellant.

Healey, Wilson & Barlow, for appellee.

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

SPENCER, J.

This is an action at law wherein Fay Smith & Associates, Inc., a corporation, is plaintiff and appellant, and Consumers Public Power District, a corporation, is defendant and appellee. The action was commenced in the district court for Lancaster County. After some preliminary proceedings on a petition and an amended petition over a period of more than 2 years, plaintiff filed a second amended petition. Shortly thereafter, defendant filed a motion for summary judgment, with a supporting affidavit. No pleadings had been filed in the case by the defendant other than motions. The deposition of plaintiff's president, which defendant had taken over 2 years previously, was on file. The plaintiff filed no affidavit, and the affidavit filed by the defendant with its motion for summary judgment was restricted to identifying and offering two letters between the parties which were referred to in the deposition.

After argument, the motion for summary judgment was sustained, and the plaintiff's action dismissed. Plaintiff filed a motion for new trial which was overruled, and the plaintiff perfected its appeal to this court.

Plaintiff assigns as error the sustaining of defendant's motion for summary judgment and the overruling of plaintiff's motion for new trial.

The motion for summary judgment was submitted to the trial court on the deposition of the plaintiff's president; the second amended petition with attached exhibits, consisting of an unsigned contract and a letter from plaintiff's president dated May 17, 1954; and two letters, one from plaintiff's president dated May 24, 1954, and the other from defendant's general manager dated June 4, 1954, both of which were supplied by the affidavit of defendant's general manager.

In Wolf v. Tastee Freez Corp., *ante* p. 430, 109 N. W. 2d 733, we said: "In considering a motion for summary judgment the court should view the evidence in the

light most favorable to the party against whom it is directed."

We now review the second amended petition, the deposition, and the letters in the light of the above rule, and state conclusions which we feel could reasonably be drawn to sustain plaintiff's claim.

Plaintiff is a firm of consulting engineers. Plaintiff and defendant were in the process of developing a contract for architectural services in the construction of a steam generating plant between Lincoln and Beatrice when the Custer Public Power District sued to stop the project. A contract satisfactory to both parties had been developed but had not yet been signed. This contract is attached to and made a part of plaintiff's second amended petition. Shortly after the suit was filed by the Custer Public Power District, the plaintiff was approached by representatives of defendant about doing preliminary work pending the litigation, which both parties assumed would be terminated successfully although there would be a delay of several months. In response to these inquiries, the plaintiff offered to start work immediately and tendered the services of plaintiff's three executives for a nominal hourly charge for the services to be rendered by them. Plaintiff alleges, however, this charge was conditional and that if defendant prevailed in the litigation and went ahead with the project, the work done by its executives would then be compensated on the basis set forth in the unsigned contract, allowing credit for the amount paid. The defendant accepted the proposal and plaintiff did the preliminary work for which it was paid $12,854.17. Plaintiff alleges its proposal was made in its letter to the defendant dated May 17, 1954, and amplified in its letter of May 24, 1954; and that the defendant accepted the offer in its letter of June 4, 1954.

The letter of May 17, 1954, to defendant is as follows:

"Enclosed herewith is an outline of recommended procedure in plant design.

"You will note that the design consists of six phases, three of which must be completed before actual equipment specifications can be prepared. Upon completion of the first three phases, decision on major equipment components can be determined and when such determination is made, actual design can be undertaken.

"Due to recent developments in connection with providing additional capacity for your eastern division, we wish to propose the following plan under which a considerable portion of preliminary design work can be completed.

"In the contract which has been developed covering our services in connection with your proposed plant, provision has been made for compensation of employees of our organization, excepting Smith, Mann, and Lyle. We propose to start work immediately on phases 1, 2, 3, and 4 as contained in the enclosed design outline, under identical terms of our contract, providing that compensation for actual time of Smith, Mann, and Lyle in connection with preliminary design phases be paid at the rate of $4.50 per hour plus 50%.

"When present uncertainties in connection with proposed work are removed and if Consumers proceed with proposed construction, the amounts paid to our organization for the services of Smith, Mann, and Lyle would be considered as payments on account of the basic fee in our main contract.

"Would like to discuss this with you in Columbus later this week but will call you for an appointment."

The letter of May 24, 1954, to defendant is as follows:

"This letter will confirm our discussion of May 21 regarding preliminary engineering work in connection with your proposed power plant to be located in the Lincoln-Beatrice area.

"We will proceed at once assembling necessary information which will be required to enable us to make heat balance studies, and when these studies are ap-

proved by your organization, we will be in a position to promptly ask for bids on major equipment items.

"We will also proceed with surveys in connection with the selection of the plant site. This work will cover the assembly of information relating to rail lines, gas lines, water conditions and available sub-surface information and the planning of any sub-surface explorations which might be required when construction is undertaken.

"Mr. Lyle and an assistant will be responsible for the survey for the site, and Mr. Mann will proceed with the preliminary studies in connection with the plant. He will work with Mr. Venable and his assistant in assembling required information as to the prospective loads and load duration curves under which the plant will operate.

"It is expected that within 3 or 4 weeks he will be in a position to proceed with heat balance studies at which time we would employ Mr. John Peterson who worked with him in North Omaha.

"We would bill you for the services of the men for actual time spent on the work at the following rates:

"Mr. F. E. Smith	$4.50 per hour
Mr. Robert Mann	4.50 per hour
Mr. Hayes Lyle	4.50 per hour
Mr. John Peterson	3.50 per hour
Mr. J. H. Smith	2.50 per hour

It is not expected that Mr. F. E. Smith will spend much time in connection with your work until his study in connection with Lincoln is completed.

"Mr. John Peterson will not be available until the latter part of June. In fact, the information required for heat balance studies will not be available before that time.

"We would bill you as stated in our proposal of May 17 for hours spent on preliminary studies at the rates stated above plus 50%, and stenographic help as required at cost. We would also expect you to reim-

burse us for meals and lodging for the site survey men when away from Omaha and auto expense at 8 cents per mile.

"We have some small jobs in our office at the present time and estimate that not more than 75% of the time will be spent on your job.

"We estimate that our billings to you would not exceed $10,000 through the month of August.

"Sometime in August progress should reach the point where an additional electrical engineer could be used to advantage and possibly an additional draftsman. However, such additional help would only be employed with your approval.

"We propose to work closely with and under the direction of your organization during this preliminary period and assure you that such work will save valuable time in enabling us to get construction started promptly when present uncertainties are removed."

The letter of June 4, 1954, from defendant to plaintiff is as follows:

"Subject: *Preliminary Engineering Work*

"This letter will confirm discussions with you relative to the firm of Fay E. Smith and Associates proceeding with preliminary engineering work on the proposed power plant for the Consolidated Eastern System, as more fully set out in your letters of May 17 and 24.

"We are hereby instructing you to proceed with preliminary work, with the understanding that the control as to the work you are undertaking will remain with Consumers Public Power District and that the estimated cost for Phases 1, 2, 3 and 4 will be $10,000.00, for which we have Board approval.

"Mr. W. F. Venable, Superintendent of Power Supply, will be the individual in Consumers District's organization with whom you will work on these preliminary studies."

Plaintiff has pleaded an action for services fully performed. Subsequent to the successful termination of

the litigation with the Custer Public Power District, defendant did proceed with the construction of a steam plant. Plaintiff was not retained for the architectural services or as consulting engineers, although its work was used by the defendant. Plaintiff is not seeking to recover for the breach of the unsigned contract. It is seeking to recover for the services actually rendered by its three executives on the basis of the rate stipulated in the unsigned contract, allowing credit for the amount paid on the hourly rate, which it contends was conditional.

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

We said in Healy v. Metropolitan Utilities Dist., 158 Neb. 151, 62 N. W. 2d 543: "It is plain that the movant in order to obtain a summary judgment must show, first, that there is no genuine issue as to any material fact in the case and, second, that he is entitled to a judgment as a matter of law. * * * The second provision is met if movant would be entitled to a directed verdict on the basis of the undisputed facts if the case were being tried to a jury."

The defendant's position may be summed up by the following paragraph from its brief: "Although the letter of May 17, 1954, does not say plaintiff is proposing a contingent fee arrangement, it does say that if Consumers later proceeds with the proposed construction, amounts paid to Smith, Mann and Lyle for the interim work 'would be considered as payments on account of the basic fee in our main contract' (E1:1,1). *However, that letter was not accepted by Consumers,* and plaintiff sent a May 24th letter to Consumers containing new provisions (page 20 of E2:1,1). This letter does not

mention the 'main contract' (E3:2,2). Consumers' later acceptance authorized only $10,000.00 for the interim work, and did not mention any contingent arrangement (E3:2,2). Eventually, plaintiff was paid $12,854.17 for work which it had been estimated by plaintiff would cost $10,000.00—and that is no 'mere pittance' for the assembly of several volumes of data (T11). There was no contingent fee arrangement—and that is clear when the three letters allegedly constituting the contract are read." (Italics supplied.)

Whether defendant did or did not accept the proposal outlined in plaintiff's letter of May 17, 1954, would certainly appear to be a genuine issue as to a material fact. Plaintiff's position is that the letter of May 24 was the result of a conversation held May 21 on the letter of May 17, and that the letter of May 24 is supplementary to the letter of May 17.

The letter of May 24, 1954, refers to a discussion held May 21. It goes into detail as to the type of work to be done. It specifies the individuals who will be responsible for particular phases. It is to be noted that the letter states: "We would bill you as stated in our proposal of May 17 * * *." While the contingent fee arrangement is not specifically mentioned, it certainly is not negatived or excluded, and the language used, liberally construed, lends substance to the plaintiff's claim. The last paragraph of the letter then states: "We propose to work closely with and under the direction of your organization during this preliminary period and assure you that such work will save valuable time in enabling us to get construction started promptly when present uncertainties are removed." This, in connection with the language used, is consistent with plaintiff's construction.

The following from the deposition of plaintiff's president, offered by the defendant, construes the letter of May 24, 1954, as contended by plaintiff: "Q- And the May 24th letter was a proposal for doing the same sort

of work that you had proposed in your May 17th letter, was it not? A- Yes. Q- But I presume the terms under which you were going to do the work were somewhat different in your May 24th letter than they were in your May 17th letter or else you wouldn't have bothered to write another letter, would you? A- I imagine what prompted this May 24th letter was in connection with employees that we would have in addition to members of the firm, which I don't recall whether it was discussed on May 21st or not. There was some question come up as to who we had available for this work and some other matters is what prompted the letter of May 24th. *It is nothing more than the expansion of the proposal of May 17th.*" (Italics supplied.)

Construing the evidence most favorable to the plaintiff for summary judgment purposes, the following from the defendant's letter of June 4, 1954: "This letter will confirm discussions with you relative to the firm of Fay E. Smith and Associates proceeding with preliminary engineering work on the proposed power plant for the Consolidated Eastern System, as more fully set out in your letters of May 17 and 24," would lend further substance to the plaintiff's claim.

Defendant appears to rely on the following questions and answers from the deposition as limiting the pay for the preliminary work to the letters and excluding any reference to the contract: "Q- Now then your petition in this case states that you did submit a supplemental proposal that Consumers had asked for and that Consumers had accepted it, and I wonder if it isn't correct to say that the three letters we have referred to—your letter of May 17, 1954, your letter of May 24, 1954, and Mr. Schacht's letter of June 4, 1954 are the proposal and acceptance you are referring to? A- That is right. Q- There isn't any additional provisions of any proposal or acceptance in this regard any place, is there? A- No. * * * Q- I am not sure that I understand Mr. Smith now. Insofar as the interim work in connection with that sup-

plemental proposal of your's was concerned, is the agreement for that contained in the three letters; the letter of May 17th, 1954 and the letter of May 24, 1954 and the letter of June 4, 1954? A- What is June 4? Q- That is Mr. Schacht's letter to you. A- What did you ask me? (Question read back) A- Yes. Q- *And beyond what is in those three documents, did anybody from Consumers ever say to you orally or in writing that you would be paid for this interim work in accordance with the terms of the contract which was under negotiation? A- No.*" (Italics supplied.)

In Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290, we stated as follows: "Summary judgment is effective and serves a separate useful purpose only when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged."

The defendant's position is that it has pierced the allegation of plaintiff's pleadings by the admission of plaintiff's president, as set out above, and it is therefore entitled to a summary judgment. Viewing the testimony of the plaintiff's president in the light most favorable to plaintiff, we do not so construe it.

The trouble with defendant's position is that it overlooks the fact that on a motion for summary judgment the plaintiff is entitled to have every inference that can be drawn from the evidence resolved in its favor if possible. The following two paragraphs from the letter of May 17, 1954, are sufficient for the purposes of the motion to suggest a contingent fee proposal and to incorporate the unsigned contract into the letter by reference: "We propose to start work immediately on phases 1, 2, 3, and 4 as contained in the enclosed design outline, *under identical terms of our contract*, providing that compensation for actual time of Smith, Mann, and Lyle in connection with preliminary design phases be paid at the rate of $4.50 per hour plus 50%.

"When present uncertainties in connection with pro-

posed work are removed and *if Consumers proceed with proposed construction,* the amounts paid to our organization for the services of Smith, Mann, and Lyle *would be considered as payments on account of the basic fee in our main contract.*" (Italics supplied.)

The first paragraph of the letter of June 4, 1954: "This letter will confirm discussions with you relative to the firm of Fay E. Smith and Associates proceeding with preliminary engineering work on the proposed power plant for the Consolidated Eastern System, *as more fully set out in your letters of May 17 and 24,*" is sufficient for purposes of the motion to constitute an acceptance of the proposal. (Italics supplied.)

Construing these paragraphs for summary judgment purposes, it is apparent to us that a genuine issue as to a material fact exists and that the motion for summary judgment should have been overruled.

The evidence offered on a motion for summary judgment is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, and affidavits which constitute only a part of the evidence available on a trial on the merits. Rehn v. Bingaman, 157 Neb. 467, 59 N. W. 2d 614; Wolf v. Tastee Freez Corp., *ante* p. 430, 109 N. W. 2d 733.

Defendant urges estoppel as a defense to plaintiff's claim. We dispose of that defense in this case by suggesting that its very nature raises a material fact issue which could not be disposed of on the fragmentary record in this case.

For the reasons given above, the motion for summary judgment should not have been sustained. The judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED AND REMANDED.

LOYD WEST, APPELLANT, V. PAUL J. WEGNER, APPELLEE.
111 N. W. 2d 449

Filed November 10, 1961. No. 35044.

1. **Contracts.** Courts will not permit a party to avoid a contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form.
2. **Contracts: Fraud.** The doctrine that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing the contents of such writing is not applicable in a suit thereon between the original parties thereto, where the defense is that such writing, by reason of fraud, does not embrace the contract actually made.

APPEAL from the district court for Knox County: JOHN E. NEWTON, JUDGE. *Affirmed.*

Roscoe L. Rice and *Frederick M. Deutsch*, for appellant.

George F. Johnson, Arthur L. Burbridge, and *Mark J. Ryan*, for appellee.

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

BOSLAUGH, J.

This is a suit upon an agreement guaranteeing the payment of a promissory note. The appellant, who was the plaintiff in the court below, was the payee of the note. The appellee was the defendant in the court below. The jury returned a verdict for the defendant. The plaintiff's motion for new trial was overruled and the plaintiff has appealed.

The following is a summary of the pleadings so far as is important to the disposition of this appeal: The petition alleged the execution of the guaranty agreement by the defendant at the time of the execution and delivery of the note by the makers and in consideration of the value evidenced thereby. The answer contained a general denial and alleged that the guaranty agreement was attached to the note at the request of the plaintiff and not the makers; that there was no con-

sideration for the execution of the guaranty agreement; and that the defendant's signature to the guaranty agreement was obtained by the fraud of the plaintiff in representing to the defendant that he was merely signing as a witness. The reply alleged that the defendant was mature, was able to read and write, and was estopped to deny that he understood the meaning of the guaranty agreement at the time he signed it.

The question presented by the appeal is whether the evidence is sufficient to support the verdict and judgment for the defendant. In determining the sufficiency of the evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it. Graves v. Bednar, 171 Neb. 499, 107 N. W. 2d 12.

The defendant is 64 years of age. He is engaged in a general insurance business in Creighton, Nebraska. From 1919 to 1945 he was in the automobile business in Creighton, Nebraska.

The defendant is the father of Fredrick P. Wegner. In April 1954, Fredrick P. Wegner and his wife, Ferol H. Wegner, entered into a contract to purchase a lumberyard at Bonesteel, South Dakota, from the plaintiff. The contract did not include the inventory but provided that it would be the subject of future negotiation and possible agreement between the parties.

In July the defendant went to Bonesteel and helped his son in the lumberyard where the inventory was being taken. After the inventory had been extended it was found to be much larger than Fredrick P. Wegner had anticipated. Fredrick P. Wegner and his wife were in doubt as to whether to go ahead with the deal and, on July 24, 1954, conferred with the plaintiff about the transaction. Late that afternoon they decided to go ahead with the purchase.

On the evening of July 24, 1954, the plaintiff came to the home of Fredrick P. Wegner. Fredrick P. Wegner

and his wife and children were there together with the defendant. After Fredrick P. Wegner and his wife had signed the note, the defendant was called into the room and the plaintiff asked the defendant to sign as a witness. The defendant then placed his signature on the back of the note on a blank line under the printed form of the guaranty agreement. The defendant knew that he was placing his signature on a promissory note but he did not read the instrument or ask anyone present to read it for him. The defendant can read and write but had left his glasses at home. While the defendant was in the room he asked the plaintiff about the rate of interest that the note bore and how much blue-sky there was in the deal.

The defendant also signed a guaranty agreement on the back of a second note. He recognized his signature but did not remember signing his name or when it was done. The defendant also signed as a witness to a supplemental agreement between the plaintiff and the defendant's son. Again he recognized his signature but did not remember signing his name or where or when it was done.

The plaintiff relies upon the rule that a party to a contract is not permitted to avoid the contract on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form. Garsick v. Dehner, 145 Neb. 73, 15 N. W. 2d 235. But this rule does not apply where the controversy is between the parties and the execution of the instrument was induced by fraud.

The doctrine that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing the contents of such writing is not applicable in a suit thereon between the original parties thereto when the defense is that such writing, by reason of fraud, does not embrace the contract actually made. Ward v. Spelts & Klosterman, 39 Neb. 809, 58 N. W. 426. See,

also, Reilley Bros. v. Thompson, 127 Neb. 683, 256 N. W. 642; J. I. Case Co. v. Hrubesky, 125 Neb. 588, 251 N. W. 169; New Omaha Thompson-Houston Electric Light Co. v. Rombold, 68 Neb. 54, 93 N. W. 966, reversed on other grounds on rehearing, 68 Neb. 71, 97 N. W. 1030; Story v. Gammell, 68 Neb. 709, 94 N. W. 982; Woodbridge v. DeWitt, 51 Neb. 98, 70 N. W. 506; Spelts & Klosterman v. Ward, 2 Neb. (Unoff.) 177, 96 N. W. 56; Aultman & Taylor Co. v. Finck, 36 Neb. 680, 54 N. W. 989; Cole Bros. & Hart v. Williams, 12 Neb. 440, 11 N. W. 875; First Nat. Bank of Omaha v. Lierman, 5 Neb. 247; Mardis v. Miller, 241 F. 470.

The following statement which is applicable here is from Cole Bros. & Hart v. Williams, *supra,* which was an action between the original parties in which fraud was alleged: "In one point of view the signing of a written instrument without reading it, because of the temporary loss of one's spectacles, where the use of another pair could have been procured without much effort, or in such case relying upon an interested party on the other side to read it, when one's own friends or employees were near at hand, would be regarded as negligence, and the want of due diligence, in case it turned out that the paper signed was of a different character and import from that purporting to have been read and intended to be signed. But in this case the defendants are in no position to suggest the carelessness or want of diligence on the part of the plaintiff in relying on the good faith and truthful reading of their agent, even had his eye-sight been perfect or his spectacles at hand."

Under all of the facts and circumstances in this case there was a jury question as to whether the defendant was induced to execute the guaranty agreement by the fraud of the plaintiff. The evidence is sufficient to support the verdict and judgment.

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

AFFIRMED.

COUNTY OF DOUGLAS, STATE OF NEBRASKA, ET AL., APPELLEES, V. OEA SENIOR CITIZENS, INC., A CORPORATION, APPELLANT.

OEA SENIOR CITIZENS, INC., A CORPORATION, APPELLANT, V. COUNTY OF DOUGLAS, STATE OF NEBRASKA, ET AL., APPELLEES.

111 N. W. 2d 719

Filed November 17, 1961. Nos. 34956, 35055.

1. **Taxation.** By the terms of Article VIII, section 2, of the Constitution of Nebraska, the Legislature is empowered to exempt from taxation by general law property which is owned and used exclusively for educational, religious, or charitable purposes, when such property is not owned or used for financial gain or profit to the owner or user.
2. ———. By section 77-202, R. R. S. 1943, the Legislature implemented Article VIII, section 2, of the Constitution of Nebraska, so as to exempt from taxation property owned and used exclusively for educational, religious, or charitable purposes, when such property is not owned or used for financial gain or profit to either the owner or user.
3. ———. The question of taxability of property being a subject of inquiry yearly and in the first instance each year by the county assessor, an adjudication that it is exempt from taxation in any one year is not res judicata of the question of whether or not it is exempt in any succeeding year.
4. **Taxation: Actions.** An independent action is proper in which to determine whether or not property which has been placed upon the assessment rolls is exempt from taxation, and this is true notwithstanding the availability of a statutory remedy.
5. **Trial: Judgments.** The Summary Judgments Act authorizes summary judgment where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and where no genuine issue remains for trial.
6. **Taxation: Charities.** Property which is owned and used primarily for the purpose of furnishing low-rent housing is not property owned and used exclusively for charitable purposes within the meaning of the Constitution and statutes of the State of Nebraska.

APPEALS from the district court for Douglas County: JACKSON B. CHASE and JOHN E. MURPHY, JUDGES. *Affirmed.*

Frank C. Heinisch and *Eisenstatt & Lay*, for appellant.

John J. Hanley, Arthur D. O'Leary, and *William F. Ryan,* for appellees.

Kenneth H. Dryden, J. M. Emmert, and *Wade Stevens,* amici curiae.

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

YEAGER, J.

Here are two actions both of which are so related to the same subject and the same parties as to permit them to be regarded as a single action calling for adjudication upon but one basic theory of relief. The first one, numerically speaking, contains the basic theory and the second may well be said to be secondary and incidental to the first.

In the first action the County of Douglas, State of Nebraska, and Joseph Stolinski, County Assessor of Douglas County, Nebraska, are plaintiffs and appellees. OEA Senior Citizens, Inc., a corporation, is defendant and appellant.

By their petition the plaintiffs declared their own capacities as plaintiffs and the legal status of the defendant, which was that of a nonprofit and nonstock corporation, organized under the laws of the State of Nebraska. The petition was filed on October 23, 1959. Therein it was alleged that the defendant was the owner of certain real estate in Douglas County, Nebraska, on which was located housing facilities, where services were provided for elderly persons, and where an educational program in the field of geriatrics designed to contribute to health, happiness, and usefulness in longer living was to be carried out.

It was further alleged that previous to March 1, 1959, the board of equalization of Douglas County, Nebraska, determined that this property was exempt from taxation; that on March 1, 1959, Joseph Stolinski in his capacity as county assessor determined that it was not

exempt and placed it on the tax rolls for taxation; that on June 22, 1959, on complaint of the defendant the board of equalization found that it was exempt and again removed it from the tax rolls; and that on August 25, 1959, the board of county commissioners of Douglas County, Nebraska, directed the county attorney to commence this action the purpose of which was to have determined in this, a declaratory judgment action, whether or not this property was exempt from taxation under the Constitution and laws of the State of Nebraska. The prayer was for a declaratory judgment under sections 25-21,149 to 25-21,164, R. R. S. 1943, declaring that the property involved was not used by the defendant exclusively for educational, religious, or charitable purposes, but that it was owned and used for financial gain or profit.

To the petition the defendant filed a demurrer. The grounds of the demurrer were (1) that the court was without jurisdiction of the person or the subject matter, (2) that there was a defect of parties defendant, and (3) that the petition did not state facts sufficient to constitute a cause of action. This demurrer was overruled.

For the purpose of clarity in the consideration of the substantial issue involved in the case it will be said here that the demurrer was, as will later appear, properly overruled. There is but one substantial issue and, as will be made clear later herein, it is that of whether or not the property in question was exempt from taxation under the Constitution and statutes of the State of Nebraska. Only one ground of the demurrer is mentioned in the assignments of error. That one is that the district court did not have jurisdiction of the subject matter. This is based on the theory that the matter involved was not properly one upon which an adjudication could be made in a declaratory judgment action.

Declaratory judgments and to what they may extend are provided for in sections 25-21,149 and 25-21,150, R.

R. S. 1943. It is not deemed necessary to quote their provisions herein in their entirety since there is no question in this case as to the contents and meaning of these provisions. For clarity, however, it appears advisable to quote section 25-21,149, R. R. S. 1943, which is the definitive provision, as follows: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." The true question is whether or not there is a present right to resort to the declaratory judgment process to determine the question under consideration.

On the face of the record it appears that this should be determined adversely to the defendant by reason of the declaration and prayer of an answer which the defendant filed in the case by which it is bound. However the matter will be considered at length later herein. Therein the defendant points out that this is the subject of a declaratory judgment and prays that the court "render a declaratory judgment." This was a part of the answer on which the case was tried. See, In re Estate of McCleneghan, 145 Neb. 707, 17 N. W. 2d 923; Barry v. Barry, 147 Neb. 1067, 26 N. W. 2d 1.

By the answer which has been mentioned the capacities of the plaintiffs alleged in the petition and the allegations therein contained as to the organization and existence of the defendant, the ownership of the property in question, and as to what had been done by the plaintiffs, the board of equalization, and the defendant starting with the designated incident prior to March 1, 1959, and the specifically dated incidents occurring thereafter to and including August 25, 1959, were admitted.

Further answering the defendant described the property, its present and prospective uses, its plan of management, and its maintenance.

It pleaded that the building on the land was 12 stories in height and in it were 132 identical one-room efficiency units above the first floor, and on the first floor were a dining room, lounge, office, and an apartment for a custodian; that a custodian, cook, and nurse were provided; that senior citizens living in the building served on a voluntary basis in the kitchen, dining room, and office, and in the performance of other duties in the building; that regular programs were arranged for the senior citizens for community services, art and craft work, and for entertainment and social activities; that a charge of $70 a month for each unit was made to the occupants toward cost of maintenance and amortization of a mortgage on the property; that it was contemplated that any excess required for cost of maintenance and amortization would be paid by the Omaha Education Association; that no part of the income was for financial gain or profit to the defendant or the occupants of the building; and that the meals were served on a cost basis.

It further pleaded that it was a nonprofit and nonstock corporation organized and existing under sections 21-1501 to 21-1508, R. R. S. 1943; that it owned and used this property in trust for the Omaha Education Association; that as owner it did not own or use it for financial gain or profit to either the owner or user; and that thus it was exempt from taxation.

It appears that although this is not a complete summary of the answer it is sufficient upon which to present the question on which determination is required.

A portion of the answer not summarized sets forth what a directive of the Federal Housing Administration contained in the determination of whether a mortgage shall be exempted from taxation under the theory that a project designed for occupancy by elderly persons at

low cost to them on which the loan is made is a charitable purpose. This has not been summarized on the ground that what was said there is of no controlling significance in this case. The reason for this is that it could hardly be contended that a directive of a federal administrative department could add to or take anything from the language and meaning of a constitutional or statutory provision of the State of Nebraska. This applies to directives in this area coming from any federal administrative agency on the question of the taxable status of this property.

The plaintiffs filed a reply but as to it nothing need be said except that it is a denial of new matter in the answer.

After issue was thus joined the plaintiffs moved for summary judgment in their favor and the defendant moved for summary judgment in its favor. After hearing, the motion of the plaintiffs was sustained and that of the defendant was denied and judgment rendered accordingly. From this judgment the defendant has appealed.

The controlling facts as disclosed by the record are not in dispute. The plaintiffs, as is clear, presented their motion for summary judgment on their petition and the allegations of fact in the answer of the defendant, together with the evidence adduced, which described the factual status of the defendant on which must depend the decision as to whether or not this property was exempt from taxation. The defendant presented its motion on the same evidentiary background.

The petition and answer, to the extent necessary to a determination of the questions involved, have already been summarized. The following is a summary of the pertinent evidence adduced at the hearing.

From this evidence it is ascertained that charges to residents would be no more than costs involved; that occupancy was not limited to retired teachers but applications were subject to review by the board of directors

of the Omaha Education Association; that at the time of hearing 79 occupants of the building had made contributions to the Omaha Education Association in amounts ranging from $1,200 to $1,500, which contributions were nonrefundable; that no resident acquired any proprietary interest; that each resident was required to pay $70 a month and if the cost of maintenance is increased by taxation the increase would be passed on to the residents; that meals were optional at low cost and could be taken for $1.33 a day; that the right of removal of residents by action of the defendant was not in general prohibited, however in the record is an exhibit in blank which is denominated "Receipt" which if executed would grant the donor of $1,500, when retired, the privilege of living in the home for life subject however to the obligation to pay a proportionate share of monthly expenses, maintenance, and amortization of the loan, and subject to the rules and regulations adopted for the government of the home; that for occupants there were no leases in writing; that a third or more of the occupants were not teachers; that occupants were accepted without ability to pay; and that some of the occupants were subsidized by receiving work and assistance in order to enable them to pay their rent in the amount of $70 a month.

As becomes apparent the basic question presented for determination is that of whether or not the property of the defendant was exempt from taxation. This in turn must be determined by the true meaning of Article VIII, section 2, Constitution of Nebraska, as follows: "* * * The Legislature by general law may exempt property * * * owned and used exclusively for educational, religious, charitable * * * purposes, when such property is not owned or used for financial gain or profit to either the owner or user. * * * No property shall be exempt from taxation except as provided in the Constitution."

The Legislature implemented this grant of power by the following which appears in section 77-202, R. R. S.

1943: "The following property shall be exempt from taxes: * * * (c) Property owned and used exclusively for educational, religious, charitable * * * purposes, when such property is not owned or used for financial gain or profit to either the owner or user; * * *."

On the question of whether or not the declaratory judgment process is available it has already been pointed out that the defendant has unequivocally stated that the issues are properly determinable under the declaratory judgment process. It does not appear necessary to say more on the subject than that this amounts to a waiver of its right to complain, provided of course nothing has transpired to bar the right and power of the court to make a determination upon what has been referred to herein as the primary issue.

The defendant urges that there was a bar to the right to maintain the action since in effect it says that the property was declared exempt by the board of equalization on June 22, 1959, and that from this action no appeal was taken, hence that was binding, and that no right of action was thereafter available to determine the question of whether or not this property was exempt from taxation.

From the brief of the defendant it is at least inferable that it contends that the action of the board of equalization became res judicata with reference to the exemption status of this property.

A sufficient answer to the question of res judicata is that in this action there is no pleaded purpose to in anywise cause to be disturbed what was done by the board of equalization on and prior to June 22, 1959. The pleaded purpose of the plaintiffs was to have the tax status of the property ascertained for the period thereafter. The defendant admitted that this was true by its answer, as follows: "* * * the action of the County Assessor of Douglas County, in placing the property of the defendant on the tax rolls, is discriminatory and will result in continuous litigation and appearances be-

fore the County Board of Equalization unless this court renders a declaratory judgment determing (sic) whether or not the property of the defendant is subject to taxation or exempt under the Laws and Constitution of the State of Nebraska.

"WHEREFORE, the defendant prays that the court render a declaratory judgment, finding and determining that the property of the defendant is owned and used exclusively for educational and charitable purposes and is exempt from taxation under the Laws and Constitution of the State of Nebraska."

On the question of jurisdiction generally of the court to entertain this action and to adjudicate on the record presented the question of whether or not the property was exempt from taxation, it is pointed out again that this action is related only to the status of the property at the time the action was commenced and thereafter, and not before. It is further pointed out that the county assessor, a party plaintiff in the action, was required annually in the manner provided by statute to supply "a list of the taxable lands and lots in his county." See § 77-1303, R. R. S. 1943. As is clear the assessor in the performance of his service included the property of the defendant. The defendant asserts in substance that this inclusion would have the effect in the last analysis of imposing a void tax upon the property.

The decisions of this court make it clear that an independent action is proper in which it may be determined whether or not property which has been placed upon the assessment rolls is exempt from taxation. This is true notwithstanding the availability of statutory remedy. See, Offutt Housing Co. v. County of Sarpy, 160 Neb. 320, 70 N. W. 2d 382, affirmed, 351 U. S. 253, 76 S. Ct. 814, 100 L. Ed. 1151; Ainsworth v. County of Fillmore, 166 Neb. 779, 90 N. W. 2d 360.

The type of independent action to which the language of these cited cases was directed was injunction and it is of course true that the appropriate remedial

process in the case of assessment and taxation and a claim of exemption would be that of injunction.

It is concluded therefore that the issues presented herein are subject to determination in a declaratory judgment action, which in essence under the circumstances is injunctive in determining the tax status of this property.

There are two remaining questions for consideration in this opinion to the extent that it concerns case No. 34956. The first is that of whether or not on the record before the court a summary judgment could be properly rendered. The second is that, if it be found that it could be properly rendered, was the summary judgment which was rendered the one required under law?

The statutory provisions relating to summary judgments are found in sections 25-1330 to 25-1336, R. R. S. 1943. In interpretation and application of these provisions this court said in Ingersoll v. Montgomery Ward & Co., Inc., 171 Neb. 297, 106 N. W. 2d 197: "The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and that no genuine issue remains for trial. The purpose of the statute is not to cut litigants off from their right of trial by jury if they really have issues to try." See, also, Mecham v. Colby, 156 Neb. 386, 56 N. W. 2d 299.

The controlling facts in this case are not in dispute. There is tacit agreement on this proposition, since the plaintiffs have moved for summary judgment in their favor, and the defendant has likewise moved, on the basis of the same record.

If under the facts which, as has been pointed out, are not in dispute, it may be said that this property was owned and used exclusively for educational, religious, or charitable purposes and not for financial gain or profit to the owner or user it was exempt from taxation and the judgment of the court was erroneous

and should be reversed. On the other hand if it was not so used the motion for summary judgment made by the plaintiffs was properly sustained and the judgment should be affirmed.

It may be said without additional remarks that the property of the defendant was neither owned nor used for religious purposes. It may also be said that it was not owned or used exclusively for educational purposes. There was evidence of slight educational use which was incidental and beneficial to occupants but this was not in any sense exclusive.

As to whether or not it was owned and used for financial gain or profit to the owner and user the simple and unequivocal answer is that it was not.

These observations therefore make it clear that the decision herein shall turn on the question of whether or not this property was owned and used exclusively for charitable purposes. The simple answer is that it was not. This answer in the last analysis flows from the meaning of the word "exclusively" as used in the statute and the Constitution. The meaning of the word is so clear that it requires no interpretation but only application. From examination of the record it conclusively appears that this property was not owned and used exclusively for charitable purposes.

There can be no doubt that some use and purpose was charitable and all of it highly worthy and commendable, but it does not necessarily follow that in any true sense the use was exclusively charitable.

Charity and charitable use are familiar terms in both lay and legal parlance, but they are not capable of exact definition. It may well be said that whether or not an act or a use of property is charitable must in each instance be determined upon its own facts. In the light of this uncertainty of definition and the exclusory exaction of the Constitution and the statute it appears that the determination may depend appropriately upon disclosed incidents of operation. In short and in par-

ticular, does or does not the undisputed evidence disclose a use or uses which are exclusively charitable?

There is here a record of incidents and practices which make it clear that this property was not owned and used exclusively for charitable purposes.

The design and purpose of the building on the land was to furnish housing to selected people at low cost. There is nothing to indicate that it was to be below the cost of the service furnished. In design the purpose was that each occupant should be charged his or her part of operation, maintenance, and the amortization of the mortgage on the property, and for the cost of the meals taken. At the time of trial the charge for occupancy was $70 a month. In this connection it is true that inability of an occupant to pay in whole or in part might arise but the occupant might be allowed to remain. This did not however abate the charge. The purpose was to obtain payment from other sources such as the Omaha Education Association or from contributions from other sources. There was no right to be granted to occupants to remain without payment for occupancy from some source. In fact no right to remain in occupancy other than at the will of the defendant was a declared purpose except as to a limited class of occupants. This class included only those making a donation of $1,500 to the Omaha Education Association toward the cost of building a home for retired people. This was extended to them for life on retirement on condition that they pay the proportionate share of monthly expenses, maintenance, and amortization of loan, and subject to the rules and regulations adopted for the government of the home.

In this it is not difficult to perceive that the operations of the defendant included worthy charitable aspects but it may not well be said that this ownership and use was exclusively charitable. No definition of charity found in any available lexicon is sufficient upon which to declare what has been described in this record as

exclusively charitable, that is that the furnishing of low-cost housing at its real cost is charitable.

There have been decisions in other jurisdictions which are contrary to this view, the citations of which will not be included herein. This court is unwilling to follow what is regarded as fallacious reasoning.

This precise question has not previously been before this court but the measure of the application of "exclusively" has been declared with certainty. In Nebraska Conf. Assn. of Seventh Day Adventists v. County of Hall, 166 Neb. 588, 90 N. W. 2d 50, it was said: "Property is exempt from taxation in this state if it is owned and used exclusively by a religious or educational institution in carrying on its educational work, if all the income from the property is used exclusively for the support of its educational endeavors, and if no financial gain or profit inures to the owner of the property." See, also, Iota Benefit Assn. v. County of Douglas, 165 Neb. 330, 85 N. W. 2d 726, 66 A. L. R. 2d 898.

The Ohio Supreme Court in Cleveland Branch of the Guild of St. Barnabas for Nurses v. Board of Tax Appeals, 150 Ohio St. 484, 83 N. E. 2d 229, in interpretation of constitutional and statutory provisions practically the same as the provisions being interpreted herein and in application to a state of facts not materially different from the factual situation involved here, said: "The members of the Cleveland Branch of the Guild of St. Barnabas for Nurses are to be commended for their activities in establishing and maintaining the guild house, but its present use does not entitle it to exemption under the statute cited."

In Beerman Foundation, Inc. v. Board of Tax Appeals, 152 Ohio St. 179, 87 N. E. 2d 474, in dealing with a like situation, the court said: "The use of the property in the instant case is primarily for furnishing low-rent housing and not excusively for charitable purposes."

It must be said therefore that on the basis of the record in case No. 34956 the district court properly ren-

dered a summary judgment in favor of the plaintiffs and against the defendant on the plaintiffs' motion, and also in favor of the plaintiffs and against the defendant on its motion.

Turning now to case No. 35055, it is pointed out that this is an independent action by OEA Senior Citizens, Inc., a corporation, plaintiff, against County of Douglas, State of Nebraska, and Joseph Stolinski, County Assessor of Douglas County, defendants, by which action the plaintiff sought a new trial on the ground of newly discovered evidence, or the discovery of new evidence having controlling significance after the judgment had been rendered in case No. 34956. In the transcript is a decree in which a finding was made in favor of the defendants and a judgment of dismissal of the petition was rendered. The appeal here is from that judgment of dismissal.

A summary of the alleged newly discovered evidence is that since the trial and decision in case No. 34956 information had been obtained that the Internal Revenue Service in the United States Treasury Department had ruled that the plaintiff was an organization organized and operated exclusively for a charitable purpose; that all contributions made to it were deductible by the donors as charitable donations for the purposes of federal income taxation; that bequests, legacies, devises, transfers, or gifts to the plaintiff or for its use were deductible for federal estate and gift tax purposes; that the plaintiff was exempt as a charitable organization from payment of federal income tax; and that it was not liable for taxes imposed under the Federal Insurance Contributions Act or the Federal Unemployment Tax Act.

If it be assumed that the necessary procedural steps were taken to bring the question of whether or not this information was of evidentiary value before the court, which is difficult to do since the transcript fails to disclose any process to cause the defendants to be treated

as parties to the action, since there is no bill of exceptions, and since there is nothing which under statute or rule of court could be regarded as a substitute for a bill of exceptions, or for a case stated, it must be said that the observations made with regard to case No. 34956 make it clear that there was no error in the rendition of judgment against the plaintiff. It was pointed out there that the actions and findings of federal administrative agencies may not be regarded as effective in the determination of the meaning of the words contained in the Nebraska Constitution and the Nebraska statutes.

For the reasons herein set out the judgments in case No. 34956 and in case No. 35055 are severally affirmed.

AFFIRMED.

PETER KIEWIT SONS', INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. COUNTY OF DOUGLAS, APPELLEE AND CROSS-APPELLANT.
111 N. W. 2d 734

Filed November 17, 1961. No. 34997.

1. **Taxation.** Where a person reports intangible property but does not return it for taxation, the property reported and not returned is omitted and undervalued property within the meaning of section 77-1502, R. R. S. 1943.
2. **Corporations: Taxation.** There is a presumption that a corporation is domiciled in the state of its incorporation and that its intangible personal property is taxable in such state.
3. ———: ———. Where a corporation conducts none of its business in the state of its incorporation and in fact carries on its business in another state where complete control and management of its corporate powers and purposes is exercised, the actual domicile of such corporation for tax purposes is in the latter state.
4. **Taxation.** The general rule is that intangible personal property has a situs at the domicile of the owner for tax purposes.
5. ———. In the absence of evidence that such intangible personal property is not within a recognized exception to the general rule, such intangible property is properly taxable in the state of the domicile of the corporation.

6. **Corporations: Taxation.** Bank deposits of a corporation kept in a bank outside of the state of the corporation's domicile are taxable in the state of its domicile unless shown to be within an exception to the general rule.
7. ———: ———. Stock in subsidiary and affiliated foreign corporations are taxable in the state of the corporation's actual domicile although kept in a foreign state for safekeeping.
8. ———: ———. Bills and accounts receivable owned by the corporation arising outside of the domiciliary state are taxable in the state of the corporation's domicile unless shown to be within some recognized exception that makes them nontaxable in that state.
9. **Taxation.** In listing bills and accounts receivable for taxation under section 77-701, R. R. S. 1943, the taxpayer may not properly deduct bills and accounts payable therefrom.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed as modified.*

Fraser, Wenstrand, Stryker, Marshall & Veach and *Tracy J. Peycke*, for appellant.

John J. Hanley, Arthur D. O'Leary, and *William F. Ryan*, for appellee.

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

CARTER, J.

This is an appeal from the district court for Douglas County fixing the value of plaintiff's intangible property for taxation purposes.

In April 1959, plaintiff filed its intangible property tax return. In this return it listed Class A intangibles for assessment in the amount of $71,890 and Class B intangibles in the amount of $30,000. In its return the plaintiff showed that it owned stock in foreign corporations in the amount of $2,068,070. It showed also that it owned cash in banks outside Nebraska in the amount of $1,966,319. It further showed that it owned gross bills and accounts receivable in the amount of $2,323,664 and bills payable in the amount of $2,204,865. On November 2, 1959, plaintiff paid the taxes levied on the

amounts of Class A and Class B intangibles returned by it for taxation.

The record shows that the board of equalization of Douglas County took no action upon plaintiff's return during its regular session ending on June 26, 1959. After notice and hearing, the board of equalization on November 17, 1959, raised plaintiff's Class A intangibles from $71,890 to $4,361,875, and its Class B intangibles from $30,000 to $2,098,070 for taxation purposes for 1959. Plaintiff appealed to the district court, where the increased valuation was sustained in part. An appeal was thereupon taken to this court.

It is the contention of the plaintiff that the county board of equalization was without authority to raise plaintiff's intangible property valuations on November 17, 1959, for the reason that the increase in value was not the result of omitted or undervalued property within the meaning of section 77-1502, R. R. S. 1943. This contention is without merit. While it is true that plaintiff disclosed the ownership of the intangibles in question, it did not return them for taxation purposes. It in fact specifically excluded them as taxable items. This brings it within the meaning of omitted or undervalued property contained in section 77-1502, R. R. S. 1943.

The primary contention made by the plaintiff is that shares of stock in corporations foreign to Nebraska, bank deposits outside of Nebraska, and bills and accounts receivable arising from business transactions outside of Nebraska, are not taxable in this state. In this respect the record shows that plaintiff is a Delaware corporation with its business headquarters in Omaha, Nebraska. It carries on a general contracting business in many states and in many foreign countries. It owns stock in 7 corporations organized or domesticated in this state which are taxed in the normal manner and are not involved in this litigation. It owns stock in 21 subsidiary or affiliated corporations in other states and Canada. In three of these subsidiary or affiliated companies, plain-

tiff does not exercise business control at Omaha and with trivial exceptions their activities are outside of Nebraska. The office at Omaha does the accounting for all subsidiary and affiliated companies except one in New York and two in Canada. The plaintiff handles the financing of these companies, although but 5 percent to 10 percent of its business is carried on in Nebraska. The subsidiary and affiliated companies were organized for special purposes in carrying out plaintiff's operations and, undoubtedly, to provide tax benefits under existing federal revenue laws. The stock certificates in the subsidiary and affiliated corporations were kept in a safety deposit box in Council Bluffs, Iowa, a point just across the Missouri River from Omaha. There is no evidence that these stock certificates are taxed by the State of Iowa.

The statutory law of this state provides that all intangible property "in this state," not expressly exempt, shall be subject to taxation, and shall be valued and assessed at its actual value. § 77-201.01, R. R. S. 1943.

The record discloses that plaintiff owned stock in its subsidiary and affiliated corporations outside of Nebraska in the amount of $2,068,070. A presumption exists that the intangible property of a corporation is taxable in the state of its incorporation. Newark Fire Ins. Co. v. State Board of Tax Appeals, 307 U. S. 313, 59 S. Ct. 918, 83 L. Ed. 1312. But where it is shown that the domicile of the corporation is actually in a state other than the incorporating state, the situs of intangible property follows the domicile of the corporation and it is taxable in the domiciliary state. Wheeling Steel Corp. v. Fox, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143. The evidence shows that plaintiff was incorporated in Delaware and that its articles of incorporation provide that the principal office of the corporation in the State of Delaware is to be located at 100 West Tenth Street in the city of Wilmington. The by-laws of the corporation provide that the resident agent in Wilmington is to

be The Corporation Trust Company. The by-laws further provide that the corporation shall also have an office in the city of Omaha, Nebraska, and such other places as the board of directors shall designate. The evidence shows that plaintiff has never maintained an office in Wilmington and does not have a single officer or employee at that point. The seat of control of the plaintiff is in Omaha where its principal officer resides and directs the operations of the corporation. The evidence further shows that plaintiff keeps its records at its principal place of business in Omaha. It performs the accounting and bookkeeping of all of its 21 subsidiary and affiliated corporations, except 3, in Omaha. The financing of these corporations is handled and controlled from the company headquarters in Omaha. The evidence clearly shows that the company is actually domiciled in Nebraska, although it has a legal domicile in Delaware.

Normally the stock owned by plaintiff in its subsidiary and affiliated corporations would be held and controlled by it at its principal place of business. No reason is given as to why the company's stock certificates were kept in a safety deposit box in Council Bluffs, Iowa. It had no office, officers, or employees at that point so far as the record shows. The inference is plain that they were kept there to avoid taxation in Nebraska. The fact remains that they were in the possession and control of the principal officers of the corporation and the corporation itself, all of whom were domiciled in Nebraska. We think the plaintiff's stock in its subsidiary and affiliated corporations outside of Nebraska was an integral part of plaintiff's business in Nebraska and has a taxable situs in this state under the rule that the situs of the intangible property follows the owner's domicile for purposes of taxation. Commonwealth of Pennsylvania v. Sunbury Converting Works, 286 Pa. 545, 134 A. 438, 48 A. L. R. 992. At least, the placing of stock certificates in a safety deposit box in another state, without any ex-

pressed reason for doing so, is not sufficient reason for departing from the general rule.

In Massey-Harris Co. v. Douglas County, 143 Neb. 547, 10 N. W. 2d 346, this court said: "The general rule is that the situs of intangible personal property for the purposes of taxation is the domicile of the owner. This rule is usually bottomed on the legal maxim, 'mobilia sequuntur personam,' i.e., 'moveables follow the person;' or, as sometimes stated, the situs of personal property is the domicile of the owner." See, also, Aachen & Munich Fire Ins. Co. v. City of Omaha, 72 Neb. 518, 101 N. W. 3. The Legislature does have the power to separate the situs of personal property from the domicile of the owner where the personal property is actually within the state. Aachen & Munich Fire Ins. Co. v. City of Omaha, *supra*. There are no exceptions to the general rule that apply to this case. The plaintiff is domiciled in Nebraska and its personal property has a situs for tax purposes in the domiciliary state. State v. Burton Swartz Cypress Co., 190 La. 947, 183 So. 226. The stock certificates in subsidiary and affiliated corporations owned by plaintiff as the parent corporation are properly taxable in Douglas County, Nebraska, where the plaintiff is domiciled. They are "in this state" within the meaning of section 77-201.01, R. R. S. 1943.

Plaintiff asserts that its bank accounts in the amount of $1,966,319 carried in banks outside of Nebraska are not subject to taxation in Nebraska. A bank account is nothing more than an indebtedness owed by the bank to the depositor. All deposits and withdrawals in the case before us are controlled by the principal office of the plaintiff in Omaha. It is in fact an indebtedness owing to the plaintiff whose domicile is in Omaha. The situs of the bank account is the domicile of the owner for purposes of taxation. Massey-Harris Co. v. Douglas County, *supra*.

In Wheeling Steel Corp. v. Fox, *supra*, the court in a case very similar on its facts said: "The so-called

'money in bank' is not cash or physical property of the Corporation but is an indebtedness owing by the bank to the Corporation by virtue of the deposit account. From the Wheeling office proceed the items deposited and there the withdrawals are directed and controlled. In the light of this course of business as shown by the agreed statements of fact, we find no sufficient basis for concluding that the bank accounts thus maintained and controlled were properly attributable to the Corporation at any place other than its general office at Wheeling. If there were any special circumstances by which any of these deposits could be deemed to have been localized elsewhere, they do not appear upon the present record."

We think the bank accounts of the plaintiff carried in banks outside of Nebraska are taxable in Nebraska on the theory that they follow the domicile of the owner for purposes of taxation.

The evidence shows that plaintiff had bills and accounts receivable in the amount of $2,323,664. Plaintiff returned bills and accounts receivable in the amount of $30,000 which were admittedly localized and subject to taxation in Nebraska. It is the contention of the plaintiff that the remaining bills and accounts receivable in the amount of $2,293,664 are not subject to taxation in this state.

The bills and accounts receivable were owned by and payable to the plaintiff. It is asserted that plaintiff is a Delaware corporation and that the evidence is not sufficient to show that its intangible property has attained a tax situs in Nebraska. In addition to what we have previously said on this subject, we point out that plaintiff has no place of business in Delaware, although it has designated a resident agent in the city of Wilmington. The business affairs of plaintiff corporation are carried on in the city of Omaha. It is the seat of government of the corporation. Its principal officer resides there. Its board of directors meets there. The management

of the business affairs of the corporation originate wholly from the Omaha office. Its books and records are kept and maintained at that point. Its indebtedness is paid by the Omaha office and its financing is handled entirely from that office. The evidence indicates that its construction contracts are made at the Omaha office and that its construction projects are generally supervised from the Omaha office. In fact, the evidence indicates that all of the business of the corporation is directed from its headquarters office in Omaha. The bills and accounts receivable here involved were integral parts of the general contracting business conducted in Omaha. The case falls squarely within the holding of Wheeling Steel Corp. v. Fox, *supra*, and meets the objections in a contrary holding in Newark Fire Ins. Co. v. State Board of Tax Appeals, *supra*. We necessarily conclude that the domicile of the plaintiff corporation for tax purposes is in Douglas County, Nebraska, under the language of the Wheeling case wherein it is said: "The Corporation established in West Virginia what has aptly been termed a 'commercial domicile.' It maintains its general business offices at Wheeling and there it keeps its books and accounting records. There its directors hold their meetings and its officers conduct the affairs of the Corporation. There, as appellant's counsel well says, 'the management functioned.' The Corporation has manufacturing plants and sales offices in other States. But what is done at those plants and offices is determined and controlled from the center of authority at Wheeling. The Corporation has made that the actual seat of its corporate government." The evidence is clearly sufficient to overcome the presumption that the taxable situs of plaintiff's intangibles is in the incorporating state.

The bills and accounts receivable are owned by the plaintiff and their situs for tax purposes is the domicile of the owner in the absence of a showing that they are within any recognized exception. They are therefore

properly taxable in Douglas County, Nebraska, the actual domicile of the plaintiff corporation.

It is contended by the plaintiff that the stock in foreign corporations, the bank accounts outside of Nebraska, and the bills and accounts receivable arising outside of Nebraska, are not connected with plaintiff's Nebraska business and they therefore have no taxable situs in Nebraska. The general rule is that the situs of intangible personal property is the domicile of its owner. Where the intangibles of a nonresident owner have become localized, they may be taxed in the state where they are found. Southern Pacific Co. v. McColgan, 68 Cal. App. 2d 48, 156 P. 2d 81. This does not necessarily mean that they could not be taxed also at the domicile of the owner. Curry v. McCanless, 307 U. S. 357, 59 S. Ct. 900, 83 L. Ed. 1339, 123 A. L. R. 162; Cream of Wheat Co. v. County of Grand Forks, 253 U. S. 325, 40 S. Ct. 558, 64 L. Ed. 931. But in the instant case the owner is domiciled in Nebraska and its intangibles are taxable in this state on that basis alone under the evidence adduced. No attempt was made to show that these intangibles had a taxable situs outside Nebraska other than to state that they were held or arose outside the state. This is not enough. We are not here confronted with the problem of taxing intangibles found and taxed in another state, or subject to tax in such state, and its effect upon the power of the domiciliary state to tax. There is no evidence in this record that any of these intangibles were localized and subject to tax in any state other than Nebraska. There is nothing therefore to take them out of the scope of the general rule that the situs of intangibles for taxation is the domicile of the owner.

The defendant has cross-appealed from the judgment of the trial court as to the gross credits allowed in the assessment of the bills and accounts receivable. Suffice it to say that the trial court deducted the bills payable from the bills and accounts receivable and thereby fixed the value of the bills and accounts receivable arising

outside of Nebraska at $88,799 instead of $2,293,644. The bills payable were erroneously deducted. Stephenson School Supply Co. v. County of Lancaster, *ante* p. 453, 110 N. W. 2d 41. The judgment of the district court is modified by fixing the value of bills and accounts receivable for taxation purposes at $2,323,664. As so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

PEARL J. FUCHS, AND THE OMAHA NATIONAL BANK AND PEARL J. FUCHS, CO-ADMINISTRATORS OF THE ESTATE OF BERT L. FUCHS, DECEASED, APPELLANTS AND CROSS-APPELLEES, V. PARSONS CONSTRUCTION COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT.

111 N. W. 2d 727

Filed November 17, 1961. No. 34998.

1. **Judgments.** A judgment following the sustaining of a demurrer, after the party elects to stand on his pleading, which is based on a technical defect of pleading, a lack of jurisdiction, misjoinder of parties, or the like, does not involve the merits of the controversy and will not support a plea of res judicata.
2. **Appeal and Error.** Where the mandate of the Supreme Court is indefinite the opinion of the court should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon. This is so, whether or not a copy of the opinion is attached to the mandate, if it is published in the court's reports.
3. **Architects.** An architect, employed by the owner to prepare plans and specifications, to supervise construction, and to interpret the plans and specifications, is the agent of such owner.
4. **Contracts.** Where one contracts to perform a given undertaking in accordance with prescribed plans and specifications, he is not permitted to vary from the prescribed plans and specifications and, if the work is performed in compliance therewith, he cannot be held as a guarantor that it will be free from defects, or withstand the action of the elements, or accomplish the purpose intended.
5. ———. In such a situation the engagement of the contractor is fulfilled by compliance with the plans and specifications, and

he remains liable only for defects resulting from improper workmanship or other fault on his part.

6. **Architects: Contracts.** The architect's certificate of compliance with the plans and specifications by the contractor, except as limited by contract, and in the absence of fraud or bad faith, or such gross negligence as would amount to bad faith or failure to exercise honest judgment on the part of the architect in certifying performance, is ordinarily a defense to a claim for noncompliance with the plans and specifications.

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

Crawford, Garvey, Comstock & Nye, for appellants.

King & Haggart, for appellee.

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

CARTER, J.

Plaintiffs commenced this action against the defendant for the breach of a building contract, alleging that defendant failed to comply with the plans and specifications during the course of construction to plaintiffs' damage in the amount of $200,000. The trial court sustained a motion for directed verdict or to dismiss at the close of all the evidence on all grounds asserted except the defense of res judicata. The plaintiffs appealed. The defendant cross-appealed from the adverse ruling of the trial court that res judicata was not a defense. Upon the death of Bert L. Fuchs, during the pendency of the action, his interest was revived in the names of The Omaha National Bank and Pearl J. Fuchs as Co-Administrators of the Estate of Bert L. Fuchs, deceased.

It is evident that if the defense of res judicata was a valid one it would finally terminate the litigation. We deem it necessary therefore to first dispose of that issue.

The record discloses that Bert L. Fuchs and Pearl J. Fuchs commenced an action in the district court for Douglas County against Parsons Construction Company,

the contractor, and Steele, Sandham & Steele, the architects, jointly to recover for the faulty construction of the building involved in the present case. A demurrer was filed to this petition by each defendant on three grounds: (1) that there was a defect of parties defendant, (2) that several causes of action were improperly joined, and (3) that the petition did not state a cause of action. The court sustained the separate and general demurrers of each defendant. An appeal was taken therefrom by the plaintiffs which resulted in an opinion and judgment of this court. Fuchs v. Parsons Construction Co., 166 Neb. 188, 88 N. W. 2d 648. The defendant asserts that the final judgment is res judicata of the issues in the present case. While it is true that the opinion in the former case holds that the demurrers were properly sustained, and nothing more, and sustained the dismissal of the action upon failure of plaintiffs to further plead, an examination of the opinion clearly reveals that the affirmance was based on the improper joinder of causes of action against improperly joined defendants. This court did not determine the issues on their merits but on the form of the action. It is the general rule that a judgment on the merits only may properly be pleaded as res judicata. The case clearly falls within the rule announced in Yates v. Jones Nat. Bank, 74 Neb. 734, 105 N. W. 287, wherein it is said: "But a judgment on a demurrer, which is based on a technical defect of pleading, a lack of jurisdiction, misjoinder of parties, or the like, does not involve the merits of the controversy, and is not available as res judicata. * * * When a plea of res judicata is interposed, the controlling question is whether the judgment offered to support it is based on the merits of the controversy." See, also, Clark v. Lincoln Liberty Life Ins. Co., 139 Neb. 65, 296 N. W. 449; Robinson v. Dawson County Irr. Co., 142 Neb. 811, 8 N. W. 2d 179. The opinion in the former suit clearly shows that the dismissal in the trial court was affirmed for the reason that there was a misjoinder

of parties defendant and causes of action, and not on the merits of the case. See Trainor v. Maverick Loan & Trust Co., 92 Neb. 821, 139 N. W. 666. The mandate of this court should be construed in connection with the opinion of the court. State ex rel. Johnson v. Hash, 145 Neb. 405, 16 N. W. 2d 734; Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561. This is so whether or not a copy thereof is attached to the mandate if the opinion appears in the published reports.

The defendant contends that when plaintiffs elected to appeal rather than to divide their causes of action against the improperly joined defendants in accordance with section 25-809, R. R. S. 1943, they made an irrevocable election and are estopped from filing new actions against the proper parties. Such a rule in the present case would place the plaintiffs in a dilemma from which they could not escape. If they did not appeal, the sustaining of the general demurrer followed by a dismissal would validate the defense of res judicata. See Trainor v. Maverick Loan & Trust Co., *supra*. If they appealed then they would be estopped from filing new actions because of their election to appeal. The law does not contemplate placing a party in such an impossible position. Plaintiffs are clearly entitled to file separate actions against the misjoined defendants which they may prosecute, providing the final judgment on appeal in the prior case does not decide the litigation on the merits. Trainor v. Maverick Loan & Trust Co., *supra;* Palchi v. Robbins, 272 Mich. 411, 262 N. W. 381.

The evidence will be considered under the familiar rule that 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 was directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be

deduced therefrom. Johnston v. Robertson, 171 Neb. 324, 106 N. W. 2d 192.

Plaintiffs contracted in early 1953 for the services of Steele, Sandham & Steele, architects, in connection with the proposed construction of a building at 2401 North Eleventh Street in Omaha. Pursuant to this contract the architects prepared plans and specifications for the building and bids were taken for its construction. The defendant Parsons Construction Company was the successful bidder. The construction of the building was commenced in June 1953 and completed in March 1954. The lessee of the building, Fuchs Machinery & Supply Company, started to move into the building in December 1953, and completed the moving operation in February 1954.

The evidence shows that in April of 1954 the building began to settle. The west side of the building settled to such an extent that it was visible from the adjoining street. Windows in the building cracked, and interior partitions pulled away from the ceiling and floor. The floor settled as much as 10.5 inches in places. Cracks appeared in the exterior walls. Doors could not be opened and closed. Built-in fixtures were materially damaged. In places the plumbing was damaged. The steel superstructure supporting the roof became twisted and out of alignment. It is not disputed that the building was badly damaged. The action is against the contractor for the breach of its contract to construct the building in accordance with the plans and specifications.

The primary cause of the damage appears to have been the settling of the piles which support the exterior walls and the interior columns, all of which support the steel superstructure of the building. The specifications recite that investigation indicates that rock will be encountered at 27.5 feet and it is contemplated that piles will be driven to refusal at that elevation. The specifications provide for the driving of three test piles to permit the engineer supervising the work to verify or

modify the basic lengths of the piles provided for therein.

Four test holes were driven by the defendant instead of the required three. The evidence shows that the location of the building was on "made" ground by the Missouri River, which had subsequently been used as a city dump. The test borings confirmed these facts and also the existence of a ledge of limestone at about 31 feet below the surface of the ground. The test borings were unsatisfactory in determining the consistency and strength of the rock ledge, and indicated little resistance in the formations below it for an approximate distance of 30 or 40 feet. For these reasons the specifications provided for the driving of the test piles to determine the point to which the piles should be driven to sustain the designed load.

It was determined by the structural engineer employed by the architects that these 8-inch piles, measured at the small end of the piles, should be driven with a 3,120-pound hammer with a 10-foot drop until it required 5 blows to move the pile downward for a distance of 5⅜ inches, which by a formula explained in the record indicated that the pile would sustain a load of 15 to 20 tons. Such a bearing was deemed adequate by the structural engineer and the architects. The driving of the test piles was witnessed by the structural engineer, the architect's engineer, and both the job sponsor and the construction superintendent for the defendant. The instructions of the architects' consulting structural engineer following the tests were to drive the piles to the depth that would show a bearing of 15 to 20 tons and then stop, it being feared that otherwise the penetration of the rock ledge would result, and the bearing lost which was necessary to support the designed load. These directions admittedly were conveyed to defendant's job sponsor, who in turn passed them on to the construction superintendent charged with driving the piles. The piles were so driven by the defendant under the supervision of the architects' engineer. This is evidenced

further by the fact that the architects' engineer wrote on the original plans "Single piles 30 ft. clouster 26 ft.," indicating that the piles were not to be driven to or through the rock ledge.

The contract provides that the construction of the building was to be supervised by the architects as the agent of the owner. It was further stated that the architects were to make any needed interpretations of the plans and specifications and see to it that the building was constructed in conformity with such plans and specifications. Any variations from such were to be authorized by the architects by written authorization only. It is the contention of plaintiffs that the specifications required the piling to be driven to refusal and that this was not done, and that there was no written modification of the specifications that would permit the defendant to drive the piles otherwise.

The foregoing issue involves the meaning of the term "refusal" contained in the specifications. Plaintiffs contend that it means that the piles should be driven until they would not move downward. We cannot agree with this definition under the evidence adduced in this case. The term "refusal" is rather meaningless unless the weight and fall of the hammer is prescribed. Certainly the point of refusal as defined by plaintiffs would be less with a 500-pound hammer and a 10-foot drop than a 3,000-pound hammer with a 15-foot drop. Factors were lacking in the specifications to accurately determine the meaning of "refusal" as used therein. It was for the architects under the terms of the contract to interpret the meaning of the terms used under such circumstances. The architects through their consulting structural engineer defined the term by the directions he gave as to the driving of the piles. On the witness stand he defined the term as the point "where we expect to develop the resistance that is adequate for this particular job." Other engineers testified similarly to the meaning of the term, although there was evidence to

the contrary. We think this definition must be accepted in the absence of a more specific definition in the contract. The specifications state that rock would probably be encountered at 27.5 feet and it is contemplated that piles will be driven to refusal *at that elevation.* These provisions of the specifications indicate that the definition advanced by plaintiffs was not intended. The evidence shows that there was no splitting or brooming of the piles for the reason that the force applied to the piles was not sufficient to produce such results. We conclude that the defendant contractor drove the piles in accordance with the plans and specifications and the directions of the architects and their consulting structural engineer. It is at least apparent that the piles were driven in accordance with directions of the architects and their consulting structural engineer who, as the interpreters of the plans and specifications by contractural provision, were the final authority and whose instructions the contractor was obliged to follow. Plaintiffs have therefore failed to show a breach of contract on the part of the defendant contractor in the manner and method of driving and placing the piles.

The expert evidence in the record indicates that the piling was to support the walls and superstructure of the building. The weight of the floor was to be carried by the soil underneath. This was one of three plans devised and explained to the owner. The owner chose the type designed by the architects in the plans and specifications. The plans and specifications called for a ¾-inch expansion joint between the floor slab and the exterior walls for the entire perimeter of the building except at the dock area. The caps on the piling supporting the interior columns were designed to be covered with two inches of concrete to make them conform to the level of the floor. Two-inch-cut trowel joints were to be made around the perimeter of the caps to permit the breaking of the concrete at such points if the floor settled. The wire mesh reinforcing was to extend only to the trowel

cuts in furtherance of the plan to anticipate the settling of the floor. The evidence shows that the defendant failed to make the trowel cuts and to limit the wire mesh to the perimeter of the trowel cuts when the pouring of the floor commenced. The architects' engineer observed this departure from the plans and specifications and directed compliance. The defendant made the corrections in accordance with the instructions. It is evident that the corrections were approved by the architects' engineer and by one of the architects himself when final payment was authorized by him. We fail to find any breach of contract by the defendant with regard to the wire mesh and trowel cuts.

Plaintiffs contend that the contract was violated when the defendant permitted a concrete ledge to form around the inside perimeter of the building at a point 8 inches below the surface of the 6-inch concrete floor. This resulted in the outside edges of the floor being held up and thereby prevented the settlement of the floor any more than 2 inches on its outside edges. This is asserted as a damage in that the floor was not permitted to settle uniformly on the supporting earth.

In respect to this concrete ledge projecting into the building, the evidence shows the following: The plans and specifications originally called for grade beams 5 feet deep and 8 inches wide to be constructed with metal or wood forms. The grade beam level was subsequently lowered by 3 feet on the written directions of the architects. This caused the grade beam to be constructed through the ruble and debris in the soil which had its origin in its former use as a public dump. Because of the additional expense of construction of the grade beams through this ruble and debris, the architects authorized the trencher method of forming the grade beam without the use of wood or metal forms. Thus the earthen sides of the trench constituted the form of the grade beam. The defendant, however, used a wood form at the top of the grade beam around the perimeter of

the building in order to have a level base for the concrete block wall construction. In vibrating the poured concrete it was forced out under the form used in shaping the top of the grade beam. The concrete set and formed an irregular shelf or ledge around the building about 2 inches below the bottom of the floor. The shelf or ledge was apparent to anyone for a long period of time. The defendant's job sponsor observed it and concluded that it was unimportant. The architects' engineer supervising the job made no complaint about it, although it was open to view for several months. It is evident that no one felt that the floor would settle to this level. While it is true that the shelf or ledge did hold up the floor to some extent around the inside perimeter of the building after it had settled 2 inches, it was not the cause of the settling of the building. The use of the trencher method was properly authorized. The architects' engineer was required to be present under the terms of the contract when the pouring of the grade beam was commenced, and to give his consent thereto. He approved the methods employed after inspection. In addition thereto, there is expert evidence in the record that the construction of the grade beam as shown was considered a good practice commonly used in the industry. The approval of the trencher method was known to produce irregular side walls. The failure to remove projecting concrete extending into the building, under all the circumstances shown, does not constitute an actionable breach of the contract. It is evident that the shelf or ledge would have played little part in the overall picture except for the settling of the piles and the unusual settling of the earth under the floor. The proximate cause of the floor damage was the overloading of the piles and the settling of the ground and compacted fill designed to bear the weight of the floor. The shelf or ledge was incidental to the damage caused by the settling of the piling and the compacted earth upon which the floor was designed to rest. The dam-

age would have occurred irrespective of the existence of the shelf or ledge.

It is contended that the provision in the contract for supervision by the architects required an architect's presence on the job continuously, and that such supervision was not provided. If there was a failure on the part of the architects in this respect, a matter which we do not decide, it is not chargeable to the defendant contractor.

The record shows that the final payment on the contract was certified by the architects on March 31, 1954, and paid by the owner. The effect of the architects' certificate is that the building had been completed in accordance with the plans and specifications and that final payment was in order. The specifications provide: "Only final payment shall be construed as an acceptance, and no payment whatever shall be construed as an acceptance of any departure from the contract."

An architect employed by the owner is the agent of such owner in supervising construction work and in the interpretation of plans and specifications relating thereto. Erskine v. Johnson, 23 Neb. 261, 36 N. W. 510; 3 Am. Jur., Architects, § 5, p. 1000.

The general rule as to a contractor's liability is stated in Friederick v. County of Redwood, 153 Minn. 450, 190 N. W. 801, and quoted with approval in Fuchs v. Parsons Construction Co., *supra,* as follows: "Where a contractor makes an absolute and unqualified contract to * * * perform a given undertaking, it is the general * * * rule that he assumes the risks attending the performance of the contract * * *. But where he makes a contract to perform a given undertaking in accordance with prescribed plans and specifications, this rule does not apply. Under such a contract he is not permitted to vary from the prescribed plans and specifications even if he deems them improper and insufficient; and therefore cannot be held to guarantee that work performed as required by them will be free from defects, or withstand

the action of the elements, or accomplish the purpose intended. Where the contract specifies what he is to do and the manner and method of doing it, and he does the work specified in the manner specified, his engagement is fulfilled, and he remains liable only for defects resulting from improper workmanship or other fault on his part." The foregoing rule is applicable in the absence of fraud or bad faith, or such gross negligence as would amount to bad faith or failure to exercise honest judgment on the part of the architects in certifying complete performance in accordance with the plans and specifications. Plaintiffs in their reply allege fraud, gross mistake, bad faith, and a failure to exercise honest judgment because of the architects' connivance with the defendant in willful disregard of the duties of each to the plaintiffs. There is no evidence in this record tending to support the foregoing allegations, nor any evidence from which the truth of these allegations could be inferred. The plaintiffs have failed to establish an actionable breach of the construction contract and consequently the contractual effect of payment in full is unrelated to the situation before us.

Due to the conclusion reached, it is not necessary to consider other errors assigned. We conclude that defendant constructed plaintiffs' building in accordance with the plans and specifications as interpreted by the architects and the architects' instructions given in their capacity as agent of the owner. The plaintiffs failed to prove a cause of action against the defendant and the trial court properly directed a verdict in defendant's favor.

AFFIRMED.

EMMA O. RECKLING, APPELLEE, V. WALTER W. RECKLING, APPELLANT.

111 N. W. 2d 627

Filed November 17, 1961. No. 35020.

1. **Divorce.** An appeal lodged in this court from a decree rendered in a suit for divorce brings the case here for trial de novo.
2. ———. The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case.
3. ———. In determining the question of alimony or division of property as between the parties, the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property owned at the time, its value at that time, its income-producing capacity, if any, and whether accumulated or acquired before or after the marriage; and from all such elements the court should determine the rights of the parties and all other matters pertaining to the case.
4. ———. Generally, we do not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time.

APPEAL from the district court for Dakota County: JOHN E. NEWTON, JUDGE. *Affirmed as modified.*

John McArthur, for appellant.

Smith & Smith, for appellee.

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

MESSMORE, J.

This is an action for divorce brought in the district court for Dakota County by Emma O. Reckling, plaintiff, against Walter W. Reckling, defendant. The trial court granted the plaintiff an absolute divorce, the custody of two minor children, a house that the parties owned, a 1955 Plymouth automobile, various items of

furniture, household goods, and equipment, and certain items of personal property contained in the home; ordered that the defendant be required to pay to the clerk of the district court for Dakota County child support in the amount of $50 a month for each of the minor sons placed in the plaintiff's custody; and ordered that the defendant pay to the clerk of the district court for Dakota County the amount of $150 each month as alimony until further order of the court. The defendant filed a motion for new trial which was overruled, and the defendant appealed.

The record discloses that the plaintiff and defendant were married at Council Bluffs, Iowa, on May 22, 1926, and six children were born to this marriage. The four girls of the family are married, and Larry E. and Ross F. Reckling, minor sons of the parties, are in the custody of the plaintiff. The record further shows that the defendant is employed by the Burlington Railroad Company, has lived in Lincoln since July 17, 1958, and his salary in 1959 was about $8,000. From this was taken his income tax and railroad retirement payments. Larry E. Reckling attends Wayne State Teachers College located at Wayne, Nebraska, and Ross F. Reckling is a junior in the Dakota City high school. During the marriage, the parties acquired a house which is 60 or 70 years old, and they own it as joint tenants. This house is old fashioned with two wall furnaces downstairs and no heat upstairs.

On cross-examination the plaintiff testified that Larry E. Reckling works part of the year when he can; that she was 54 years of age at the time of trial and the defendant was 55 years of age; that she earned $25 a week if she was able to work 24 hours a week, which she was doing at the time of trial; and that Larry E. Reckling was born December 13, 1942, and Ross F. Reckling was born September 25, 1944. This witness further testified that she doubted if she could sell the house for $6,500; that the value of the furniture would

be about $600; and that the car she has is a 1955 Savoy, two-door Plymouth, and the defendant has a 1955 Belvedere deluxe four-door Plymouth.

An appeal lodged in this court from a decree rendered in a suit for divorce brings the case here for trial de novo. See Peterson v. Peterson, 152 Neb. 571, 41 N. W. 2d 847.

"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, 164 Neb. 642, 83 N. W. 2d 368.

"In determining the question of alimony or division of property as between the parties, the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property owned at the time, its value at that time, its income-producing capacity, if any, and whether accumulated or acquired before or after the marriage; and from all such elements the court should determine the rights of the parties and all other matters pertaining to the case." Holmes v. Holmes, 152 Neb. 556, 41 N. W. 2d 919. See, also, Martin v. Martin, 145 Neb. 655, 17 N. W. 2d 625.

As stated in Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51: "We recognize that under our statutes the legislature has enabled the court to retain control over the financial situation of the parties, where it is necessary or advisable to do so. * * * There are cases, and we have so held, where the situation of the parties and the contingencies are such that the amount of alimony cannot be placed in a lump sum without danger that such allowance may prove unjust or inequitable to one or the other of the parties and it is therefore proper for the court to provide for the payment of a stated sum at fixed periods over an indefinite period. However, 'Gen-

erally, we do not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time.' " See, also, Martin v. Martin, *supra;* McGechie v. McGechie, 43 Neb. 523, 61 N. W. 692; Swanson v. Swanson, 137 Neb. 699, 290 N. W. 908.

In the light of the record and the foregoing authorities, we conclude that the plaintiff should have the use and benefit of the home described as Lots 10, 11, and 12, Block 89, in the village of Dakota City, Dakota County, Nebraska, and all buildings and appurtenances thereon and thereunto belonging for and during the period of her natural life; and that the defendant shall pay all taxes levied and assessed against said property, both delinquent and as they accrue, the insurance on the dwelling and buildings located on said land, and the reasonable repair of the same. In this connection, it is further ordered that in the event the plaintiff should remarry, said home shall be vacated immediately and possession thereof delivered to the defendant. We further conclude that the $50 allowance for the two minor sons in the custody of the plaintiff should not be disturbed. It is ordered that the plaintiff be awarded alimony in the amount of $15,000, payable in equal monthly installments in the amount of $125 on the first day of each month to the clerk of the district court for Dakota County, Nebraska, from and after the time the mandate issues in this case and for a period of 10 years.

The judgment of the trial court is affirmed as modified.

AFFIRMED AS MODIFIED.

WILLIAM F. YOUNGS, APPELLANT, V. ARTHUR L. WAGNER ET AL., APPELLEES.
111 N. W. 2d 629

Filed November 17, 1961. No. 35047.

1. **Trial: Judgments.** The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined.
2. ———: ———. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed.
3. ———: ———. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled.
4. ———: ———. In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case and, second, that he is entitled to a judgment as a matter of law.
5. ———: ———. Summary judgment is effective and serves a separate useful purpose when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged.

APPEAL from the district court for Scotts Bluff County: ALBERT W. CRITES, JUDGE. *Reversed and remanded.*

Wright & Simmons and *James R. Hancock,* for appellant.

Holtorf, Hansen & Fitzke and *Alfred J. Kortum,* for appellees.

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

MESSMORE, J.

This is an action by a guest passenger against his host driver and the father of the host driver to recover damages for injuries sustained in a one-car accident. The defendants, Arthur L. Wagner and Alvin Wagner, moved for a summary judgment pursuant to sections 25-1330 to 25-1336, R. R. S. 1943. The trial court found generally for the defendants and against the plaintiff, and sustained the defendants' motion for a summary

judgment. The plaintiff filed a motion for new trial which was overruled. The plaintiff appealed.

The plaintiff's petition alleged that on November 22, 1957, the defendant, Alvin Wagner, was the owner of a 1952 Chevrolet sedan which was kept for the use, pleasure, and benefit of his family including his minor son Arthur L. Wagner, hereinafter referred to as the defendant. The petition further alleged that on said day the defendant was using and operating the automobile with the permission and consent of the owner; that about 11:30 p.m., the plaintiff was riding as a guest in said automobile; that the defendant was driving the automobile east on State Highway No. 86 in Scotts Bluff County at a speed of approximately 60 miles an hour; that State Highway No. 29 in Scotts Bluff County intersects State Highway No. 86 from the north at a point approximately 5 miles south of Mitchell; that as the defendant approached said intersection he did not reduce the speed of the automobile but recklessly and negligently attempted to turn his automobile to the north onto State Highway No. 29; that the speed at which the automobile was being driven was too great to permit such a turn to be made, and when the plaintiff observed that the defendant was attempting to turn onto State Highway No. 29 he protested and advised the defendant not to turn but to continue on east, but the defendant carelessly and negligently drove the automobile into the borrow pit on the east side of State Highway No. 29, thereby causing the automobile to overturn; and that due to the gross negligence of the defendant, the plaintiff received personal injuries and was entitled to damages.

The defendant's answer denied all allegations of the plaintiff's petition not admitted, and alleged that the plaintiff, on or about November 22, 1957, was a guest in the automobile driven by the defendant; that on or about that date the defendant had been repairing his automobile at the garage where both he and the plaintiff

were employed; that the defendant asked the plaintiff if he wished to go for a ride; that the plaintiff did go for a ride; that the plaintiff failed to protest against any of the acts of the defendant as to the operation of the automobile; and that if the defendant was in any way negligent in the operation of the automobile, which negligence was denied, any negligence that could be attributed to the defendant was less than gross. The prayer was that the plaintiff's petition be dismissed.

There are certain well-established rules relating to summary judgments as follows.

The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244.

In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed. Dennis v. Berens, 156 Neb. 41, 54 N. W. 2d 259.

The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. Dennis v. Berens, *supra.*

In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case and, second, that he is entitled to a judgment as a matter of law. Healy v. Metropolitan Utilities Dist., 158 Neb. 151, 62 N. W. 2d 543; Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290.

Summary judgment is effective and serves a separate useful purpose when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. Eden v. Klaas, 165 Neb. 323, 85 N. W. 2d 643.

The record contains a deposition of the plaintiff. He testified to the effect that he was riding in an automobile being driven by the defendant on November 22,

1957; that the accident happened about 11 p.m., at the intersection of State Highways Nos. 86 and 29, 4 miles south of Mitchell at the corner on top of a hill called Hubbard Hill; that the automobile was going east and started to turn the corner to the north; that going up the hill just before turning the corner he observed the defendant was going too fast; that he was sitting in the middle of the front seat and looked at the speedometer and the defendant was driving around 60 miles an hour at the time; that before the defendant attempted to turn the corner, this witness told him not to try to go around the corner; that he did not think the defendant was going to make the corner; and that the defendant did not apply the brakes. He further testified that the last thing he remembered was that they hit the highway sign off the edge of the road which would be 20 or 30 feet from the north edge of the east-west road; that both roads were black-topped; that the condition of the roads that night was good; that visibility was good; that there were no other automobiles around at that time; and that when they went off the road the automobile turned over on its side, then on its top, and skidded into an irrigation lateral causing the plaintiff injuries. This witness further testified that they drove to Morrill, south from Morrill to the Lyman highway directly west of where the accident happened, and then to the corner where the accident happened. The defendant drove within the speed limit all the time, that is, within the 55 mile an hour nighttime speed limit. The defendant drove at that rate of speed until within the last 3 or 4 miles before coming to the corner when he increased the speed a little to get a better road check. This witness further testified that he did not complain about the defendant's driving other than just before the defendant turned the corner.

Oreval Helling, by affidavit, stated he was riding on the right side of the front seat, the plaintiff in the middle, and the defendant driving. His affidavit stated

the route which was taken, and that he believed the defendant could have turned the corner all right except that the road narrowed suddenly toward the north and the defendant turned too wide; that he did not know the speed the defendant was driving at the time of the accident but he did not believe that the defendant was exceeding the speed limit; that at no time during the drive from Mitchell until the time the accident happened did he say a word about the defendant's driving, nor did the plaintiff do so during the trip; that the accident happened when the defendant, driving east on the highway from the west, turned north onto the highway to go north to Mitchell and did not turn sharp enough to keep the right wheels off of the east shoulder, and the car went into the ditch on the east side of the north-south road north of the corner and upset; and that at no time during the trip did the defendant exceed the speed limit.

The defendant, by affidavit, stated that he was the driver of the automobile involved in the accident which occurred at about 11 p.m., on November 22, 1957; that the accident happened at the intersection of State Highways Nos. 86 and 29, about 5 miles south of Mitchell, in Scotts Bluff County; that at the time of the accident the plaintiff was a guest passenger riding in the middle of the front seat and Oreval Helling was riding on the right side of the front seat; that he had been driving just under the speed limit, but slowed to 30 or 35 miles an hour and turned north at the intersection; that as he turned north the right wheel went off of the pavement and the car turned over on its top in the east borrow pit about 10 feet east of the east shoulder of the road; that somewhere around 10 p.m., they started to take a drive to test out the automobile to be sure everything was functioning correctly; that he asked the plaintiff to ride along with him and also asked Oreval Helling; that during the ride neither the plaintiff nor Helling at any time complained about his driving prior

to the accident; and that at the time he was turning the corner and at the time the right wheel hit the shoulder and the wheel was caught by soft shoulder or loose dirt or whatever it was that caused the automobile to upset, neither the plaintiff nor Helling said anything about his driving or asked him to stop the automobile or to reduce its speed.

There is a conflict in the evidence as to the speed and as to the warning which could relate to gross negligence.

We find that there is a genuine issue as to a material fact as shown by the evidence.

For the reasons given herein, the motion for summary judgment should not have been sustained. The judgment of the trial court is reversed and the cause is remanded for further proceedings according to law.

REVERSED AND REMANDED.

HAROLD M. GAUGHEN ET AL., APPELLANTS, V. LEONARD GAUGHEN ET AL., APPELLEES, IMPLEADED WITH ALICE JOAN EMANUEL ET AL., APPELLANTS.
112 N. W. 2d 285

Filed December 1, 1961. No. 34881.

1. **Wills.** In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
2. ———. The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law.
3. ———. The intention within the ambit of this rule is the one expressed by the testator by the language employed in his will and does not refer to an entertained intention not expressed therein.
4. ———. A patent ambiguity in a will must be removed by interpretation according to legal principles and the intention of the testator must be found within the four corners of the will.

5. ———. Where the language in a will shows a different intention is effectively manifested, section 76-117, R. R. S. 1943, relating to cross-remainders, is not applicable.
6. ———. The presumption of a per capita distribution is not a strong one and is easily overborne. It will yield to a very faint glimpse of a contrary intention in the context, or a contrary intention deduced from a study of the will as a whole.
7. ———. Under the language in the will here considered the testator devised three life estates, each life estate consisting of a one-third interest in the testator's property, to his two sons and a daughter and to their spouses. In the event any of the spouses remarried, his life estate in the property would be eliminated. The fee descends in thirds at three distinct times, the death of the survivor of each son and his wife, and the death of the survivor of the daughter and her husband. The grandchildren then would take their father's share per stirpes. Should the testator's daughter die without leaving natural-born children surviving her and her husband, then the children of the two sons of the testator would take their share of their aunt's one-third interest in the testator's property per capita.
8. ———. Insofar as our opinion reported in 171 Neb. 763, 107 N. W. 2d 652, is in conflict with this opinion, it is hereby overruled.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. On rehearing. See 171 Neb. 763, 107 N. W. 2d 652, for original opinion. *Reversed and remanded with directions.*

William G. Line, for appellants.

Edward Asche and *George E. McNally,* for appellees.

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

MESSMORE, J.

This case involves the construction of the will of Martin F. Gaughen, deceased. Harold M. Gaughen is a son of the deceased and is referred to in certain paragraphs of the will as Harold Gaughen. Mamie Gaughen is the wife of Harold Gaughen. Leonard Gaughen is a son of the deceased, and Thelma Gaughen is the wife of Leonard Gaughen. Marie Mundy is a daughter of the deceased,

and her husband is Leo Mundy. Alice Joan Emanuel is a daughter of Harold Gaughen and the wife of Dennis Emanuel. Rita A Gaughen is a daughter of Harold Gaughen. Martin F. Gaughen, Charles E. Gaughen, Thomas P. Gaughen, Kathryn Jean Gaughen, and Kenneth G. Gaughen are the children of Leonard and Thelma Gaughen. The above-named persons constitute the sole persons interested in the estate of the deceased.

The appellants contend that the deceased intended by his last will and testament that certain described real estate be disposed of as follows: An undivided one-third interest therein to descend for life to Leonard Gaughen and Thelma Gaughen, or the survivor, an undivided one-third interest for life to Marie Mundy and Leo Mundy, or the survivor, and an undivided one-third interest for life to Harold Gaughen and Mamie Gaughen, or the survivor. It was further contended that after the death of the above parties, it was the testator's intention that the remainder interest in said real estate was to go in fee simple as follows: An undivided one-third interest in said real estate to the children of Leonard Gaughen, an undivided one-third interest to the children of Harold Gaughen, and the remaining undivided one-third interest, upon the passing of the survivor of Marie Mundy and Leo Mundy to the living children of Harold Gaughen and Leonard Gaughen, share and share alike, that is, if no natural-born children of Marie Mundy and Leo Mundy survive them.

In an amended petition the plaintiffs alleged that a patent ambiguity appeared in paragraph 2 of the will, which will be referred to in the opinion.

The guardian ad litem of Charles E. Gaughen, Thomas P. Gaughen, Kathryn Jean Gaughen, and Kenneth G. Gaughen, minors, alleged by way of cross-petition that by the terms of the last will of the testator he intended to and did devise his real estate to the children of his sons Leonard Gaughen and Harold Gaughen, and the children born naturally to his daughter Marie Mundy,

share and share alike, or per capita, and not per stirpes, subject only to the life estates therein to Harold Gaughen, Leonard Gaughen, Marie Mundy, Mamie Gaughen, Thelma Gaughen, and Leo Mundy; and that there was neither a latent nor patent ambiguity in said will.

Martin F. Gaughen filed an answer and cross-petition wherein he prayed that the petition and amended petition of the plaintiffs be dismissed; and that the court make a determination that no ambiguity, either latent or patent, existed in the last will and testament of the testator, and by the terms thereof the testator devised his real estate to the children of Leonard Gaughen and Harold Gaughen and the children born naturally to Marie Mundy, in equal shares, per capita and not per stirpes, subject only to the life estates therein of the parties as heretofore named.

The trial court rendered judgment finding that the will did not contain either a latent or a patent ambiguity, and that the testator intended to devise the entire remainder per capita, and not per stirpes.

The plaintiffs Harold Gaughen and Mamie Gaughen, and defendants Alice Joan Emanuel and Rita Gaughen filed a motion for new trial which was overruled. An appeal was taken to this court by Harold Gaughen and Mamie Gaughen, plaintiffs and Alice Joan Emanuel and Rita Gaughen, defendants.

The part of the will necessary to be construed in this case is as follows: "SECOND. I give and devise to my sons Harold Gaughen and Leonard Gaughen and my daughter Marie Mundy or to their spouses Mamie Gaughen, Thelma Gaughen and Leo Mundy, respectively, during their natural lives (description of the land omitted) * * * Dodge County, Nebraska; and in the event any of the spouses Mamie Gaughen, Thelma Gaughen or Leo Mundy should remarry, their life estate in the above described real-estate shall cease; and upon the death of said life tenants or the remarriage of my children's spouses, Mamie Gaughen, Thelma Gaughen and Leo

Mundy, I give and devise the remainder of said real estate to the children of my son Leonard and the children of my son Harold, share and share alike and to the children born naturally of my daughter, Marie Mundy, if any, and in the event no children are born naturally to my daughter Marie, then I give and devise their share in said above described real estate to the children of my sons Harold and Leonard, share and share alike."

Our opinion reported in 171 Neb. 763, 107 N. W. 2d 652, holds that the remainder estate goes to the children of Leonard Gaughen and Harold Gaughen, and the natural-born children of Marie Mundy, share and share alike, or per capita, and not per stirpes, and that the decree should be modified to provide that all of the children of Harold Gaughen and Leonard Gaughen and the issue of Marie Mundy share in the remainder estate as a single class per capita, which class shall be subject to being opened to admit additional children of Harold Gaughen and Leonard Gaughen and issue of Marie Mundy.

When this case was first argued and submitted to this court the appellants did not set forth their contention as follows: Where land is conveyed or devised to several persons for life and at "their death" to "their children," the phrase "their death" will be read "their respective deaths" and the phrase "their children" will be read "their respective children." Consequently, this court did not have the opportunity to pass upon the issue now raised by the appellants in their motion for rehearing.

The will is not artfully drawn, its provisions are carelessly expressed, and it is patently ambiguous.

The question to be determined on this appeal is whether the grandchildren take per capita or whether they take per stirpes.

Distribution per capita is an equal division of the property to be divided among the beneficiaries, each receiving the same share as each of the others, without reference to the intermediate course of descent from

the ancestor. Distribution per stirpes is a division with reference to the intermediate course of descent from the ancestor. It gives the beneficiaries each a share in the property to be distributed, not necessarily equal, but the proper fraction of the fraction to which the person through whom he claims from the ancestor would have been entitled. See Kramer v. Larson, 158 Neb. 404, 63 N. W. 2d 349.

There are certain rules of law that govern the manner in which a will is to be construed.

In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. Jacobsen v. Farnham, 155 Neb. 776, 53 N. W. 2d 917, 33 A. L. R. 2d 543; Kramer v. Larson, *supra.*

The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law. Jacobsen v. Farnham, *supra;* Kramer v. Larson, *supra.*

The intention within the ambit of this rule is the one expressed by the testator by the language employed in his will and does not refer to an entertained intention not expressed therein. In re Estate of Zents, 148 Neb. 104, 26 N. W. 2d 793; Kramer v. Larson, *supra.*

A patent ambiguity in a will must be removed by interpretation according to legal principles and the intention of the testator must be found within the four corners of the will. Kramer v. Larson, *supra.* See, also, § 76-205, R. R. S. 1943.

Section 76-117, R. R. S. 1943, provides: "When an otherwise effective conveyance of property is made to two or more persons as tenants in common for life or for a term of years which is terminable at their deaths, with an express remainder, whether effective or not, (a) to the survivor of such persons, or (b) upon the death of all the life tenants to another person or persons, such

conveyance, *unless a different intent is effectively manifested,* creates cross limitations among the several tenants in common, so that the share of the one first dying passes to his cotenants to be held by them in the same manner as their original shares, and the shares of the second and others dying, in succession, are similarly treated until the time when the property is limited to pass as a whole to the remainderman." (Emphasis supplied.)

The above-cited section is relied upon by the appellees in this case to support their contention above stated.

The appellees cite Bodeman v. Cary, 152 Neb. 506, 41 N. W. 2d 797, wherein the testator gave his daughters, Sophia Bodeman and Amy Bodeman, all of his real estate for their use and benefit so long as they lived. On their death, he devised his real estate to certain named children and grandchildren, share and share alike. This court held that the fee simple title to no part of the real estate involved should vest in any devisee free from the burden of the life estate, until both life tenants were deceased. Amy still lived, and had a life estate in all of the real estate. The court held: "An estate given or conveyed to two or more persons for their use and benefit so long as they live ordinarily continues during the life of each, and is terminated only at the death of the survivor."

The appellees rely on the case of Dole v. Keyes, 143 Mass. 237, 9 N. E. 625, wherein a testator, by his will, gave to his wife the income and improvement of his house during her life, and charged his estate with her maintenance; and then provided as follows: "All the rest and residue of my estate, real or personal, of every name and nature, I give the income and the improvement of the same to my children, to wit, John Perley and Sarah Lambert, wife of George Lambert, and at their decease the said real and personal estate shall revert to their children, and also the above described estate given to my beloved wife after her decease, to them

and their heirs forever." The court held: "We are of opinion that the testator's grandchildren take *per capita,* not only on the ground that the whole fund goes over together, but also because this remainder is evidently given in the same proportions as the remainder after the wife's death, which is limited by the same clause, and, as the remaindermen's parents take no interest in the latter, there can be no doubt that, if it stood alone, it would go *per capita.*" The decree of the lower court was affirmed.

It is likewise the appellees' contention that the words "share and share alike" indicate an equal division among a class and they import a division per capita, unless a contrary intention appears. There can be no quarrel with this proposition of law.

We believe that the foregoing constitutes the appellees' contention respecting the will in the instant case. The cases of Bodeman v. Cary, *supra,* In re Estate of Pfost, 139 Neb. 784, 298 N. W. 739, and Kramer v. Larson, *supra,* cited by the appellees, will be referred to later in the opinion.

We believe that the old English common law cases throw some light on the type of will before us. Consequently we cite in part some of such cases.

In Arrow v. Mellish, 1 De G. & Sm. 355, John Moore made his will containing the following bequest: "To her my said wife, I give and bequeath the use and usage of all my worldly goods, money, and other effects which I may die possessed of, to have and to hold during her natural life, and at her death I give and bequeath the same to my three nieces, viz., Elizabeth, Catherine, and Sarah, daughters of my brother William Moore, and also to Mary Arrow, daughter of John Roxbee, niece to my said wife, Mary Moore, to be by them equally divided, share and share alike, and at their deaths to go equally, share and share alike, to their children." The Vice-Chancellor said: "In this case the words 'their children' must mean 'their respective children.'" It

was further said: Bequest to testator's wife, of the use and usage of all his effects for her life, and at her death bequest of the same to four nieces by name, to be by them equally divided, share and share alike, and at their deaths to go equally, share and share alike, to their children, held, to give the respective children their parent's share only.

In Wills v. Wills, 20 L. R. Eq. 342, John Wills, by his will, gave the residue of his estate and property to his trustees with the following direction: "The interest of the residue of my estate vested in the names of the said trustees shall be paid half-yearly to my sons Charles Thomas Wills and John Wills equally for their natural lives, and at their death the principal to be divided equally between the children of the said Charles Thomas Wills and John Wills." Sir G. Jessell, M. R., said: "In the first place, the will makes a provision for the testator's two children primarily, and then for his grandchildren. The natural course would be, under these circumstances, that after the death of either of the children, his children should be provided for. It is, therefore, very unlikely that he intended that there should be no provision for one branch until the head of the other branch should be dead.

"The testator gives the income of the residue of his estate to his two sons equally for their lives. That would not give to either of them more than a moiety. Then he proceeds, 'And at their death the principal to be divided equally between the children of the said C. T. Wills and John Wills.' That is all. The expression 'at their death' cannot be literal. It is impossible the testator could have supposed that both his sons should die at the same moment; and I may repeat the observations of Lord Langdale in Willes v. Douglas (1), that ' "at their death" cannot mean the contemporaneous death of all, but the deaths of each respectively.' If so, away goes Malcolm v. Martin (2).

"The only other possible interpretation is, 'at the

death of the survivor,' but that gets rid of the word 'their.' I prefer taking it as 'at their respective deaths.' There is now no gift of the moiety of the income after the death of either of the sons to anybody. He directs at their death 'the principal,' that is, the principal of that moiety of which the income is now free, 'to be divided equally between the children' of his two sons.

"There are two possible constructions. The literal construction will not do. The natural and probable construction is that by the children he means the respective children. This was the view taken in Arrow v. Mellish (3), where the words 'their children' were held to mean 'their respective children.' "

In a number of the later cases a per stirpes distribution was directed, where the testator had made a bequest to several for life and then to their children, issue, or heirs.

The case of Clapper v. Clapper, 246 Iowa 899, 70 N. W. 2d 145, was a real estate partition suit, but the appeal was only from an adjudication construing a will to provide that the remaindermen, children of the testator's children, take the property per stirpes and not per capita. The parties were the beneficiaries under the will of Henry W. Clapper. His wife predeceased him. Omitting the reference to the testator's wife, the fourth paragraph of the will stated: "* * * the use or rental of the above described real estate shall go to my children during their lifetime, and at their death shall be divided equally, and shall vest in 'fee simple' between their children." The provision for the testator's children created a tenancy in common in the land during the life of each child. § 557.15, Code of Iowa, 1954. This section of the Iowa Code provides: "Conveyances to two or more in their own right creates a tenancy in common, unless a contrary intent is expressed." Nebraska does not have any such statute. In any event, this court may determine that a tenancy in common exists when warranted by a will.

In the Clapper case the appellees contended that the will showed testator intended that the remainder of the one-fourth share in the use of the land which each of the testator's children held for life should go to such life tenant's children equally at his death, which would result in a per stirpes distribution. Appellants contended that the will showed testator intended a per capita distribution. The court said: "However, as stated in appellants' brief, the sentence may be clarified by eliminating the words 'shall vest in fee simple', so it would read 'and at their death shall be divided equally between their children.' Under the proper rule of construction it would mean 'and at their respective deaths shall be divided equally between their respective children.' This means a distribution per stirpes, with the children of each child taking equally that share (¼) in which their parent had his life estate." The court further said: "The rule of construction stated by the decisions quoted from is sound and appears to represent the majority doctrine. * * * Hence, 'their death' will be read 'their respective deaths' and 'their children' will be read 'their respective children.' The sentence in the will would then read 'and at their respective deaths shall be divided equally, and shall vest in fee simple between their respective children.'" There are a multitude of cases that sustain the position taken in Clapper v. Clapper, *supra*. See, Annotation, 13 A. L. R. 2d 1062, supplementing annotations in 16 A. L. R. 122, 78 A. L. R. 1411, and 126 A. L. R. 179.

In Dills v. Deavors (Ky.), 266 S. W. 2d 788, W. T. Deavors (a son of Sally Deavors, deceased) and his son Earl brought an action against Dewey Dills, devisee under the will of a deceased daughter of Sally Deavors, to determine their rights under a deed executed by Sally Deavors to her children. The deed read as follows: "This deed of conveyance made and entered into this 11th day of July, 1892, between Sally Deavors, party of the first part, and Martha J. Deavors, Victoria C.

Deavors, and W. Thomas Deavors, parties of the second part: Witnesseth: That the said party of the first part, for and in consideration of the love and affection I have for my three children, do hereby sell and convey to the party of the second part, their heirs and assigns, the following described property, to-wit: (Description omitted) The said Sally Deavors retains and keeps possession of said land during her natural life time * * * and at her death the aforesaid tract of land is to go to her three children * * * and they are to have full possession of the same so long as they live, and at their death it is then to go to their bodily heirs * * *." Sally Deavors died in 1904. She left surviving her the three children previously named. The court said: "It appears to be the prevailing rule that where land is conveyed or devised to several persons for life and at 'their death' to 'their' children or bodily heirs, the phrase 'their death' will be read 'their respective deaths' and the phrase 'their children' or 'their bodily heirs' will be read 'their respective children' or 'their respective bodily heirs.' Annotation, 16 A. L. R. 123, 57 Am. Jur., Wills, sec. 1315, p. 870."

In Horne v. Horne, 181 Va. 685, 26 S. E. 2d 80, the court said: "The presumption of a per capita distribution is not a strong one and is easily overborne. It will yield to a very faint glimpse of a contrary intention in the context, or a contrary intention deduced from a study of the will as a whole." See, also, Claude v. Schutt, 211 Iowa 117, 233 N. W. 41, 78 A. L. R. 1375. In the Horne case, which started as a suit for partition, a grantor conveyed a certain tract to his two sons with remainder "to their lawful children." The deed also provided that the grantor wished one son to be given the dwelling house and 75 acres of land and no more and the land was properly partitioned accordingly. One of the grantees died without issue and the children of the other grantee contended that the remainder was a gift to a class composed of the children of both, if both had chil-

dren, or, if only one had children, to the children of that one. On the other hand, the heirs of the grantor contended that the deed created life estates in separate and distinct parts of the tract of land and that the remainder must be construed to be distributive so as to give the share of each grantee to his children, if he had any, and one son having died without issue, that part of the estate given him for his life reverted to the estate of the original grantor. It was held: That the children of the grantee were not entitled as purchasers under the deed to the remainder in that part of the land given to the other grantee, since the two life estates were not joint estates in the land, but were estates in separate and distinct parts thereof, certainly not less than life estates in common.

In Stoutenburgh v. Moore, 37 N. J. Eq. 63, a testator provided by his will "all the rest and residue of my estate, real, personal and mixed, I give, devise and bequeath the income to my two sons, Robert and Edward, to be equally divided between them during their lives, *and at their death to be equally divided between my grandchildren,* to them, their heirs and assigns." The testator had two sons living at the time of making the will. They were both married and both survived the testator. Edward died leaving a widow and one child; Robert survived and had four children. The questions presented were, what was the interest of Robert in the remainder, and what was the interest of the grandchildren of the testator? Robert claimed that he was entitled, by virtue of an implied cross-remainder, to the whole of the income for his life, and that the remainder was not divisible until his death. His children claimed that whenever it was divided it was to be divided per capita among all the grandchildren, his children and the child of his brother Edward. On behalf of the complainant, the child of Edward, it was claimed that the gift to Robert was only half of the income of the remainder, in any event, and that on the death of Edward

the remainder was divisible into two shares, one of which went at once to the child of Edward, and that on the death of Robert the other share would go to his children. The court said that neither of the sons had a right, under the will, to more than one-half of the income in any event, and when one of them died the principal was to be divided. The author of the opinion said: "* * * I am of opinion that by the term 'at their death' the testator meant at the death of them respectively, not at the death of the survivor." In this opinion the case of Jackson v. Luquere, 5 Cow. 221, was referred to, wherein, under a devise to two daughters, "to be equally divided between them, share and share alike, and to be to them for and during their natural life, and after their death then to be to their and each of their children, and to be divided between them, share and share alike" it was held that on the death of one daughter, her share vested in her children immediately, per stirpes.

In Williams v. Johnson, 228 N. C. 732, 47 S. E. 2d 24, a devise was made to the children of the testator's deceased son for life and then to their bodily heirs, or issue, surviving them, and in the event that any of such grandchildren should die, without leaving surviving issue, then to his next of kin in fee simple. The court held that the children or issue of each grandchild should take per stirpes and not per capita. The court pointed out that if the testator had intended that his grandchildren and their issue should constitute a class and take per capita, there would have been no necessity for a limitation over upon the failure of any grandchild to leave issue surviving him.

In 3 Page on Wills (Lifetime Ed.), § 1082, p. 291, it is said: "Even the use of such a word as 'equally' or 'share and share alike' is not conclusive of an intention to distribute per capita; since the equality which is intended may be among the various classes, and not among all the individuals. Accordingly, a gift to the heirs of A and B, etc., to be divided equally, or share and share

alike, has been held, in some cases, to show an intent to distribute per stirpes." And in § 1081, p. 290, it is said: "The fact that the parents are named and the children are not named, but are described by relationship to their respective parents, tends to show that a per stirpes distribution is intended, * * *." See, also, Bethea v. Bethea, 116 Ala. 265, 22 So. 561; Mooney v. Tolles, 111 Conn. 1, 149 A. 515, 70 A. L. R. 608. To like effect see 3 Jarman on Wills (7th Ed.), c. XLII, pp. 1688, 1689, 1690; Mewborn v. Mewborn, 239 N. C. 284, 79 S. E. 2d 398.

Restatement, Property, § 301, p. 1649, states: "Similarly if the members of the class are of two or more families and the parent of each of these families is given a prior life interest in an equal share in the subject matter of the class gift, this fact tends to establish that those class members who are the children of one life tenant are to take only that share in which the parent life tenant had his interest. Additional language specifically giving over the share of the parent to his children excludes per capita distribution."

In In re Estate of Pfost, *supra,* the word "between" was considered as more controlling than the words "be divided equally, in equal shares, share and share alike" in determining that a devise was to be distributed between 13 people, half to one of the 13 and the other half to the 12, rather than to the 13 per capita. It is apparent that this court did not in reality give too much credence to the words "share and share alike" in determining this case. In the cited case this court did not say that the use of the term "share and share alike" would or would not indicate a per capita division.

The cases of In re Estate of Pfost, *supra,* and Kramer v. Larson, *supra,* are not ones involving a life estate in more than one person and remainder in their children, or words of similar import. In the latter case the rule of construction is different, as hereinbefore pointed out.

In Bodeman v. Cary, *supra,* the court held that the true intent was to create a joint tenancy with right of

survivorship. In the instant case it appears that there was no intent to create a joint tenancy with right of survivorship between the three families, but that survivorship was only intended between the husbands and wives. The court said, quoting from In re Estate of Vance, 149 Neb. 220, 30 N. W. 2d 677: " 'While as between joint tenancies and tenancies in common the law prefers the latter, yet if the purpose to create a joint tenancy is clearly expressed in an instrument of conveyance or ownership, the law will permit the intention of the parties to control, and a joint tenancy with right of survivorship will be created.' "

We have been unable to find cases exactly in point, relating to the construction of a will such as we have in the instant case. However, there are a great number of cases, including those cited, that use certain words which have the same meaning as the words used in the will considered in this case. In the case of Dole v. Keyes, *supra,* cited by the appellees, the court rejected the majority rule as we view it from our research.

As we interpret the will under consideration, rules of law relating thereto, and the authorities as heretofore set forth, the testator devised three life estates, each life estate consisting of a one-third interest in the property, to Harold and his wife, if she survives him, to Leonard and his wife, if she survives him, and to Marie Mundy and her husband, if he survives her. At the death of Harold, or at the death of his wife, if she has not remarried, whichever occurs last, their life estate in one-third of the property is extinguished and Harold's children take the right of possession to one-third of the property. Leonard's children take in the same manner. The same result follows if Marie and Leo Mundy leave natural-born children surviving them and, if they leave no natural-born children surviving, their life interest is extinguished and Harold's and Leonard's children take their aunt's one-third interest in the property per capita. The fee thereby descends in thirds at three distinct

times, at the death of the survivor of Harold and his wife, the death of the survivor of Leonard and his wife, and the death of the survivor of Marie and her husband.

Section 76-117, R. R. S. 1943, providing for the creation of cross-remainders, is not applicable for the reason that the will effectively manifests an intent not to create cross-remainders between the life tenants. In the will here considered there is no language which clearly expresses that a joint tenancy exists, but the language therein does appear to create a tenancy in common.

We conclude that insofar as our former opinion is in conflict with this opinion it should be overruled.

We reverse the judgment of the district court and remand the cause with directions to render judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., concurring.

The dissent in this case attempts to make difficult that which appears to be a rather simple problem when properly analyzed.

The real question, as I view it, is whether or not the testator created a tenancy in common or a joint tenancy when he conveyed a life estate to his three children. I submit that it was the former. There is not one word in this will to indicate that a joint tenancy or a tenancy in common with survivorship was intended. It is a well-known rule in this state that tenancies in common are favored and that joint tenancies will not be found in the absence of language indicating a clear intent to create one.

Upon the decease of a tenant in common his interest descends to his children in the absence of language vesting it elsewhere. Consequently, upon the death of one of the tenants in common his interest vests immediately in his children, share and share alike. The fault in the dissent is contained in the unwarranted premise that the life estate created a survivorship in the

surviving life tenant when there is not the semblance of any such intent.

The majority is charged in the dissent with ignoring section 76-117, R. R. S. 1943. This act applies only when a conveyance of property is made to two or more persons as tenants in common for life or for a term of years which is terminable at their deaths "with an express remainder, * * * (a) to the *survivor* of such persons, or (b) upon the death of *all* the life tenants." There is no provision of the will that brings the case within the scope of this statute. Even the Nebraska Law Review article quoted in the dissent reflects this limitation upon the scope of section 76-117, R. R. S. 1943.

The will provided that in the event no children were born naturally to his daughter, the testator gave their share in the real estate to the "children of my sons Harold and Leonard, share and share alike." If the position taken in the dissent is the correct one, there was no need whatever for this provision. It becomes superfluous under such an interpretation. The rule is that the intent of the testator will be gathered from the four corners of the will. This means that the intent of the testator is to be determined from the whole will and not only from those provisions that appear to support any specific theory.

I submit that the conclusion of the majority is consistent with all provisions of the will and properly reflects the intent of the testator. The confusion in the case, if any, is injected by the dissent and not the majority opinion.

SPENCER, J., dissenting. SIMMONS, C. J., and BOSLAUGH, J., concurring in this dissent.

I am unable to agree with the majority opinion for three reasons: First, it to me patently ignores the intent of the testator and by an anachronistic rule of construction wholly foreign to Nebraska law actually defeats that intent; second, it in effect repeals section 76-117, R. R. S. 1943, which is section 17 of the Uniform

Property Act; and, third, if a rule of construction is to be applied, the wrong one has been used.

The question in this case is whether the remainder is to be distributed per stirpes or per capita. In concluding that a part of the remainder is to be distributed per stirpes, the majority opinion brings into our law a rule of construction sometimes referred to as the English rule, which has been adopted in some states in this country which lean toward a stirpital construction. Stated briefly, this rule provides that a devise to life tenants as tenants in common with remainder to their children upon the death of the life tenant is to be construed not as it is written but as if the devise read to their *respective* children upon their *respective* deaths. As I will suggest later, this rule has no place in Nebraska law, and, in any event, it is not applicable to this will.

I believe that the intent of the testator, which is controlling in the construction of any will, is so evident in this case that it is unnecessary to resort to an arbitrary rule of construction in order to arrive at the meaning intended. I think it is clear that the testator intended that his children during their "natural lives," or their spouses until their remarriage, should have the use and income of the property, and upon the "death" of the life tenants and the death or remarriage of the spouses, the remainder was devised to the children of Leonard and Harold and the natural-born children of Marie. I believe that the testator indicated an intent to treat all of the remaindermen equally and that no intention to the contrary is found in the will.

Until this case we have consistently held in Nebraska that the court, without much regard to canons of construction, would place itself in testator's position, ascertain his intent, and, if lawful, enforce it. Judge Sullivan stated the rule as follows in Weller v. Noffsinger, 57 Neb. 455, 77 N. W. 1075: "No rule of law is better settled, or more in accord with good sense, than that which requires the intention of the testator to be ascer-

tained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, no conventional form of expression, are necessary to enable one to make an effective testamentary disposition of his property. The court, without much regard to canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it." This exact language was repeated in Krause v. Krause, 113 Neb. 22, 201 N. W. 670, and In re Estate of Dimmitt, 141 Neb. 413, 3 N. W. 2d 752, 144 A. L. R. 704, and in other cases. It is found in substance in every will construction in our reports, including Bodeman v. Cary, 152 Neb. 506, 41 N. W. 2d 797, which is controlling herein but which the majority opinion, because of the assumption of a false premise and some judicial surgery performed on the testator's intent, holds to be inapplicable.

I suggest further that the law followed is an anachronism. It is followed in this country only in those states which favor a stirpital distribution. Nebraska is not one of them. As we said in Douglas v. Cameron, 47 Neb. 358, 66 N. W. 430: " 'The rule of representation applies only from necessity, or where there are lineal heirs in different degrees.' " And again, in the same case at page 366, referring to an opinion by Chief Justice Shaw of Massachusetts: "The point, however, we desire to impress is that at the time he wrote, representation in America was not presumed, but was only applied where the statute affirmatively provided therefor." The reason for stirpital distribution in England and why it has not been generally adopted in America is discussed in that case.

An observation by the writer of an Annotation appearing in 16 A. L. R. 16 is illuminating: "It is a common remark that the decisions on the question as to when beneficiaries under a will are to take per capita, and when per stirpes, are in hopeless confusion. Analysis and comparison, however, show that their diver-

sity of result is due not to a difference as to the principles of construction, but as to the amount of evidence of a contrary intent which will overcome the general presumption that, *where the proportions in which the beneficiaries are to take are not specified, they take per capita.* The cause of this difference is due to the inclination of some courts—notably those of Connecticut, Georgia, Illinois, Indiana, Kentucky, New Jersey, and Pennsylvania—toward stirpital distribution wherever possible." (Italics supplied.)

What the majority opinion is doing is reading into the will words which simply are not there, which in nowise reflect the testator's intent, but on the contrary have the effect of destroying the very thought clearly expressed by the testator, especially so when the language used is given its generally accepted, literal, and grammatical meaning. In fact, the children of the testator themselves construed the will to create cross-remainders in the surviving children until the motion for rehearing. I quote from appellants' original brief: "Martin F. Gaughen's will (E1:2) made certain bequests and the major portion of his property, consisting of 240 acres of farm land in Dodge County, was devised as follows: Life estates were devised to testator's three children, Harold, Leonard, and Marie Mundy and their spouses, Mamie, Thelma, and Leo Mundy. *On the death of the last of the above life tenants,* the remainder was devised in the following manner: * * *." (Italics supplied.) They were correct in that interpretation, I believe, because there is nothing in the will which permits any enjoyment of the remainder interest prior to the demise of all the children, and the demise or remarriage of all the spouses, and any other interpretation does violence to the will itself.

Assuming, however, that the testator created a tenancy in common in his children as the majority opinion holds, then certainly section 76-117, R. R. S. 1943, must be followed. This section is section 17 of the Uniform

Property Act, and was intended to avoid exactly the thing the majority opinion creates. In 1939, when the Nebraska State Bar Association was considering the Uniform Property Act and what position to take with reference to it, an able real property lawyer reported on section 17 as follows: "Section 17 deals with the doctrine of cross remainders; and provides that when an estate is conveyed to two or more persons as tenants in common which is terminable at their deaths with an express remainder to the survivor of such persons or upon the death of all of the life tenants to another person, such conveyance creates cross limitations among the tenants in common so that the shares of those dying vest in the remaining tenants. We have no Nebraska statute and have had no Nebraska cases dealing with the rule of cross remainders. It suffices to say that a great deal of hair splitting and technicalities have been indulged in by the courts generally in dealing with this problem. It is bound to arise in Nebraska and it should be settled in such a manner as to avoid needless difficulties. This proposed section furnishes a statutory definition, clarifies the law, expresses a common sense view, does away with technicalities and settles the matter so that all may understand." 18 Nebraska Law Review, No. 4, p. 145.

The majority opinion brushes aside section 76-117, R. R. S. 1943, by stating that it is inapplicable here because the will effectively manifests an intent not to create cross-remainders between the life tenants. I believe that not only is an opposite intent manifested in the will, but that the very purpose of the statute has been ignored. It is my opinion that the Legislature intended to avoid the operation of the so-called English rule by enacting section 76-117, R. R. S. 1943, which provides that none of the remaindermen shall go into possession until all of the life estates have been terminated. In arriving at the conclusion that an opposite intent is manifested in the will, the majority rely upon

a rule which has never been in effect in this state and which if it were, the statute abolished. In effect, the rule is used to void the statute and thus destroy its meaning and effect.

The matter to be decided in this case is whether the remainder is to be distributed per capita or per stirpes. The majority do hold under their construction that the remainder devised to the natural-born children of Marie is to be distributed per capita to the children of Leonard and Harold in the event there is a failure of issue to Marie. I cannot draw this fine a distinction. I believe that the testator intended the entire remainder is to be distributed per capita, and not one-third per capita and two-thirds per stirpes.

I suggest further that there are other rules of construction in England and those states which lean to a stirpital distribution which would be more logical than adding words to a will if the testator's intent were not clear. Those constructions, however, would require a per capita distribution and not a stirpital one.

Under a bequest to children of several persons, the children take per capita and not per stirpes in the absence of words indicating a different intent. Abrey v. Newman (1853), 16 Beav. 431, 51 Eng. Rep. R. 845, 22 L. J. Ch. 627, 17 Jur. 153, 1 Wkly. Rep. 156. See the American and other English cases collected in 16 A. L. R. 61. If it were argued that this rule should not apply because of the language used in the instant will, I suggest that the cases do not bear out this assumption. As said in 3 Page on Wills (Lifetime Ed.), § 1082, p. 288: "It also applies where he describes them as separate classes, such as 'the children of' one named parent, and 'the children of' the other named parent," which incidentally is our exact situation. As suggested by Page in the same article, this is the rule even if the parents are related to the testator in unequal degrees.

There is in the majority opinion the suggestion that if the parents are named, and the children are not

named, a per stirpes distribution is intended. The reference is supported by single Connecticut and Alabama cases, both of which jurisdictions are states favoring stirpital distribution on the slightest pretext. I suggest the rule followed in most jurisdictions is otherwise. See the cases collected in 16 A. L. R. at page 31. To the same effect see 57 Am. Jur., Wills, § 1301, p. 861, which does not even mention the Connecticut and Alabama cases.

There is also the rule which is followed in both England and those states favoring a stirpital distribution that where there is a limitation over, the distribution is per capita and not per stirpes. A good illustration of these cases is the Kentucky case of Walters v. Crutcher, 15 B. Mon. 2, which I use because the Kentucky case of Dills v. Deavors, 266 S. W. 2d 788, has been cited in the majority opinion. That case holds the rule contended for in the majority opinion to be inapplicable where there is a limitation over in case of the death of any of the life tenants without children, since in such case an intention is apparent that all the children will take as one class. That is exactly the situation which we have in the instant case.

It will serve no purpose to extend this dissent further. I summarize by saying that to hold that the testator devised both a life estate and a remainder in thirds is to overlook these salient features of the will and the admitted facts appearing in the record: First, the testator designated the objects of his bounty by their relationship to their living ancestors, thereby indicating that they are not to take in his or her place or by representation, but that the reference to the ancestors is solely for the purpose of designating the beneficiary. Second, all the remaindermen are of the same degree of kindred to the deceased, and if all of the children of deceased be dead, they would take equally under the statute of descent in the absence of a will. Third, if the decedent had intended a stirpital distribution, he could have

easily stated so in his last will. He made no attempt to do so. Fourth, the testator on two occasions in the disputed paragraph decreed distribution on a share and share alike basis with nothing to be found in the entire will indicating an intent contrary to the generally accepted meaning of the quoted words. Fifth, the provisions of the will itself, wherein the testator devised the remainder "upon the death of said life tenants or the remarriage of my children's spouses," indicates that the whole remainder goes over together instead of in separate shares.

Our first opinion in this case, Gaughen v. Gaughen, 171 Neb. 763, 107 N. W. 2d 652, is the correct one and should be adhered to.

DARTMOUTH COLLEGE, A CORPORATION, APPELLEE, V. GERALD ROSE ET AL., APPELLANTS, IMPLEADED WITH RALPH ROPKEN ET AL., APPELLEES.
112 N. W. 2d 256

Filed December 1, 1961. No. 34979.

1. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite.
2. **Limitations of Actions: Adverse Possession.** A party, in order to establish title to real estate by the operation of the statute of limitations, or in other words by adverse possession, must prove by a preponderance of the evidence that he has been in actual, continuous, notorious, and adverse possession of the property under claim of ownership during the full period required by the statute.
3. **Limitations of Actions.** The statutory period for the establishment of title to real estate by adverse possession is 10 years.
4. **Adverse Possession.** To determine the acts necessary to constitute adverse possession it is sometimes necessary to take into

consideration the character of the property and the purposes for which it is suitable.

5. ———. It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character. Ordinarily the hidden or remote view or belief of the possessor in taking possession does not relate itself to the adverse character of the possession.

6. Waters. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.

APPEAL from the district court for Dakota County: JOHN E. NEWTON, JUDGE. *Affirmed.*

Cecil W. Orton and *Kindig, Beebe & McCluhan,* for appellants.

Smith & Smith and *Woods, Fuller, Schultz & Smith,* for appellee.

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

MESSMORE, J.

This is an action in equity brought on July 28, 1959, by Dartmouth College, a corporation, against the defendants Gerald Rose and Gloria Rose, husband and wife, Lawrence Harris and Rosetta Harris, husband and wife, and Ralph Ropken and Betty Ropken, husband and wife. The purpose of this action was to quiet title to certain real estate described in the plaintiff's petition against all of the defendants, and to enjoin them from setting up or asserting any interest in, right or title to, or lien upon said real estate or any portion thereof. The defendants Ralph Ropken and Betty Ropken, husband and wife, filed a disclaimer of any right, title, or interest in the real estate here involved. The trial court rendered judgment quieting title in the plaintiff to certain lands as described in the plaintiff's petition, and enjoined the defendants from asserting any claim or interest in said

real estate. The court also determined that the dispute in question was confined to the land lying directly east of the plaintiff's land, since a portion of the land in dispute lies within the State of Iowa and beyond the jurisdiction of the district court for Dakota County, Nebraska. The defendants filed a motion for new trial which was overruled. The defendants appeal.

The plaintiff's petition alleged that the plaintiff is the owner by title in fee to certain real estate situated in Township 27 North, Range 9 East of the 6th P. M., in Dakota County, Nebraska. The petition further alleged that the plaintiff and its predecessors in title have had open, notorious, continuous, and exclusive adverse possession of said real estate under claim of title thereto for more than 10 years last past; that Leon E. Williams acquired title to this real estate by deed on February 13, 1948; that he died testate May 26, 1958; that by his will, which was duly admitted to probate December 6, 1958, he devised all of the real estate in Dakota County of which he died seized to the plaintiff; and that none of said defendants have any valid or legal ownership of, interest in, right or title to, or lien upon said real estate, or any part thereof, but their apparent claims cast a cloud upon the plaintiff's title which should be removed.

The defendants, except the defendants Ropken, admit that part of paragraph 5 of the plaintiff's petition alleging that these answering defendants claim some interest in, right or title to, or lien upon the real estate described in the plaintiff's petition, and deny every other allegation therein.

By cross-petition these defendants alleged that they are the owners of the real estate known as Omi Island in the Missouri River, then the description of the real estate which they claim to own is set forth; that these defendants have been in continuous, open, notorious, exclusive, and adverse possession of the lands therein described which are situated in Woodbury County, Iowa,

and Dakota County, Nebraska, under claim, and have occupied every part of said property, claiming the same as their own, clearing and improving the same, and have claimed adversely to any and all interests of the plaintiff and all other persons, and against the whole world for more than 10 years last past; and that they are now in possession of the same. The prayer is that their right, title, and interest in and to said described real estate, including all accretions thereto, be found and determined to be in these defendants and cross-petitioners, and that they have title quieted in them to said land.

The trial court quieted and confirmed title in Dartmouth College as against each and every one of the defendants named herein to the following described real estate situated in Township 27 North, Range 9 East of the 6th P. M.: Government Lots 4 and 5, Section 15, and all accretion lands thereunto belonging; Lot 6, Section 15, as located and established by survey and plat of R. V. Fairchild, civil engineer, in the year 1930, and approved by the board of county commissioners of Dakota County, Nebraska, and all accretion lands thereunto belonging; Government Lots 1, 2, 3, and 7, Section 22, and all accretion lands thereunto belonging; Lots 8 and 9, Section 22, as located and established by survey and plat of R. V. Fairchild, civil engineer, in the year 1930, and approved by the board of county commissioners of Dakota County, Nebraska, and all accretion lands thereunto belonging; all accretion lands belonging to Government Lot 5 and to Government Lot 6, Section 22; the south 16 acres of Government Lot 1, and all of Government Lot 2, Section 16, and all accretion lands thereunto belonging; Lot 3, Section 16, as located and established by survey and plat of R. V. Fairchild, civil engineer, in the year 1930, and approved by the board of county commissioners of Dakota County, Nebraska, and all accretion lands thereunto belonging; Government Lots 1 and 2, Section 21, and all accretion lands thereunto belonging; Lot 9, Section 21, as located and estab-

lished by survey and plat of R. V. Fairchild, civil engineer, in the year 1930, and approved by the board of county commissioners of Dakota County, Nebraska, and all accretion lands thereunto belonging; and the south half of the southwest quarter of Section 16, and all accretion lands thereunto belonging.

The real estate, all situated in Township 27 North, Range 9 East of the 6th P. M. (except the south half of the southwest quarter of Section 16), is also described as follows: Commencing at the northwest corner of Lot 5 in Section 15, thence due east along the north line of said Lot 5, and the centerline of said Section 15, extended to the state boundary line, between the states of Iowa and Nebraska, as set forth in the Iowa-Nebraska Boundary Compact ratified by Nebraska on May 7, 1943, and being the centerline or middle of the former proposed stabilized channel of the Missouri River, as established by the United States Engineer's office, Omaha, Nebraska, and shown on the alluvial plain maps of the Missouri River, from Sioux City, Iowa, to Rulo, Nebraska, which maps are now on file in the United States Engineer's office at Omaha, Nebraska, and copies of which maps are now on file with the Secretaries of State of the States of Iowa and Nebraska; said boundary line also being shown on exhibits Nos. 24 and 25 in this cause; thence southerly, on the centerline of said proposed channel and state line, to its intersection with the south line of Section 22, extended; thence due west, along the south line of said Section 22, extended, to the southwest corner of said Government Lot 7, in said Section 22; thence due north, along the west line of said Government Lot 7, in said Section 22, a distance of 1,745 feet; thence south, 80° west, a distance of 2,615 feet to the west line of Lot 5, Section 22; thence due north, along the west line of said Government Lot 5, in said Section 22, extended, 990 feet; thence south, 82° west, for a distance of 3,902 feet; thence north 65° west, for a distance of 1,300 feet; thence north, 3° east, for a

distance of 1,865 feet; thence due east for a distance of 1,052 feet; thence due north for a distance of 1,220 feet, to the government meander corner on the north line of Section 21; thence north along the west line of Lot 2, Section 16 to the northwest corner of said Lot 2, in said Section 16; thence east along the north line of Lot 2, extended, in Section 16 to the southwest corner of Lot 5 in Section 15; thence north, along the west line of said Lot 5, Section 15, to the place of beginning; together with all accretion lands thereto and thereunto belonging.

Assignments of error necessary to a determination of this appeal may be summarized as follows: The decision of the trial court is not sustained by the evidence and is contrary to law.

Leon E. Williams acquired the land as set forth in the plaintiff's petition from the Independent Stock Farm, a corporation, by warranty deed on February 13, 1948. The title to this land is shown to have been quieted in the plaintiff's predecessors in interest in 1933, in the case of Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647. Title was quieted in the plaintiff's predecessors to the parcel of land extending from the northwest corner of Lot 5, Section 15, Township 27 North, Range 9 East of the 6th P. M., east along the north line of said Lot 5 (the centerline of Section 15) extended, to the right bank of the Missouri River, thence southeasterly along the right bank of the Missouri River to its intersection with the south line of Section 22, Township 27 North, Range 9, extended eastward to the river bank, thence west along the extended south line of Section 22 to rejoin the south line of plaintiff's government survey land. In 1933, it was adjudged that the title to this parcel of land extended to the right bank of the Missouri River along its full frontage. In the district court for Dakota County a decree was rendered similar to the foregoing, describing the same boundaries, quieting title against other and unknown persons, and

entered in the trial court's journal December 6, 1938.

The course of the river is shown in exhibit No. 16, wherein it is stated that Omaha Creek did not run across this accretion land until long after it came into existence. At all times the north and south boundaries of the subject land have been extensions of the lines of the United States government survey as appears from this decree.

The plaintiff became the owner of this land by virtue of a devise in the will of Leon E. Williams, deceased, which was duly admitted to probate.

It was stipulated that the lands in dispute are those lying east and north of Omaha Creek as it presently flows, and said lands are river-made lands formed gradually by accretion or reliction, and not by avulsion, it being understood that the defendants do not concede that said lands are accretion to the lands of the plaintiff not in dispute.

It is the plaintiff's claim that the accretion is to its land, while the defendants contend the accretion is to what they call Omi Island, which they claim by adverse possession. The plaintiff disputes the fact that there is an Omi Island. It appears that what is called Omi Island contains 1,063.42 acres.

The plaintiff made a prima facie case by the evidence of John Laros, an engineer who made a survey of the lands involved in this litigation in 1958 and prepared a plat. He testified that the plat was drawn to scale; that the distances were correct and the lines drawn thereon were to scale; that the location of Omaha Creek was correct on the north and south where it intersects the boundary line; that the high land is as shown at the north and south boundary line; that the soil that lies east of Omaha Creek is a sandy soil and below the bank there are sandbars; and that above the high bank there is some black soil that is called "alluvial" soil, and some that might be called "river wash."

An exhibit in evidence discloses, as well as does ex-

hibit No. 1, the course of Omaha Creek which apparently entered on the north tip of what is referred to as Omi Island and flows on the west side of what is referred to as Omi Island and allegedly separates the island from the mainland. There is no dispute but that the mainland, as we refer to it in this case, is owned by the plaintiff. Exhibit No. 1 has been examined, and it is deemed unnecessary to point out the findings of the engineer who prepared this exhibit.

When Leon E. Williams owned what has been called the Independent Stock Farm, he named it the Diamond A Ranch.

Duane Jenkins testified that he lived near the Independent Stock Farm in 1948, 1950, 1951, 1952, and 1953; that in 1950 he and another person hunted on Omi Island and were unable to go very far on account of the brush; that in the winter of 1950 and 1951, and later on in that year, he and others started dragging piling off the island; that he and others covered the so-called island to the north, east, and south of Omaha Creek wherever they could get through; that Ivan Krumwiede loaned him a tractor to use on the island; that their purpose in going on the island was to drag piling; that Bud Morrow was also dragging piling with a team; that during the time he and others were on the island there was no farming done; that Bud Morrow was there and lived in a tent which was the only habitation on the island; that in the spring of 1951, he and Ralph Ropken broke some land and farmed by planting roughly 40 acres of corn and a few melons; that he was out there off and on with Ralph Ropken until the crops were harvested, and they were the only ones on the island; that he saw no fences on the island, and he was over all of it in 1950 and 1951; and that Lawrence Harris was on the island and did not order this witness off.

On cross-examination this witness testified that the island was comprised generally of willows; that there were open spots of sand in various places, and new parts

were formed on the north; that there was white sand north of where they farmed; that possibly 50 or 100 people knew that he and Ralph Ropken were farming on that land; and that people came there fishing all the time.

The defendants adduced evidence in substance as follows:

Lawrence Harris, hereinafter referred to as Harris, testified that he was on Omi Island first in July 1940, when he went there to fish; that he was on the island in 1941 to hunt and fish; that the next time he went on the island was in 1946; and that at that time he cut willows, planted a garden, and built a little dwelling using willows, boards, and driftwood. In 1946 he worked for Ivan Krumwiede off and on, and when he was off work, on Sundays and rainy days, he would go over to the island. He also spent some nights on the island. He dug a well and hunted on the island in 1946. He further testified that there were other persons on the island at that time who were fishing. He also saw Gerald Rose who had a fishing camp on the island, some cooking utensils, some decoys, and fishing lines. He saw Rose doing some clearing. This witness further testified that he was on the island in 1947, for the purpose of pulling some piling along the edge of the chute that comes out of the river. In 1947 he planted some corn, squash, pumpkins, and watermelons. In November or December of that year, when the ice was frozen strong enough to hold him, he went over to the island to trap coyotes. He cleared about 9 acres of land on the island in 1947. In 1947 he was on the island once every 2 or 3 days, and also at night. Another shack was constructed of driftwood and some willow poles. There was very little corn, and it was picked by hand. After the corn was picked he started to build a fence, and a "no trespassing" sign was put up. The fence was a two-strand barbed wire fence attached to wooden posts. He was helped by Gerald Rose and Lyle Hankins. The

first sign that was put up read "No Trespassing," but another sign was put up later reading "property of Lawrence Harris and Gerald Rose." These signs were erected in the middle of the summer of 1947. More "no trespassing" signs were put up the same year. After the corn was picked in 1947, he hunted ducks, cleared more willows, and did some fishing until the ice froze. He further testified that the cottonwoods on the island were 4 or 5 inches in diameter, and some were smaller than that. After the cottonwoods were cleared, they were piled up and burned. In January, February, and March 1948, they banded some trees, cut some brush, and burned it. After the winter months they fenced some more of the island by continuing the fencing done in 1947 to the north on the island. This witness was unable to tell how many acres were cleared in 1949, but estimated 25 acres. He further testified that in 1949, mostly garden stuff was planted, and what corn was planted was picked by hand. In 1949, he was on the island off and on through the summer, about 2 or 3 days a week. In 1949 he had a brush rake, brush cutter, tractor, and a little planter to plant corn on the island. In 1950, during the months of January, February, and March, some brush was cleared and this witness did some trapping and hunting. In the same year he sowed some clover and redtop grass, and planted some pumpkins and squash. In 1950, he was on the island at different times. He knew of no one else being there except Gerald Rose. In 1949 and 1950 there were hunters and fishermen along the island, but he did not know who they were. He dug a well on the island in 1946, another one in 1947, and in 1950 he dug another well. The chute on the west side of the island was cut off in 1958. This witness testified that the chute was approximately 450 feet wide, more or less, before the Missouri River that flowed through the chute was shut off in 1958; and that the island was surrounded by water from the time he went on it in 1946 up to 1958.

According to this witness he and Gerald Rose cleared approximately 250 acres of land on this island, and they permitted others to hunt and fish on the island. He further testified that Omaha Creek is still running along the west side of the island, and is between 30 and 50 feet wide and about 4 feet deep; that he and Gerald Rose named the island in 1948; and that the fence that was put up in 1946 and 1947 had been torn down and washed out, and they repaired it at different times.

On cross-examination this witness testified that he could not say how many acres were cleared in 1950; and that in 1949, 20 acres or more were cleared, but he could not be exact because he had never measured it.

Allison Stewart testified that he lives on the island at this time. The first time he was on the island was in the spring of 1948. He was working for Gerald Rose for 3 or 4 days, and cut some brush. The next time he was on the island was in the winter of 1952, when he dragged some piling with Gerald Rose. Subsequent to 1952, he was on the island in 1953. He had seen "no trespassing" signs on the island. On cross-examination this witness testified that he left in the spring of 1948 and went to Chicago where he remained, off and on, for 5 years; that he took 2 months' vacation around 1952; and that Gerald Rose is his brother-in-law.

Roy Towl, chairman of the State Boundary Commission for Nebraska and an engineer, testified as an expert to the effect that the channel between the island and the mainland was never dry; that the boundary line between the State of Nebraska and the State of Iowa was approved in 1943; and that by an exhibit, Omi Island is partly in Nebraska and partly in Iowa.

Gerald Rose testified that he was familiar with the tract of land lying east of the Dartmouth College farm described as Omi Island; that the first time he was on the island was in the fall of 1945, where he went to hunt and fish; and that the next occasion was in 1946. At that time he erected a small building, cleared a few wil-

lows, and put in a little garden. This structure was built of boards and some poles set in the ground with a roof over it to keep them dry while they were clearing the land. He cleared some land where the structure was located, and some north, south, and west of that. He further testified that he had seen Harris on the island in April 1946; that he first planted field corn on the island in 1949; that he cleared the land of willows by using an axe and a corn knife, and continued clearing the land each year; that he and Harris put in garden, grass, and crops of corn; that he and Harris were asked by the Iowa Public Power Company for an easement across the island, which they granted; that when he first went onto the island in 1945 there was no cleared land on the island; that he and Harris built a 300-foot mat across the property in 1946; that the mat was woven for the purpose of getting from one part of the island to another; that he and Harris built a fence and put up "no trespassing" signs in 1946 and 1947; and that in 1947 they planted sweet corn and redtop grass and in 1949 they planted some field corn. He further testified that Harris and Lyle Hankins cleared the land which Duane Jenkins farmed for 1 year, which is north of the land involved in this litigation; that the house he constructed on the island in 1946 burned down and he erected another one in 1948; that he first had machinery on the island in 1947; and that he has had machinery there ever since.

On cross-examination a deposition of this witness was used wherein he testified that the shack burned down in 1946. At the time of trial he testified that the shack burned down in 1947. As to the land cleared in 1948, he testified at the trial that 15 acres were cleared. In his deposition he stated that 25 or 30 acres were cleared. About the brush cutter built and used, at the time of trial he testified that it was used in 1948, and in his deposition he stated it was used in 1953. At the time of trial he testified that he had chickens and hogs on

this island in 1959, and in his deposition he stated that he had chickens and hogs on the land in 1954 or 1955. He further testified that he saw Jenkins and Ropken in 1951 salvaging piling. He did not tell them they could not do it or ask them for any money received from this activity.

Wayne Ross testified that in the spring of 1950 he was on the island; that Rose made a deal to push a tractor across the chute, and Harris, Ivan Krumwiede, and Ralph Ropken were there; and that they had the tractor on a raft made out of piling and pushed it across with a boat.

Robert Fiscus testified that he was on the island in 1948 and saw Rose there. Rose was cutting some willows on the south tip of the island with a tractor. On cross-examination this witness testified that he saw other people on the island at least three times.

Wilfred Satterwhite testified that he knew the location of the island and had been around the island since he was a boy; that he has seen Rose and Harris on the island from time to time; and that he saw Harris on the island in 1945 or 1946, and Harris gave him some watermelons. In 1947 Harris had machinery on the island. There was a shack on the lower part of the island. He saw Harris and Rose cutting brush on the island in 1951. He further testified that he was on the island in 1953 when a conversation was had between Harris and the foreman of the Leon E. Williams ranch, the property now owned by the plaintiff, which conversation was to the effect that the foreman directed Harris to stay off the island, and Harris told the foreman to stay on his property and he, Harris, would stay on his own, indicating the island.

Doug Wilcox testified that he was acquainted with the island and was on it the first time in 1946, going there with Rose; that he was looking for piling; and that at that time he saw a small shack on the island that Rose told him he owned. He was on the island next in

1948 with Rose. He observed that Rose had been clearing some willows and small trees. He also saw a fence on the west side of the island. On cross-examination he testified that the shack was a makeshift affair made of willow poles and probably some canvas for a roof and walls, a sort of temporary shelter; and that he had been on the island fishing and hunting four or five times a year.

Jim Satterwhite testified that he had been around the island ever since it existed; that he had a fishing camp by the island in 1946; that since 1946 he has seen Harris and Rose going back and forth to the island; and that there was always flowing water around the island, except for the time when ice was on the river.

George Berger testified that he was on the island in 1946 and that was the first time he saw Harris there. He did not recall the first time he saw Rose on the island. There was a small amount of clearing and a small shack on the island at that time. He saw vegetables and corn planted on the island in 1948. On cross-examination he testified that he saw a crop of corn planted by Duane Jenkins.

Mark M. Cain testified that he was acquainted with the island; that in 1946 he and Harris built a shelter; that in 1947 he was on the island for the reason that he was a commercial fisherman and had to put the river boats where they could be sheltered; and that he believed he saw some machinery on the island in 1948.

Lyle Hankins testified that he was acquainted with the island and was first on it with Harris in 1946; that they put up a shack, hunted and fished, did some clearing of brush, and put in a garden; that he was on the island in 1947 with Harris, and Rose was also on the island; that they cleared some brush, fished and hunted, and planted garden; that he was on the island in 1948 and at that time Harris made a homemade tractor; that Duane Jenkins farmed some land on the island in 1951, and this witness worked for Jenkins for 2 days;

and that he and Harris had cleared the land Jenkins farmed prior to the time Jenkins farmed it. On cross-examination this witness testified that he did not know how many acres were cleared, but that there were about 5 patches of garden in 1949.

Merrill Boyd testified that he first saw Harris on the island in 1946 or 1947; that he saw a shack on the island in 1948; that in 1948 he saw a fence and "no trespassing" signs along the west side of the island erected by Harris and Rose; and that he also saw a garden on the island in 1948. He further testified that he saw Harris clearing willows in 1947 and 1948; that he asked Harris for permission to erect a duckblind off the island in 1946; that it first became impossible to get around the island by boat in 1958; and that there was running water there all the time except when it would freeze.

Flay Boyd testified that he was on the island in 1947, and at that time Harris was occupying the island.

The record also shows tax list corrections of Dakota County for the year 1954. The reason for the correction was "pt of island of accretion." There is evidence indicating that the defendants requested this property be placed on the tax rolls in 1957.

In rebuttal the plaintiff adduced evidence in substance as follows.

John Laros testified that he had examined all of the aerial photographs offered by the plaintiff; that he could see no evidence of farming on the island in 1949; and that the photograph for 1955 was the first evidence he could detect of cultivation on the island.

Ivan Krumwiede testified that he had lived in Dakota County all of his life, was familiar with Omi Island, and had lived in that vicinity for a period of 40 years; that he knew Harris and Gerald Rose, and was a brother-in-law of Harris; that he was acquainted with the island prior to 1946, and was on it 8 or 10 times and did not see Harris or Rose on the island; that he was generally on the island 2 or 3 times a year from 1946 to 1950 to

hunt and fish; that he saw no dwelling, fences, or cultivation on the island; that the first time he saw any farming on the island was in 1951, and this farming was done by Ropken and Jenkins; that when Harris was on the island from 1946 to 1950, he was just fishing and gathering up oil barrels and lumber from the river; that Harris planted some melons on the island in 1953; and that he was acquainted with the farming operations of Ralph Ropken and knew that he was on the island between 1950 and 1954. He further testified that he conducted piling salvage operations on the island in the fall and winter of 1949.

Tag Krumwiede testified that he was familiar with the island; that he was on the island occasionally from 1946 to 1949, and found no evidence of habitation, farming, or fencing; that he was on the island in January 1950 on two occasions, for the purpose of searching for piling; that in January 1950, the island was covered with willows and brush; that he did not see any "no trespassing" signs on the island; and that from 15 to 25 hunters, and maybe more, asked permission from him to hunt on the island because that is a favorite hunting place.

Dewey Krumwiede testified that he was on the island occasionally between 1946 and 1950, and saw no evidence of habitation or cultivation.

Ralph Ropken testified that he was familiar with the island and became acquainted with it first in 1949 when he helped Ivan Krumwiede drag piling off of the the island; that in the winter of 1950 he and Duane Jenkins gathered piling on the island; that he was all over the island by tractor and on foot, and saw practically all of the island, but saw no signs of human habitation or cultivation, nor did he see any fence, farm machinery, or trespassing signs on the island; that he and Duane Jenkins started farming on the island in 1951, in the same area where it was later cultivated by Rose and Harris; and that he returned to the island in

1953. At that time Harris had a little patch of melons on the island, and a winch with which he was dragging piling. Harris came onto the island to garden in 1953, and Rose came on the island to garden or cultivate it in 1955.

Byron B. Morrow, also known as Bud Morrow, testified that in the winter of 1950 and the early part of 1951, he was raking piling off the river and gathering piling that was available on the bars and banks of the Missouri River; that he went on the island in October 1950, and was there until some time in February 1951; that he had a team of horses, and salvaged considerable piling from the island; and that he was pretty well all over the island and found no evidence of settlement, cultivation, or habitation. There are two exhibits in evidence which corroborate this witness' actions in gathering piling and fixing the time.

We have examined the maps, the aerial photographs, and all of the exhibits received in evidence. The maps and aerial photographs disclose a comprehensive history of the land here involved.

It was stipulated that the first half of the 1954 taxes were paid by Leon E. Williams in 1958. The remainder of this tax was unpaid.

It will be noted from the evidence adduced by the parties that there is a direct conflict on the main issues here involved. This being true, the rule is: "Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite." Dunbier v. Rafert, 170 Neb. 570, 103 N. W. 2d 814.

"A party, in order to establish title to real property by the operation of the statute of limitations, or in other words by adverse possession, must prove by a pre-

ponderance of the evidence that he has been in actual, continuous, notorious, and adverse possession of the property under claim of ownership during the full period required by the statute. * * * The statutory period for the establishment of title to real estate by adverse possession is 10 years." Jones v. Schmidt, 170 Neb. 351, 102 N. W. 2d 640.

"To determine the acts necessary to constitute adverse possession it is sometimes necessary to take into consideration the character of the property and the purposes for which it is suitable." Walker v. Bell, 154 Neb. 221, 47 N. W. 2d 504.

"It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character. Ordinarily the hidden or remote view or belief of the possessor in taking possession does not relate itself to the adverse character of the possession." Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331.

In Frank v. Smith, 138 Neb. 382, 293 N. W. 329, 134 A. L. R. 458, this court held: "Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause."

In the instant case the parties do not question that accretion is here involved.

It appears from the record that the defendants claim ownership of the entire island. The evidence shows that the land in question was used by the public generally for the purpose of hunting, fishing, trapping, pulling piling, and picking up flotsam. The defendants were engaged in these activities, and such are insufficient to place the owner on notice of adverse possession.

The evidence shows that in the early part of 1951, the defendants well knew that others were using and occupying the island. In this connection we make refer-

ence to the evidence of Duane Jenkins, Byron B. Morrow, and Ivan Krumwiede. The defendants made no objection to such occupancy, nor did they seek to oust the parties from the land. In 1951, Duane Jenkins put in about 40 acres of crops on this land. Ralph Ropken testified that he and Duane Jenkins had the island to themselves when they were working on it. Harris came on the island and started to do some work on it in 1953, and Rose came on the island for the same purpose in 1955. Ivan Krumwiede testified that Harris first cultivated some of the land on the island in 1953, with his permission.

"In determining whether particular acts of ownership indicate an adverse possession, the usual and ordinary use of similar lands by their owners should be taken into consideration. No precise rule of general application can be laid down. Any act, or series of acts, which shows the open, notorious, exclusive, and hostile possession of one who claims to be the owner of the land may be proven as evidence of adverse possession. Thus, such possession may be evidenced by * * * clearing and cultivating, * * * pasturing, cutting timber, * * * fishing, * * * or performing similar acts. However, irrespective of the character of ownership asserted, acts of dominion over the land must, to be effective as against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. A mere temporary use of the property by a trespasser at intervals, whether such intervals are remote or frequent, is not enough." 1 Am. Jur., Adverse Possession, § 132, p. 867. See, also, Huston v. Graves (Mo.), 213 S. W. 77, 5 A. L. R. 423; Walker v. Bell, *supra;* Stokes v. State, 121 Ark. 95, 180 S. W. 492, Ann. Cas. 1917D 657.

The record also shows that this land is a part of a large alluvial plain in which the river has moved back and forth to a considerable extent during the years.

The accretion border to which the land accreted is shown by a decree of the district court for Dakota County in 1933, which determined that the plaintiff's predecessors in interest held and owned land lying to the east of Omaha Creek which for some years prior had been established in its present course running southward along a high water chute.

In Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647, this court said: "The evidence clearly sustains the claim that the formation of the accretion land had gone on to a considerable extent before this little creek cut down across it. In our opinion this does not render void the plaintiff's just claim to this land so formed. We are supported in this holding by several cases, among them Dowdle v. Wheeler, 89 S. W. 1002 (76 Ark. 529), which holds: 'Where an accretion has begun by a deposit against the shores of the mainland, the subsequent existence of an intermediate stream between the mainland and the accretion does not prevent the accretion from belonging to the owner of the mainland.'" Title was confirmed in the plaintiff and the defendants were enjoined from claiming title to, or possession of, any of said land.

The maps, plats, abstracts, and also the 1933 and 1938 quiet title judgments established the north and south lines of the property here involved, as extensions of the United States government survey lines to the riparian border. In other words, the north line was the centerline of Section 15 extended east to the river, and the south line was the south line of Section 22 extended east to the river.

Lawrence H. Hart, one of the United States government engineers who had worked on the river for more than 28 years, called the channel down to Omaha Creek a "high water chute." This does not imply an island, but simply a watercourse that will have higher water at some times than at others, and will be dry in spots or in part at low water.

As to the ownership of this property, see Independent Stock Farm v. Stevens, *supra*, where the court said that plaintiff's predecessor in title owned the land extending east of Omaha Creek. The accretion in question is that very land which became a part of plaintiff's land.

Other assignments of error made by the defendants are without merit.

For the reasons given in this opinion we affirm the judgment of the trial court.

AFFIRMED.

IN RE APPLICATIONS OF UNITED AIR LINES, INC. UNITED AIR LINES, INC., APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

112 N. W. 2d 414

Filed December 1, 1961. Nos. 34980, 34987, 34988, 34989, 35022.

1. **Constitutional Law: Commerce.** The commerce clause of the Constitution of the United States of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority.
2. **United States: Commerce.** As to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive.
3. **Constitutional Law: Commerce.** The line of division between cases where, in the absence of congressional action, the state is authorized to act, and those where state action is precluded by mere force of the commerce clause of the Constitution of the United States, is not always clearly marked.
4. ———: ———. In the absence of congressional legislation, a state may constitutionally impose taxes and enact inspection laws, quarantine laws, and, generally, laws of internal police, although they may have an incidental effect upon interstate commerce.
5. ———: ———. The commerce clause of the Constitution of the United States, of its own force, restrains the states from imposing direct burdens upon interstate commerce.

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

Kennedy, Holland, DeLacy & Svoboda, Clarence E. Heaney, Jr., J. Stanley Stroud, and *Robert D. Skochdopole,* for appellant.

Clarence A. H. Meyer, Attorney General, and *Homer G. Hamilton,* for appellee.

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

SIMMONS, C. J.

This opinion decides five appeals from parts of orders of the Nebraska State Railway Commission, hereinafter called the commission. The appellant in each instance is the United Air Lines, Inc., hereinafter called United. We reverse the orders of the commission on the principal issue involved in the appeals.

Three of the five appeals may be rather quickly disposed of on the principal issue presented by the appeals. There will remain one question common to all five appeals which we take up at the conclusion of this opinion.

In our number 34987, United petitioned for an order disclaiming jurisdiction, or, in the alternative, authorizing the issuance of shares of its common stock heretofore reserved for key management personnel under applicants' restricted stock option plan.

The commission refused to grant the request for a waiver or disclaimer of jurisdiction of the subject matter of the application and granted the alternative prayer of the application.

Pursuant to section 75-710, R. R. S. 1943, the commission required United to pay $300 as a condition precedent to the issuance of its order authorizing the issuance of the securities involved. United made the payment of $300 without prejudice to its right to question the jurisdiction of the commission over the applicant or

to require the payment of the statutory fee.

In our number 34988, United asked for an order disclaiming jurisdiction, or, in the alternative, authorizing the payment of a 3 percent stock dividend. As in case number 34987, the commission overruled the United request for a waiver or disclaimer of jurisdiction and granted the alternative prayer. The statutory filing fee was paid under the conditions above-stated in the sum of $162.60.

In our number 35022, United made application for an order disclaiming jurisdiction, or, in the alternative, authorizing the issuance of preferred and common stock, and stock warranties in connection therewith, and approving proposed consolidations with Capital Airlines, Inc. As in the other cases, the commission denied the request to disclaim jurisdiction, granted the application, and required the payment of the statutory filing fee of $1,000 which was done under the conditions above-stated.

The Attorney General here disclaims jurisdiction in the commission in the above three cases. No issue being presented, we reverse the orders in the above cases so far as the jurisdictional issue presented here is concerned.

This brings us to the two cases on which the parties present issues here.

In our number 34980, United petitioned for an order of the commission disclaiming jurisdiction, or, in the alternative, authorizing the issuance by United of its subordinated debentures in the principal amount of $25,000,000 and its common stock issuable upon conversion of said debentures, and finding that the issue of its debentures is reasonably required for the purposes of the corporation. The commission denied the order of disclaimer of jurisdiction and granted the alternative prayer upon conditions not important here. The commission required the payment of the statutory fee of $1,000 which was paid subject to the conditions expressed above.

The final case of the series is our number 34989, wherein United prayed for an order disclaiming jurisdiction, or, in the alternative, approving an amendment to a credit agreement between applicant and the First National City Bank of New York with reference to bank borrowings, and authorizing issuance of promissory notes pursuant to said amendment. The commission denied the request for a disclaimer of jurisdiction and granted the alternative prayer to issue notes in the sum of $165,000,000. As in the other cases, United was required to pay the statutory filing fee in the sum of $1,000.

The two issues presented here are: First, the jurisdiction of the commission over the subject matter of the last two above-recited applications. Second, if the above issue is decided in favor of United, United requests that we order a return of the fees paid.

There is no issue of fact presented.

United is a corporation organized and existing under the laws of Delaware. It is qualified to do business in Nebraska. Its principal office is located in Illinois.

Pursuant to authority conferred by certificates of public convenience and necessity issued to it by the Civil Aeronautics Board under the federal Aviation Act of 1958, as amended, United is engaged in the transportation of persons, property, and mail by aircraft over a transcontinental route which connects cities on both the east and west coasts and Hawaii, as well as intermediate cities, including Omaha and Lincoln, Nebraska. United does intrastate or interstate business in 23 states, the District of Columbia, and British Columbia, Canada. United holds, among other certificates, a certificate of public convenience and necessity issued by the Nebraska State Railway Commission authorizing it to provide intrastate transportation of persons and property by aircraft between Omaha and Lincoln, Nebraska.

In 1959 United flew 134,200 revenue passenger miles in the transportation of Lincoln-Omaha passengers, which was three one-thousandths of one percent of

United's system revenue passenger miles flown in 1959, which total mileage was 5,160,757,000 revenue passenger miles. United's intrastate mileage of 55 miles between Lincoln and Omaha amounts to but 0.47 percent of the 11,613 unduplicated route miles in its system.

Applicant's real and personal property in Nebraska as of January 1, 1960, totaled $1,200 in Lincoln and $97,680 in Omaha. This is less than 1/3 of 1 percent of the total value of United's real and personal property.

United, as of the time of the hearings, had an authorized capitalization of 600,000 shares of preferred stock of the par value of $100 per share, issuable in series, none of which were issued and outstanding and in respect of which no series has been designated, and 5,000,000 shares of common stock of the par value of $10 per share. As of November 30, 1960, 4,087,054 shares of common stock were issued and outstanding. United had a capital surplus in the amount of $51,701,464; earned surplus in the amount of $50,321,152 plus earned surplus appropriated for self-insured risks in the amount of $5,000,000; and long-term debts outstanding in the amount of $219,052,000. As of September 30, 1960, United's assets, including cash in the amount of $25,103,662 and operating property and equipment, less depreciation reserves in the amount of $183,788,871, totaled $483,527,522. United's net earnings and gain on sale of aircraft, after income taxes, for the year ending December 31, 1959, totaled $13,798,621 and for the 9 months ending September 30, 1960, $9,711,536.

The number of United's stockholders in Nebraska is 155, which is less than 1 percent of the total number of United's stockholders.

The facts having special reference to each of the applications herein involved are set out below.

Substantially all of the money raised and to be raised by the issue of debentures is to be expended beyond the limits of the State of Nebraska in the acquisition of new aircraft equipment and the acquisition, exten-

sion, improvement, and maintenance of United's facilities. These debentures are to be issued under an indenture between United and First National City Trust Company as trustees. Said debentures are wholly unsecured.

Said indentures bear date as of December 1, 1960.

Said debentures have been duly registered with the Securities and Exchange Commission under the federal Securities Act of 1933, as amended.

On December 20, 1957, United entered into a credit agreement with the First National City Bank of New York. This was an agreement whereby United could borrow through a group of banks headed by the First National City Bank of New York the sum of $130,000,000 on short-term, 90-day notes until December 31, 1960, at which time the outstanding short-term notes would be converted into a long-term note. This was an agreement between United and the several banks wherein the banks agreed to loan United money at certain times and in a certain method and evidenced by certain characters of notes. It had reference strictly to bank borrowings.

The agreement was amended on November 30, 1960. There were four major changes in this amendment. First, the amount of the borrowings was increased from $130,000,000 to $165,000,000. Second, it made certain restrictions on stock payments such as cash dividends, etc. Third, it took into consideration the issuance of the $25,000,000 subordinated debentures, which was the subject matter of Application No. 22539. Fourth, it broadened the definition of "net worth" to include the subordinated debentures and any other indebtedness subordinated in terms satisfactory to the bank.

Thus, the commitment of the banks with reference to loans to United was increased by $35,000,000.

The amendment provided that the borrowings should be evidenced by short-term notes, 90-day notes, and extended the date when the short-term notes would be

consolidated into one long-term note from December 31, 1960, to June 30, 1962.

The practice has been to pay off each 90-day note at maturity and then borrow an equivalent amount and issue a new note. Should the short-term borrowings be paid up by June 30, 1962, then there would be no long-term note.

The net book worth of United's operating property and equipment as of October 31, 1960, as shown by the balance sheet of that date, was $389,456,000.

The particular statute involved is section 75-704, R. R. S. 1943: "A common carrier or public service corporation doing business in the State of Nebraska, may issue stocks, bonds, notes or other evidence of indebtedness, payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of facilities, or for the improvement or maintenance of its service, or for the discharge or lawful refunding of its obligations; *Provided,* and not otherwise, there shall have been secured from the State Railway Commission an order authorizing such issue and the amount thereof, and stating that in the opinion of the commission the use of the capital to be secured by the issue of such stock, bonds, notes or other evidence of indebtedness is reasonably required for the said purposes of the corporation."

This act was first passed in 1909. Laws 1909, c. 108, § 1, p. 428. It was then made to apply to: "A common carrier or public service corporation organized and incorporated or hereafter incorporated, under or by virtue of the laws of the state of Nebraska, * * *."

In 1923 the act was amended so as to apply to: "A common carrier or public service corporation doing business in the state of Nebraska, * * *." Laws 1923, c. 168, § 1, p. 398. It will be noted that the amendment of 1923 extends the reach of the place of organization of the corporation. It limited its application to a common

carrier or public service corporation doing business in Nebraska. We find nothing in the legislative or judicial history of the period that might show a reason for the above change. It is apparent that the Legislature shifted its concern from the concept of a corporation incorporated under the laws of this state to that of concern as to a corporation doing business in this state, no matter where organized.

The question then is one of the extent of the reach of the act as it now exists in section 75-704, R. R. S. 1943.

The Legislature in the same act put in an additional provision, now section 75-709, R. R. S. 1943, providing that the provisions of this act "* * * shall not apply to common carriers, the security issues of which are under the control of the Interstate Commerce Commission." Laws 1923, c. 168, § 1, p. 400. Here the Legislature did limit the reach of the act so as to exclude great numbers of interstate common carriers. The language is indicative of a legislative intent only, for at that time great interstate common carriers by air were not in existence. As such, they need not be put without the reach of the act.

There is another legislative amendment, now section 75-705, R. R. S. 1943, enacted in 1925. Laws 1925, c. 141, § 1, p. 371. It provided: "The commission may, in its discretion, prescribe rules and regulations for the keeping of accounts of any corporation or company subject to this act."

This language may be rationally applied to corporations whose business is exclusively or largely restricted to Nebraska; or stated otherwise, show they are in effect Nebraska operating corporations no matter where organized. To require an interstate carrier of the size and scope of operation of United to comply with it goes beyond the scope of a reasonable application of a sound legislative requirement. If Nebraska has power to make that requirement, then every other state where United operates could have like power. The result would be

unjustifiably expensive, and near chaos in the keeping of accounts of such a carrier. We do not ascribe such a purpose to the Legislature.

In Simpson v. Shepard, 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. N. S. 1151, Ann. Cas. 1916A 18, it was held: "The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive."

In Northwest Airlines, Inc. v. Minnesota, 322 U. S. 292, 64 S. Ct. 950, 88 L. Ed. 1283, 153 A. L. R. 245, Justice Jackson in a concurring opinion said: "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government."

Threaded through the decisions of the Supreme Court of the United States is a consistent rule that places the subject matter of the applications here involved beyond state control.

State ex rel. Barrett v. Kansas Natural Gas Co., 265

U. S. 298, 44 S. Ct. 544, 68 L. Ed. 1027, was an interstate gas case. The court held: "Transportation of gas from one State to another is interstate commerce; and the sale and delivery of it to the local distributing companies is a part of such commerce. In Public Utilities Comm. v. Landon, supra, at p. 245, this Court said: 'That the transportation of gas through pipe lines from one State to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the State.' * * * The line of division between cases where, in the absence of congressional action, the State is authorized to act, and those where state action is precluded by mere force of the commerce clause of the Constitution, is not always clearly marked. In the absence of congressional legislation, a State may constitutionally impose taxes, enact inspection laws, quarantine laws and, generally, laws of internal police, although they may have an incidental effect upon interstate commerce. * * * But the commerce clause of the Constitution, of its own force, restrains the States from imposing direct burdens upon interstate commerce."

Quoting from Simpson v. Shepard, *supra,* the court held: " 'If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which in the absence of Federal regulation should be free.' "

Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915, involved the validity of a state law regulating the length of trains. The court held: "* * * the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress. * * * When the regulation of matters of local concern is

local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority. * * * In the application of these principles some enactments may be found to be plainly within and others plainly without state power. But between these extremes lies the infinite variety of cases, in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved. * * * For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests. * * * If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating state. The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent."

The above language goes to that position heretofore mentioned that if Nebraska can require a certain system of accounts, then every other state through which United

operates may do so. Of course, it relates also to the main issue here presented.

In Morgan v. Virginia, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317, 165 A. L. R. 574, the court said: "The precise degree of a permissible restriction on state power cannot be fixed generally or indeed not even for one kind of state legislation, such as taxation or health or safety. There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary - necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation. Too true it is that the principle lacks in precision. Although the quality of such a principle is abstract, its application to the facts of a situation created by the attempted enforcement of a statute brings about a specific determination as to whether or not the statute in question is a burden on commerce. Within the broad limits of the principle, the cases turn on their own facts."

United does not here challenge the constitutionality of the act, but rather challenges the construction placed on it by the commission, which makes an unconstitutional result.

The Attorney General argues that the federal government has not pre-empted the field in the regulation of interstate carriers such as are here involved and hence the state is not precluded from exercising its authority. He places reliance upon Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U. S. 329, 71 S. Ct. 777, 95 L. Ed. 993, and other cases of like import. We need but quote from the concluding paragraph of the majority opinion in the above-cited case: "It does not follow that because appellant is engaged

in interstate commerce it is free from state regulation or *free to manage essentially local aspects of its business as it pleases.* The course of this Court's decisions recognizes no such license." (Emphasis supplied.)

But here the applications of United cannot be said to deal with essentially local aspects of United's business. Here the applications go to the very heart of United's interstate business, that of financing purchases of extensive equipment for use in interstate commerce, and the consolidation of United with a large interstate air carrier. Local interests are only incidentally involved, if involved at all.

We hold that the matters involved in these applications are not subject to state control and hence that the orders of the commission here involved are invalid as being beyond the power of the commission to make. The commission's authority does not extend its reach that far.

There remains one further matter common to all five appeals. Pursuant to the provisions of section 75-710, R. R. S. 1943, United paid to the commission in each of these cases the statutory fee. It now asks that we order a refund.

It will be noted that the above section requires that the fees so paid be paid into the state treasury to the credit of the General Fund. So far as we have observed, the record does not show more than payment to the commission. We properly assume that the commission has obeyed the law and paid the funds into the state treasury.

It is obvious that United, in order to expeditiously secure a clear runway to carry out its interstate operations, paid these fees. There was not time to wait the process of a judicial determination of its rights and liabilities. However, no authority is cited to us which gives us the power in this appeal to grant the relief asked.

The request for a refund order must accordingly be

denied without prejudice to the rights or procedures of United in the matter. To the extent here stated, the orders of the commission are reversed.

REVERSED.

ROBERT E. EDMUNDS ET AL., APPELLANTS AND CROSS-APPELLEES, V. ROY C. RIPLEY, APPELLEE AND CROSS-APPELLANT.
112 N. W. 2d 385

Filed December 1, 1961. No. 35002.

1. **Trial.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence: Trial.** The burden of proof 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.
3. **Negligence.** Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances.
4. ———. 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 cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.
5. ———. 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 the injury would not have occurred.
6. **Trial.** The rule is that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

7. ———. A mere scintilla of evidence is not enough to require the submission of an issue to the jury. It is the duty of a trial court to direct a verdict where the evidence is undisputed or where the evidence, though conflicting, is so conclusive that it is insufficient to sustain a verdict and judgment.
8. **Negligence: Trial.** A recovery cannot be had for acts of negligence not alleged in the petition. The rule is that allegata and probata must agree.
9. **Trial: Set-Off and Counterclaim.** By statute, a motion for directed verdict or dismissal may be made by defendant without withdrawing a counterclaim or cross-petition.
10. ———: ———. In the event a motion for directed verdict or dismissal is sustained, the counterclaim or cross-petition shall be continued for further proceedings according to law.

APPEAL from the district court for Lancaster County: HARRY ANKENY, JUDGE. *Affirmed in part, and in part reversed and remanded.*

Johnston & Grossman, Ralph D. Nelson, Chambers, Holland, Dudgeon & Hastings, Baylor, Evnen, Baylor & Urbom, and *John A. Curtiss,* for appellants.

Cline, Williams, Wright, Johnson, Oldfather & Thompson and *Charles E. Wright,* for appellee.

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

MESSMORE, J.

This is an action brought by Robert E. Edmunds, hereinafter referred to as the plaintiff, a police officer employed by the city of Lincoln, in the district court for Lancaster County, against Roy C. Ripley, defendant, to recover damages for personal injuries received by virtue of a collision between a motorcycle driven by the plaintiff and an automobile driven by the defendant at the intersection of Twenty-sixth and O Streets in the city of Lincoln. The City of Lincoln is made a plaintiff, and is the owner of the motorcycle driven by Edmunds at the time of the accident. The Zurich Insurance Company is made a plaintiff, and is the compensation insurer for the city of Lincoln. Both the City of

Lincoln and the Zurich Insurance Company are in this case as a matter of subrogation to any recovery that the plaintiff Edmunds may succeed in obtaining.

At the conclusion of the trial the defendant moved for dismissal of the plaintiff's petition and cause of action on the ground, among others, that the evidence established that the plaintiff was guilty of negligence more than slight. The trial court sustained the defendant's motion, dismissed the plaintiff's petition and cause of action, and dismissed the defendant's counterclaim. The Zurich Insurance Company filed a motion for new trial, the plaintiff Edmunds filed a motion for new trial, and the defendant filed a motion for new trial on the dismissal of the defendant's counterclaim. All of the above-mentioned motions were overruled. The plaintiffs appealed to this court.

The pertinent assignment of error by the plaintiffs is that the verdict is contrary to the evidence and the law.

It is not questioned that on April 7, 1959, at approximately 10:15 p.m., the accident occurred.

The record shows that O Street runs east and west and has four traffic lanes, two of which run east and two of which run west. There is an aerial photograph of the intersection of Twenty-sixth and O Streets in evidence, which was made to the scale of 1 inch equaling 20 feet. The distance between the lot lines on O Street is 120 feet, and the distance between the lot lines of Twenty-sixth Street is 100 feet. O Street, at the time of the accident, was approximately 70 feet in width and Twenty-sixth Street south of the intersection was approximately 48 feet in width.

The plaintiff's petition alleges that the defendant negligently turned his automobile, without signaling, in front of and in the path of the plaintiff and the motorcycle he was driving; that the defendant was negligent while driving east on the north and wrong side of O Street in the wrong lane of traffic as he approached the intersection; that at the intersection the defendant

wrongfully "cut the corner" entering the intersection from the west, and turned his automobile directly in front of the plaintiff, blocking the plaintiff's path and causing the collision; that the defendant failed to keep a proper lookout for other vehicles, and especially the motorcycle driven by the plaintiff; and that all of such negligence was the proximate cause of the collision and the injuries suffered by the plaintiff.

The defendant's answer and counterclaim denied specifically each and every allegation of negligence alleged in the plaintiff's petition, and alleged that the accident was not caused or contributed to by the defendant; that the accident was proximately caused and contributed to by the negligence of the plaintiff which was more than slight in the following particulars: That the plaintiff operated the motorcycle at an excessive and unreasonable rate of speed and at a speed which was greater than reasonable and prudent under the conditions then existing; and that the plaintiff failed to maintain a proper lookout for traffic at the time and place, and in particular for the vehicle of the defendant.

The defendant's counterclaim restated the charges of negligence alleged against the plaintiff, and prayed for damages in the amount of $473.10, constituting damage to the defendant's vehicle.

The reply of the plaintiff denied each and every allegation of the defendant's answer relating to negligence alleged against such plaintiff, and in answer to the defendant's counterclaim denied every allegation therein not admitted.

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

Larsen v. Omaha Transit Co., 165 Neb. 530, 86 N. W. 2d 564.

The burden of proof 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. See Hansen v. Henshaw, 163 Neb. 191, 79 N. W. 2d 15.

" 'Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances.' " Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557.

"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 cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause." Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144.

"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 the injury would not have occurred." Schupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710.

The rule is that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. See, Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238; Armer v. Omaha & C. B. St. Ry. Co., 153 Neb. 352, 44 N. W. 2d 640.

"A mere scintilla of evidence is not enough to require the submission of an issue to the jury. It is the duty of a trial court to direct a verdict where the evi-

dence is undisputed or where the evidence, though conflicting, is so conclusive that it is insufficient to sustain a verdict and judgment. Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551; Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238." Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254.

The record shows that the plaintiff was operating a motorcycle westbound on O Street in the northernmost lane of traffic at a speed of approximately 20 to 25 miles an hour. He testified that there was a vehicle to his left proceeding in the same direction, which was traveling at a slightly slower rate of speed than he was; that as this vehicle and the plaintiff approached the intersection of Twenty-sixth and O Streets and crossed the crosswalk, the plaintiff's motorcycle was to the right and at the rear of the vehicle which was to his left; that he observed an eastbound vehicle turn to the left of the centerline and turn suddenly in front of him; and that he put on his brake and attempted to stop the motorcycle from sliding into the vehicle which was turning to the left or north into the intersection of Twenty-sixth and O Streets. The plaintiff further testified that the speed limit at that time on O Street was 35 miles an hour; that when he first saw the defendant's vehicle turn to the left suddenly in front of him, it was at the west side of the intersection going to the left across the centerline of O Street; that this vehicle was not in the intersection when it started to turn; that it crossed the centerline before it made the left turn and entered the intersection; and that he first observed the headlights turned at an angle to the left before the defendant's vehicle got to the west crosswalk of Twenty-sixth Street. The plaintiff further testified that he applied the brake on the motorcycle and attempted to lean it to the left so as to get it on the pavement and slide it on its side; that as he applied the brake the rear wheel apparently locked and he started to slide; that the impact shoved him down in the seat of the motorcycle;

that he felt his back snap, and the seat spring of the motorcycle catapulted him over the rear of the defendant's vehicle and down O Street; that he fell on his left knee and elbow, at which time he turned his head toward the east and saw the motorcycle spinning down O Street toward him; and that he fell approximately 40 or 45 feet southwest of the point of impact. He further testified that the front wheel and the right front crashbar of the motorcycle collided with the rear part of the defendant's vehicle.

On cross-examination the plaintiff testified that prior to the time he reached the intersection of Twenty-seventh and O Streets he was traveling approximately 25 to 30 miles an hour; that when he passed through the intersection of Twenty-seventh and O Streets he was traveling 10 to 15 miles an hour; that he increased his speed after he passed through the intersection of Twenty-seventh and O Streets; that when he first saw a vehicle, which turned out to be a Buick vehicle, he was traveling 20 to 25 miles an hour; that when he was first aware of the Buick vehicle he was approximately one-half or three-fourths of a block west of the intersection of Twenty-seventh and O Streets; that the speed of the Buick vehicle was slower than he was traveling; that as he approached to within 100 feet of the intersection of Twenty-sixth and O Streets his speed was 20 to 25 miles an hour; that when he reached the intersection of Twenty-sixth and O Streets, the front of his motorcycle was about even with the rear bumper of the Buick vehicle; that he was one car length west of the east curb of Twenty-sixth Street when he first observed the defendant's vehicle, at which time the front bumper of the Buick vehicle was about half a car length ahead and to the left of him; that as he came abreast of and passed the rear part of the Buick vehicle, he observed a red flash which he assumed was the brake lights of the Buick vehicle; and that he continued on past the Buick vehicle and into the intersection.

Warren Chrastil, a motorcycle officer employed by the City of Lincoln, testified that he investigated the accident; that he arrived at the scene of the accident approximately 3 or 4 minutes after it had occurred; that when he arrived he observed a 1959 Oldsmobile with the rear end approximately in the north crosswalk of the intersection, facing in a northeasterly direction; that he also observed the motor number 8 on a 1957 Harley motorcycle in the middle of O Street, facing in a northeasterly direction; and that the plaintiff was lying on the pavement on his back, covered with a blanket, his head to the east and his feet to the west, approximately 4 to 5 feet in a southwesterly direction from the motorcycle. He asked the defendant which direction he was traveling, and the defendant stated that he was going east on O Street, making a left turn to go north on Twenty-sixth Street; that he observed the motorcycle just before the impact; and that he was traveling at a rate of speed of 8 to 10 miles an hour just prior to the time of the accident. The defendant also stated that he was on the inside lane of traffic nearest the centerline, traveling east on O Street, planning to make a left turn; that the left blinker on his car was on, signaling the turn; that he observed another vehicle in the inside lane westbound coming toward him; that he had slowed up; and that he thought he had time to make the left turn, made the left turn, and then the collision occurred. This police officer further testified that he observed some debris consisting of fine particles of dirt from under the vehicles, chrome pieces from the motorcycle and the defendant's vehicle, and glass from the right red light on the motorcycle, lying on the pavement in the northwest corner of the intersection. This witness further testified that there was a single skid mark leading from the point of impact east on O Street; and that there were no skid marks attributable to the defendant's vehicle.

On cross-examination this witness testified that on

the basis of the marks he found and the debris, he made a determination as to where the accident occurred; that he measured the debris from the center of the intersection and found the debris to be approximately 20 feet 2 inches north and 15 feet west of the center of the intersection; and that the skid marks ran from the east to the west a distance of 40 feet and 2 inches.

The defendant testified that on the date of the accident he was the owner of a 1959 4-door Oldsmobile sedan, registered in his name and in his wife's name, which was equipped with headlights, brakes, and turn signal indicators. When indicating a turn, at the front of the vehicle there is a white light and in the rear of the vehicle there is a red light. He further testified that prior to the time of the collision he was driving east on O Street in the inside lane, that is, the lane nearest the center of the street; that his wife was with him; that his headlights were on; that he intended to make a left turn and had his left blinker lights on; that he commenced the signal for the turn approximately one-half to three-fourths of a block west of Twenty-sixth and O Streets; that after he crossed the intersection of Twenty-fifth and O Streets he turned on his indicator to indicate a left turn; that as he entered the intersection of Twenty-sixth and O Streets there was a car approximately one-third or one-half of a block east of that intersection; that the speed of his vehicle at that time was 8 to 10 miles an hour; that he had allowed his car to slow down going up hill; and that he entered the intersection and saw the car coming from the east which was far enough back that he went ahead and started to make his turn. He further testified that as he had almost completed the turn, his wife said "Oh Roy," and he glanced in her direction and at that time the front of his vehicle was approximately even with the north curb line; that he saw the motorcycle; that he could not say how close the motorcycle was at that time but it was right on top of him, and he felt the impact; that he com-

menced his left turn approximately 7 or 8 feet east of the white centerline on O Street which divides the four lanes of traffic; that the speed of his vehicle at the time of the impact was 7 to 9 miles an hour; that at the time of the impact his vehicle was facing more north than east; that after the impact his car was almost straddle of the east-west crosswalk on the north side of O Street; that when it stopped, it was faced in a northeasterly direction and had moved a distance of 18 or 19 feet; that he applied his brakes and the wheels of his vehicle did not skid; and that the front wheel of the motorcycle came in contact with his vehicle near the front of the right rear wheel, causing the tire to blow out, damaging the wheel and the right rear door. He further testified that as he commenced to turn his vehicle to the left he made an observation to the east of the intersection and observed one vehicle about one-third or one-half of a block east of the intersection, and as he continued to make the turn he observed only this one vehicle which was moving west in the inside lane; and that during the time he was making this turn his observation to the east did not reveal the presence of the motorcycle. After he brought his vehicle to a stop, he got out of it and saw the motorcycle and the plaintiff lying in the street. He went down to see how badly the plaintiff was hurt. He found the plaintiff 12 to 15 feet west of the motorcycle. He testified that he went back to his car and got two blankets and covered the plaintiff. This witness further testified that he bent over the plaintiff to stop him from crawling toward his motorcycle and the plaintiff asked him if he was the driver of the other vehicle and said: "I am sorry I hit you. I just didn't see you." The plaintiff denied making this statement.

On cross-examination this witness testified that he did not see the motorcycle until his wife said "Oh Roy," and at that time there was nothing he could do to avoid the accident. He further testified that when he first

saw the motorcycle it was practically 10 feet away from him. He estimated that he could see for 6 blocks east on O Street prior to the time of making his turn to the left, and stated that he would have no trouble in seeing traffic coming down O Street on the north side of the street, at least as far as Twenty-seventh Street; that if he had seen the motorcycle he would not have made the left turn; that there was a headlight operating on the motorcycle at the time of the collision; that the debris was approximately 20 feet north and around 9 or 10 feet west of the center of the intersection; that at the time of the collision the plaintiff was more than half way through the intersection; that from whatever point he started to make his turn to the point where the collision occurred, he at no time saw the motorcycle coming straight down O Street until it was so close to him that he could not do anything about it.

On redirect examination the defendant testified that during the time he was turning to the left he observed the Buick vehicle coming toward him and observed the lane of traffic immediately north of the Buick, but his view of that traffic lane was somewhat obstructed by the Buick vehicle; that he directed his attention to the crosswalk directly in front of him; that he did not have a clear view of the northernmost westbound traffic lane; and that his vehicle was 18.4 feet in length.

The defendant's wife corroborated his testimony relating to the action of the defendant in signaling and progressing through the intersection.

Robert F. Ambrose testified that he observed the collision while sitting in his car which was facing west at the intersection of Twenty-seventh and O Streets; that he observed the motorcycle officer approach the intersection of Twenty-seventh and O Streets, slow down, then proceed through the red light at Twenty-seventh and O Streets; that the motorcycle was following closely behind a westbound car as it approached the intersection of Twenty-sixth and O Streets, at which

time the motorcycle officer swerved his motorcycle sharply to the right lane, passing the westbound vehicle on its right side; and that as the motorcycle and the west bound vehicle were approaching the intersection of Twenty-sixth and O Streets, the motorcycle was close behind that vehicle.

The plaintiff asserts that the defendant failed to yield the right-of-way, in violation of section 701 (b) of an ordinance of the city of Lincoln which provides: "The driver of a vehicle approaching but not having entered an intersection shall yield the right of way to a vehicle within such intersection and turning therein to the left across the line of travel of such first mentioned vehicle, provided the driver of the vehicle turning left has given a plainly visible left turn signal. When two vehicles enter an intersection at approximately the same time, from the opposite directions, the driver of the vehicle desiring to turn to the left therein shall yield the right of way to the other vehicle."

The plaintiff did not allege in his petition that the defendant failed to yield the right-of-way.

"A recovery cannot be had for acts of negligence not alleged in the petition. The rule is the allegata and probata must agree." Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130.

The plaintiff alleged that the defendant "cut the corner" entering the west edge of the intersection from the north half of O Street, and violated section 715 (b) of an ordinance of the city of Lincoln which provides: "The driver of a vehicle intending to turn to the left at a street intersection, except to enter or leave a one-way street, shall approach such street intersection in the lane for traffic to the right of and nearest to the center line of the street, and the left turn shall be made by passing to the right of such center line where it enters the street intersection and upon leaving the street intersection by passing to the right of the center line of the street when entered, and shall at all times

keep to the left of the center point of the intersection."

The plaintiff testified that the defendant's vehicle was not in the intersection when it started to turn. The evidence shows that the plaintiff had very little knowledge as to where the west edge of the intersection was located, and was not in a position to state whether or not the defendant had entered the intersection when he commenced turning.

The location of the impact, as shown on exhibit No. 6, places the defendant's vehicle almost midway between the prescribed points of entry and departure for vehicles making a left turn, in accordance with the provisions of section 715 (b) of said ordinance.

The allegations in the plaintiff's petition with reference to the defendant failing to signal his intention to make a left turn and that his brakes were defective, are not effective under the facts in this case, for the reason that evidence shows conclusively that the defendant did signal a left turn, and there is no evidence of any kind relating to the brakes on his vehicle.

The evidence shows that the plaintiff was within the confines of a city intersection at night, traveling at a rate of speed of 25 miles an hour, at which time his view ahead and to his left was partially obscured so that he was in no position to observe the defendant's eastbound vehicle. Consequently, he had placed himself in a position of danger to the extent that a collision could not have been avoided.

The defendant cross-appeals, contending that the trial court erred in dismissing the defendant's counterclaim. The record discloses the following. On December 14, 1960, at approximately 3:47 p.m., after the conclusion of all of the evidence, the defendant moved to dismiss plaintiff's petition and cause of action. Immediately thereafter the defendant's motion was submitted to the trial court. The trial was adjourned until 9 a.m., the following day. On December 15, 1960, at 9:30 a.m., the court convened pursuant to adjournment, with all

counsel present, and advised counsel that it was sustaining the defendant's motion for directed verdict against the plaintiff, and was dismissing the defendant's counterclaim. Immediately thereafter the plaintiffs, Edmunds and the City of Lincoln, moved for dismissal or a directed verdict in connection with defendant's counterclaim, which had already been dismissed by the announcement of the court. These motions were overruled by the court on December 15, 1960.

Prior to September 20, 1957, section 25-834, R. R. S. 1943, provided: "The court, at any time before the final submission of the cause, on motion of the defendant, may allow a counterclaim or set-off, set up in the answer, to be withdrawn, and the same may become the subject of another action. On motion of either party, to be made at the time such counterclaim or set-off is withdrawn, an action on the same shall be docketed and proceeded in as in like cases after process served; and the court shall direct the time and manner of pleading therein. If an action be not so docketed, it may afterwards be commenced in the ordinary way."

In Harbert v. Mueller, 156 Neb. 838, 58 N. W. 2d 221, this court held: "Defendant pleaded a counterclaim and, upon the conclusion of the plaintiff's evidence, moved for and procured an order of the court directing a verdict for defendant upon plaintiff's cause of action. *Held,* that defendant, by moving for a directed verdict and obtaining a favorable ruling thereon, waived a hearing on his counterclaim when the counterclaim was not withdrawn by him before final submission of the cause as required by statute."

In 1957 the Legislature amended section 25-834, R. R. S. 1943, by adding the following provision: "(2) Notwithstanding the provisions of subsection (1) of this section, a motion for directed verdict or dismissal may be made by a defendant without withdrawing a counterclaim or cross-petition. In the event such motion for directed verdict or dismissal is overruled the

trial may proceed to final submission of the cause including the counterclaim or cross-petition. In the event such motion for directed verdict or dismissal is sustained, the counterclaim or cross-petition shall be continued as a separate cause and trial thereon had at a subsequent jury the same as if it had been filed as a separate action." Laws 1957, c. 82, § 1, p. 328.

The motion made by the plaintiffs to dismiss the defendant's counterclaim was made subsequent to the dismissal of the counterclaim by the trial court, and the plaintiffs' motions were overruled by the trial court. We conclude that the defendant is entitled to have his counterclaim continued for further proceedings, according to law. The defendant's cross-appeal is sustained.

For the reasons set forth in this opinion, we affirm the judgment of the trial court in directing a verdict for the defendant, reverse the judgment of the trial court in dismissing the defendant's counterclaim, and remand the cause relating thereto for further proceedings according to law.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

GEORGE E. SMITH, APPELLEE, V. JOHN DAMATO, EXECUTOR OF THE ESTATE OF GRACE R. DAMATO, DECEASED, APPELLANT.
112 N. W. 2d 21

Filed December 1, 1961. No. 35005.

1. **Automobiles: Negligence.** In an action for gross negligence under the automobile guest statute, where there is adequate proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence.
2. ———: ———. No one act can be separated from the whole and held to be the independent cause of an accident. Each act

is not to be segregated and weighed separately to determine whether or not it constituted gross negligence.

3. ———: ———. The several acts are to be considered as a whole. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, taken together, they may establish gross negligence. In such cases, it is for the jury to determine whether a defendant is guilty of gross or ordinary negligence.
4. **Negligence: Trial.** A verdict should not be directed nor a cause of action dismissed unless a court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach the degree of negligence that is considered gross.
5. **Trial: Appeal and Error.** It will not be presumed that passion and prejudice influence the action of jurors, but it must be affirmatively shown before a verdict will be disturbed.
6. ———: ———. Generally, the burden is on the appellant to show that the trial court erred in charging the jury.
7. ———: ———. A judgment of the district court is presumed to be correct, and a party assailing the correctness of it must assume the burden of pointing out specifically the rulings of which he complains and the mistake made by the court.

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

McGinley, Lane, Mueller & Shanahan and *Kennedy, Holland, DeLacy & Svoboda,* for appellant.

Francis A. McLane, Schrempp & Lathrop, and *Henry C. Rosenthal, Jr.,* for appellee.

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

SIMMONS, C. J.

This is an action arising under the guest passenger statute, section 39-740, R. R. S. 1943. It involves the issue of gross negligence.

Plaintiff was a guest passenger in an automobile driven by Grace R. Damato. The driver was instantly killed in the accident. The defendant is the executor of her estate.

Issues were made and trial had resulting in a verdict for the plaintiff. Defendant appeals.

We affirm the judgment of the trial court.

The accident occurred when the Damato car ran into the rear end of a highway grader of the state.

Plaintiff pleads negligence in the following particulars: The driver of the Damato car drove at a high and dangerous rate of speed; failed to keep the automobile under control; failed to keep a proper lookout; failed to consider warning signs of the hazardous condition of the highway; and failed to apply her brakes, slow down, or stop to avoid the collision.

The answer was a general denial.

At the close of the plaintiff's case-in-chief and again at the close of all evidence, defendant moved for a directed verdict which motions were severally overruled. The defendant later moved for judgment notwithstanding the verdict or for a new trial. These motions were denied.

There was evidence from which a jury could have found these facts to be true. Substantially, they are not in dispute.

The accident occurred on a clear, sunny afternoon in late August 1957. The place of the accident was a few miles west of Thedford, Nebraska, on State Highway No. 2. This highway, at the place involved, runs generally east and west. It was a two-lane, black-top highway. The accident occurred in the valley bottom between two hills.

All vehicles referred to herein were moving in an east to west direction. At the top of the hill to the east were signs reading "Road Repairs Ahead" and "Men Working." Above these signs were red flags. The signs were placed on the right-hand side of the road and facing westbound traffic. The road grader was visible at all times from the crest of the hill to the valley bottom, a distance of about a quarter of a mile or more.

The grader was at the bottom of the valley. It was painted yellow, about 9 to 11 feet in height with a 14-

foot wide blade. It weighed about 11 tons and at the time of the accident was pushing about 3 tons of road surface material and traveling at a speed of 3 miles an hour. It was operating on the right, or westbound, side of the road.

There were three westbound automobiles.

The first one turned to the left and was about opposite the grader, on the left-hand side of the road, when the collision occurred. It continued west. No testimony is given by its occupants.

The next car came over the hill at a speed of about 60 miles per hour. Its driver saw the signs, slowed down, and stopped before the grader was reached. It was then moved to the left-hand side of the road preparatory to passing the grader. It was about 25 to 50 feet behind and to the left of the grader when the Damato car ran into the rear of the grader. So far as this record reveals, no one saw the Damato car before the impact.

The Damato car hit the grader head-on with sufficient force to break into three pieces a railroad rail welded on the rear of the grader and break off one of its large drive wheels. The front end of the Damato car was pushed back so that Mrs. Damato was crushed behind the steering wheel and instantly killed. The plaintiff, sitting on the right-hand side of the front seat, was seriously injured. There were no skid marks on the highway behind the grader.

We are here confronted with the argument that plaintiff's case rests on circumstantial evidence. We discussed the distinction between direct and circumstantial evidence in Bland v. Fox, *ante* p. 662, 111 N. W. 2d 537. What we said there is applicable here. The evidence heretofore recited is direct evidence. The question here is whether, from the evidence recited, a jury could properly draw the conclusions of negligence alleged and whether or not such conclusions constitute gross negligence.

We conclude that a jury could properly conclude that Mrs. Damato was guilty of the negligence charged. Does it constitute evidence of gross negligence sufficient to take the issue to the jury?

We see no reason for restating the generally established rules dealing with this subject.

In Thompson v. Edler, 138 Neb. 179, 292 N. W. 236, we held: "In an action for gross negligence under the automobile guest statute (Comp. St. Supp. 1939, sec. 39-1129), where there is adequate proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence." The reasoning and language of that case was followed in Komma v. Kreifels, 144 Neb. 745, 14 N. W. 2d 591, where we held: "It is apparent that no one act of the defendant can be separated from the whole of these acts and held to be the independent cause of this accident. Under these circumstances, each act is not to be segregated and weighed separately to determine whether or not it constituted gross negligence. The several acts are to be considered as a whole. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, taken together, they may establish gross negligence. In such cases, it is for the jury to determine whether a defendant is guilty of gross or ordinary negligence. A verdict should not be directed nor a cause of action dismissed unless a court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach the degree of negligence that is considered gross. Here the jury were not bound to find that defendant's acts were negligence in a very high degree, but a jury question was in our opinion presented as to whether or not, under the circumstances here, the things which defendant did and failed to do

amounted to negligence in a very high degree, i. e., gross negligence."

We reiterated this holding in O'Neill v. Henke, 167 Neb. 631, 94 N. W. 2d 322. What we there said is applicable here.

The evidence here, when reviewed as a whole, is sufficient to sustain a finding of gross negligence. The trial court did not err in submitting the issue of gross negligence to the jury.

The next argued contention is that of misconduct of plaintiff's counsel in his closing argument to the jury.

It appears without dispute that Mrs. Damato and her husband were separated; that Mrs. Damato had used the name of Smith; that she had at various times given plaintiff's address as her address; and that her driver's license and other identification papers were issued, as was the certificate of title to the car, in the name of Smith.

As a matter of evidence, the ownership of the car and that Mrs. Damato was its driver were not in dispute. Defendant, from the opening statement to the jury down to his closing argument in this case, injected into this case the suggestion of an illicit relationship between plaintiff and Mrs. Damato. Neither its existence nor its relevancy is apparent. If it were relevant, it would be the burden of plaintiff to establish the identity of Mrs. Damato. Plaintiff fought back with the means at his disposal. The record is replete with argument between counsel and counsel and court.

Plaintiff was not allowed to testify to the happening of the accident because of the provisions of section 25-1202, R. R. S. 1943, the so-called Dead Man's statute. His doctor did testify that plaintiff was the victim of amnesia and had no recollection of what transpired save that there was an accident.

Counsel for plaintiff, in his opening argument to the jury, made reference to the fact that Mr. Smith's lips were closed by the law "and by proper objection of

counsel." He further said he had "no quarrel with the law" but that plaintiff was sitting there "bound and gagged" unable to tell his side of the story; "He can't explain anything that they might insinuate. * * * Don't go for any insinuation"; and "We had to prove our case the hard way, and believe me, it has been a hard way."

Defendant claims prejudicial error. It must be borne in mind that plaintiff was here discussing insinuations repeatedly injected into this case by the defendant that had no apparent relevancy to the issues of the case. Plaintiff was asking the jury to disregard the apparent attempt to blacken the character of both plaintiff and Mrs. Damato and decide the case on the issues which the case presented. It is altogether probable that in the quiet of a law library, plaintiff could have stated his views in a different way. But he was in a courtroom battle where in fact his way had been "a hard way."

Defendant knew when he made reference to these bits of insinuations about Mrs. Damato that plaintiff's lips were closed by the statute, insofar as he had knowledge of them. Knowledge of them by plaintiff does not appear in the record. Defendant cannot now claim prejudice because plaintiff met the attack in the way that he did.

In Sonneman v. Atkinson, 121 Neb. 752, 238 N. W. 532, we refused to reverse the judgment in a law case where counsel for plaintiff was charged with misconduct in respect to his argument to the jury. We there held: "Counsel for plaintiff are also charged with misconduct in respect of their arguments to the jury. Both parties had able, vigorous and apparently zealous advocates. In the temperature reached near the climax of the trial they went about as far as permissible. The court seems to have held them as nearly to the proper standards of conduct as could have been done in the circumstances. The record of the argument indicates that he treated them impartially, and we do not see that defendant was

prejudiced by, or is in a position to complain of, what occurred in the argument to the jury.

"It appears from a ruling of the trial court that much of the complaint arises from the fact that the objectionable remarks were evidently made in answer to the argument of the complaining party who was guilty of the first offense in that regard."

There is a longstanding rule that has application here. "It will not be presumed that passion and prejudice influenced the action of jurors, but it must be affirmatively shown before a verdict will be disturbed." Johnson v Nathan, 161 Neb. 399, 73 N. W. 2d 398.

We do not find prejudicial error under the circumstances of this case.

Defendant contends briefly that there was reversible error in several of the instructions. In effect, the first argument here is that evidence of gross negligence was not produced and that it was error to submit that issue and its elements to the jury. We have disposed of the question above. The assignments are not sustained.

The next assignment of error is that the court did not give the "standardized" instructions on what constituted gross negligence. Error in the instructions is not shown. The assignment is not sustained.

The next assignment of error is based on the premise that the plaintiff's case is "based solely on circumstantial evidence." We have disposed of that contention earlier in this opinion. It is not sustained.

Complaint is finally directed at three instructions given by the court which it is contended, when analyzed, directed a verdict for the plaintiff. The "analyzing" of the defendant does not appear. The instructions purported to state statutory and court announced rules applicable to the case. Error does not appear.

Generally, the burden is on the appellant to show that the trial court erred in charging the jury. 5 C. J. S., Appeal and Error, § 1560, p. 1196. Our longstanding rule has been: "A judgment of the district court is pre-

sumed to be correct, and a party assailing the correctness of it must assume the burden of pointing out specifically the rulings of which he complains and the mistake made by the court." Van Wye v. Wagner, 163 Neb. 205, 79 N. W. 2d 281.

The assignment is not sustained.

The judgment of the trial court is affirmed.

AFFIRMED.

IN RE APPEAL OF ROBERTS CONSTRUCTION COMPANY. ROBERTS CONSTRUCTION COMPANY, A CORPORATION, APPELLEE, V. STATE OF NEBRASKA ET AL., APPELLANTS, IMPLEADED WITH L. N. RESS, STATE ENGINEER, ET AL., APPELLEES.

111 N. W. 2d 767

Filed December 1, 1961. No. 35012.

1. **Contracts: Damages.** A contractor who is damaged as the result of delay in the performance of the work which is caused by a breach of the contract by the other party may recover his damages in the absence of an express provision in the contract exempting the other party from liability.
2. **Contracts.** A provision in the contract for an extension of time for delay resulting from causes beyond the control of the contractor is not the exclusive remedy of the contractor where the delay is the result of a breach of the contract by the other party.
3. **Contracts: Damages.** Where damage has occurred and the only uncertainty is the exact amount, it is sufficient if the record shows data from which the extent of the injury can be ascertained with reasonable certainty. Uncertainty as to the exact amount of damage does not justify a denial of all recovery.

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

Clarence A. H. Meyer, Attorney General, *Harold S. Salter, C. L. Clark,* and *Robert R. Camp*, for appellants.

Richard W. Smith and *Richard L. Spangler, Jr.*, for appellee.

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

BOSLAUGH, J.

This is an appeal from the disallowance of a claim by the Auditor of Public Accounts and the Secretary of State of the State of Nebraska. The claim arose out of a highway construction contract.

The contract in question was for the improvement of U. S. Highway No. 77 for a distance of 7 miles south from Beatrice, Nebraska. The contract was awarded to Roberts Construction Company by the Department of Roads and Irrigation on June 15, 1954. The work to be done by Roberts included grading and concrete paving of U. S. Highway No. 77 and surfacing of a county road which was to be used as a detour.

After the work had been completed, Roberts filed a claim with the State for damages for breach of contract. The claim included other items that are not important to the litigation at this time. The claim was disapproved by the State Engineer and disallowed by the Auditor of Public Accounts and the Secretary of State. Roberts then perfected an appeal to the district court for Lancaster County. After a lengthy hearing the district court allowed the claim in the amount of $16,594.45. The State has appealed from this judgment.

Roberts' theory of the case is that the State failed to make the construction site available to the contractor until long after the beginning date specified in the contract; that as a result of this delay the costs of the contractor were substantially increased over the amounts that were and could have been reasonably anticipated at the time the parties entered into the contract; that the failure of the State to make the construction site available at the starting date provided in the contract was a breach of express and implied covenants in that regard; and that Roberts is entitled to recover as damages the amount of its increased costs resulting from the delay.

The State's theory of the case is that it did not agree to make the construction site available to Roberts on the beginning date specified in the contract; that the State is not responsible for any delay that may have occurred and that such delay was due to other causes including the acts or omissions of the contractor; that the provision in the contract for an extension of time is the exclusive remedy of Roberts for any delay resulting from causes beyond its control; and that the evidence does not show with certainty what damages Roberts may have sustained or the causes thereof.

The district court found that the State had represented to Roberts and other bidders that by June 21, 1954, subgrade preparation on the detour would be completed and a windrow of rock placed along the length of the detour so that the contractor could begin work on that date; that utility lines would be out of the way of grading operations; that the State failed to carry out these representations and agreements at the time specified; that, without notice to Roberts or other bidders, the State granted Gage County the right to take 90 working days from May 20, 1954, to perform subgrade preparation and placement of rock upon the detour; that grading and paving along the south 5 miles of the project could not be commenced, in any substantial volume, until the work on the permanent detour had been completed; that the State failed to cause the subgrade work on the detour to be performed properly so that the surfacing placed thereon by Roberts failed and further delayed the opening of the detour; that as a result of the delay in making the construction site available, Roberts' plan for construction of the work was disrupted, an orderly and efficient construction operation was prevented, the work was extended into a period of unseasonable weather, and Roberts was subjected to excessive and unexpected costs, especially labor costs; that the State could have avoided the damage by requiring Gage County to have performed its work on or

before June 21, 1954, or by not awarding the contract; that Roberts was partly at fault in failing to thoroughly inspect the construction site, in failing to timely procure material meeting the contract specifications which would have permitted mitigation of the damage, and in other unspecified respects; and that Roberts was entitled to recover $16,594.45.

The assignments of error which require consideration are those relating to the sufficiency of the evidence to sustain the judgment against the State.

This was an action at law for damages for breach of contract. By agreement of counsel a jury was waived. Under such circumstances the findings of the trial court are equivalent to the verdict of a jury and will not be disturbed unless clearly wrong. Thus, in reviewing the evidence it must be considered in the light most favorable to the plaintiff, every controverted fact must be resolved in the plaintiff's favor, and the plaintiff must have the benefit of every inference that can reasonably be deduced therefrom. Capital Bridge Co. v. County of Saunders, 164 Neb. 304, 83 N. W. 2d 18. See, also, In re Appeal Roadmix Constr. Corp., 143 Neb. 425, 9 N. W. 2d 741.

The contract provided that Roberts would complete its work under the contract within 140 working days beginning June 21, 1954, or any prior date upon which construction operations were begun. The contract also provided for "reshaping" of the detour "after the completion of the grading operations by Gage County" and the spreading of a windrow of crushed rock "previously placed by Gage County." The contract further provided that telephone poles within the limits of the proposed construction "will be moved by their owners * * * in advance of grading operations. The contractor shall perform all work beyond the pole lines * * * after the pole lines have been moved."

On June 21, 1954, Roberts could not begin work on the north 2 miles of the project because the telephone

poles were in the way; Roberts could not begin work on the south 5 miles of the project because the detour was not available; and Roberts could not begin work on the detour because Gage County had not completed its work.

The evidence shows without dispute that at about the time the State was advertising for bids on the contract in question, it entered into a supplemental agreement allowing Gage County 90 working days in which to complete its work upon a part of the detour; that the grading work on the detour to be done by the county was not completed until sometime after July 17, 1954; that the delivery of the rock to be supplied by Gage County on the detour was not completed until August 26, 1954; that the telephone poles along the north 2 miles of the project were not moved until about August 9, 1954; and that much of the surfacing on the detour failed and required reconstructing and patching.

There is conflict in the evidence as to what caused the delay in this case but the evidence is sufficient to sustain the finding of the trial court that the State was responsible for a substantial amount of the delay that Roberts encountered in the performance of the contract.

The evidence shows that an orderly and progressive construction method, as distinguished from a piecemeal method, will permit the use of production-line or mass-production techniques which will produce an efficient use of labor and equipment and result in a lowering of costs; that labor costs per unit are 50 percent more in winter weather than in summer weather and that certain other costs are correspondingly higher; and that the delay in this case resulted in higher costs to Roberts than could have been reasonably anticipated.

Roberts computed its claim by subtracting its estimated cost of labor from its actual direct labor cost on the project, exclusive of extra work, and then adding to that figure additional expense which it attributed directly to the delay plus amounts for pay roll taxes and

insurance, general overhead expense, and profit. The judgment of the district court shows that the damages allowed Roberts were computed by deducting from the difference between the cost of labor as estimated by Roberts and the actual direct cost of labor on the project, exclusive of extra work, amounts for overtime pay, labor expense during rainy periods in August and October, labor expense when paving was shut down because of insufficient equipment, labor expense incident to rejection of defective material or work and drying out of the subgrade on the detour, labor performed prior to the starting date and after the acceptance of the work, and a deduction related to another item of the original claim which is not now in question. Thus, the trial court allowed as damages an amount equal to approximately one-half of the excess labor cost claimed by Roberts and made no allowance for pay roll taxes and insurance, other expense which Roberts attributed directly to the delay, general overhead expense, or profit.

Where it has been proved that damage has resulted and the only uncertainty is the exact amount, it is sufficient if the record shows data from which the extent of the injury can be ascertained with reasonable certainty. Colvin v. Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900. When it is established that a party has suffered damage, uncertainty as to the exact amount does not justify a denial of all recovery. The fact that the amount of damage may not be susceptible of exact proof or may be in a degree uncertain or difficult of ascertainment should not be a bar to any recovery. Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891. See, also, McCree & Co. v. State, 253 Minn. 295, 91 N. W. 2d 713. The evidence in this case is sufficient to sustain the findings of the trial court with respect to damages.

The State's contention that the provision in the contract for an extension of time is the exclusive remedy

for delay resulting from causes beyond the control of the contractor remains to be considered.

This is a matter about which there appears to be a division of authority. See Annotation, 115 A. L. R. 65, and cases cited. See, also, 17 C. J. S., Contracts, § 502 b (3) (a), p. 1058; 12 Am. Jur., Contracts, § 351, p. 914. We believe that the better view is that this provision in the contract is not the exclusive remedy of the contractor and relates only to the right of the contractor to be relieved from the liability to pay liquidated damages in the event the work is not completed within the time specified in the contract. Edward E. Gillen Co. v. John H. Parker Co., 170 Wis. 264, 171 N. W. 61, 174 N. W. 546.

We believe that the correct rule is that a contractor has the right to recover damages resulting from delay caused by a breach of contract by the other party. Thus, where there is a breach of the contract by the owner or other party, and the breach of contract results in delay in the work of the contractor, and the delay in the work causes damage to the contractor, the contractor has a right of recovery in the absence of a "no-damage clause" or other provision to the contrary in the contract and even though the contract contains a provision for an extension of time.

The principal case relied upon by the State is United States v. Howard P. Foley Co., 329 U. S. 64, 67 S. Ct. 154, 91 L. Ed. 44. In the Foley case the Supreme Court of the United States held that an electrical contractor was not entitled to recover damages for delay in the performance of his work on an airport contract. Construction was delayed because soil that was to be used to build the runways and was obtained by dredging proved to be unstable and had to be replaced. The court pointed out that the work on the runways was done with great diligence and that no fault could be attributed to the parties doing that work. The court took the position that there could be no liability to the

contractor unless the contract included an unqualified warranty to make the runways promptly available.

In Peter Kiewit Sons' Co. v. United States, 151 F. Supp. 726, 138 Ct. Cl. 668, the Court of Claims interpreted the Foley case to mean that the government is liable if it is guilty of some act of negligence or willful misconduct which delays the performance of the contract and results in damages. If this is assumed to be a correct interpretation of the Foley case and a correct statement of the law, the evidence in this case is sufficient to sustain the trial court's finding that the State breached the contract and that Roberts was damaged by the delay resulting therefrom. For example, there is evidence that the State gave the telephone company only about 3 weeks' notice that it wanted the telephone lines moved and allowed Gage County 90 working days from May 20, 1954, in which to complete its work but made no effort to advise Roberts and the other bidders that it had done so.

The evidence in this case shows that the State failed to co-ordinate the work to be done on this project. The position of the State now is, substantially, that Roberts cannot complain about delays due to this reason. We do not accept the position of the State.

The time when the work is to be performed is a matter of importance to a contractor and it is a factor which influences the bidding. It may be assumed that a contractor who is seeking immediate work or who, as in this case, plans to realize a saving by performing the work under favorable weather conditions and in an orderly and efficient manner, will bid accordingly and the State will obtain the advantage of these facts through the bidding. In this case the State has had the benefit of competitive bids based upon the documents prepared solely by it and submitted to the bidders. It is only reasonable that the State should be held responsible for

the statements and representations which it made to the bidders.

The judgment of the district court is affirmed.

AFFIRMED.

MARYLAND CASUALTY COMPANY, A CORPORATION, APPELLEE, V. JOHN P. MUNNELLY, DOING BUSINESS AS MUNNELLY CONSTRUCTION COMPANY, APPELLANT.

112 N. W. 2d 772

Filed December 1, 1961. No. 35019.

1. **Bonds.** Where a contract with a bonding company for the furnishing of performance and maintenance bonds provides that extra work shall be covered at the same rate on the amount paid therefor as on the original contract price, the premium will be calculated on such amount, and not on the actual liability assumed.
2. **Appeal and Error.** An issue not raised by the pleadings and proof in the district court cannot be raised for the first time on appeal.

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

Shrout & Foley, for appellant.

Story, Pilcher & Howard, for appellee.

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

CARTER, J.

This is an action to recover the balance of the premiums due on 23 contractor's performance and maintenance bonds. The trial court found for the plaintiff and entered judgment for $1,974.14. The defendant has appealed.

The evidence shows that the defendant was engaged in the contracting business in the city of Omaha. He entered into 23 separate grading-and-paving contracts for fixed amounts with the city of Omaha. He was

required to give performance and maintenance bonds on each of the contracts. The plaintiff furnished the bonds in the amount of the contract price. Defendant paid the premiums on the face amount of the bonds at the established rates per thousand dollars. The defendant has refused to pay the premium for extra work performed and paid for by the city of Omaha in connection with these 23 contracts. There is no dispute in the record as to the amount of the extra work performed. The amount of the judgment includes a liability of $539.09 for insurance premiums which was not contested in the trial court.

The only question for determination is whether or not a surety company may collect an additional premium based on extra work performed by a contractor where the accepted application provides: "Should the contract price exceed the amount stated in paragraph 9 hereof, the undersigned agrees to pay the Maryland Casualty Company on demand as excess or additional premium a further sum, calculated for such excess contract amount at the rate per $1,000 thereof applicable to the initial contract premium or charge; and should the contract price be less than the amount stated in paragraph 9 hereof, the Company will refund to the undersigned, as return premium, a sum calculated at the same rate per $1000 on the difference between the stated contract price and the actual contract price." The accepted applications further provided in part: "If the contract or specifications carries a guarantee or maintenance provision extending the bond beyond acceptance of the work, the undersigned agrees to pay, upon execution of the bond, and in addition to above construction premium or charge, a maintenance premium or charge * * * for such term, * * *."

It was the contention of the defendant in the district court that the extra work was performed under a separate contract and that, no second bond having been given, defendant was under no obligation to pay for

bond coverage on the extra work. In this respect each of the contracts with the city of Omaha provided: "The contractor shall also do such extra work in connection with this contract as the City Engineer may especially direct in writing; if it be of a kind for which no price is stated in this contract, such price shall be fixed by the City Engineer, subject to modification and approval by the City Council; but no claim for extra work shall be allowed unless the same was done in pursuance of special orders as aforesaid, in writing, or otherwise stated on plans." The extra work was performed and paid for in the manner provided by the contracts. It was done pursuant to the contracts and the plaintiff's bonds clearly covered the work under the provisions of the applications accepted by the plaintiff. The contracts of defendant with the city provided for maintenance for a period of 5 years. The rate on the performance provisions of the bonds was shown to be $7.50 per $1,000 and on the maintenance provisions it was $2 per year per $1,000 after the first year on the amount paid for the extra work. The rate is not questioned. The defendant was clearly liable for the performance and maintenance bonds at the established rate on the price paid for the extra work as the trial court found.

It is contended by the defendant on appeal that certain blanks in the application requiring the insertion of rates were not filled in and that the contracts with respect thereto are without legal effect. From this premise it is argued that in such a situation the amount of the premiums is based on the amount of liability assumed by the plaintiff under the bonds. It is then contended that some of the extra work was of a type that required no maintenance and that premiums were not properly chargeable on such nonmaintainable work. The accepted applications clearly show that the premiums were based on the amount paid for the extra work and not on maintainable work only. The finding that the extra work was performed in accordance with the orig-

inal contracts between the defendant and the city of Omaha makes the contractual provision that the premiums were to be calculated on the amount paid applicable and controlling. The defendant is obligated to pay the premium on the amount paid for the extra work at the same rates paid on the original contract price.

But in any event, the foregoing questions are not before this court. They were not raised in the trial court and the motion for a new trial contains no assignment of error relating to them.

This court has repeatedly held that a litigant may not change his position in the appellate court and set up issues not raised in the trial court or called to the attention of the trial court in his motion for a new trial. Dunbier v. Rafert, 170 Neb. 570, 103 N. W. 2d 814; Crunk v. Glover, 167 Neb. 816, 95 N. W. 2d 135. The only defense pleaded in the trial court was payment. Defendant is precluded in this court from asserting defenses not pleaded and presented in the trial court, or any error with reference thereto not preserved in his motion for a new trial. This is consistent with the rule that cases will be disposed of on appeal on the theory on which they were presented to the trial court by the parties. Durfee v. Keiffer, 168 Neb. 272, 95 N. W. 2d 618.

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

AFFIRMED.

DON WALKENHORST, APPELLEE, V. THEODORE A. (JIM) APOLIUS, APPELLEE, THEODORE E. APOLIUS, APPELLANT, IMPLEADED WITH SECURITY STATE BANK OF MADRID, NEBRASKA, ET AL., APPELLEES.

112 N. W. 2d 31

Filed December 1, 1961. No. 35021.

1. **Pleading.** What a pleading may be denominated in the caption is not necessarily controlling. The character of a pleading is determined by its contents.

2. **Trial: Judgments.** A motion for summary judgment serves a specific limited purpose and is not intended to supplant other existing procedures.
3. **Pleading.** The law of amendments should be liberally construed.
4. ———. Neither the statute nor any rule of court called to our attention requires a party seeking to amend a pleading to do so in any particular form or manner nor to support his application therefor by affidavit, if the record discloses that the trial court was in some appropriate manner informed of the nature and purpose of the proposed amendment.

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

Frank B. Svoboda, Franklin D. Carroll, and *W. C. Conover,* for appellant.

Schroeder & Schroeder, for appellees Merrell.

George B. Hastings and *Frederick E. Wanek,* for appellee Adams.

Firmin Q. Feltz, for appellee Riedel.

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

SPENCER, J.

This is an appeal from the sustaining of an oral motion for summary judgment, the refusal to permit the amendment of the dismissal of a cross-petition to reflect the facts, and the entry of a default judgment against the appellant. The second assignment is the only one we will discuss herein.

This is an action in equity commenced by the plaintiff below, Don Walkenhorst, to foreclose a thresherman's lien on wheat grown by Theodore A. (Jim) Apolius, hereinafter referred to as Jim Apolius, a tenant on land described as the east half of Section 6, Township 12 North, Range 37 West of the 6th P.M., in Keith County, Nebraska, owned by John C. Riedel, hereinafter referred to as Riedel. Named as parties defendant were Jim Apolius; his father, Theodore E. Apolius,

hereinafter referred to as Apolius; Security State Bank of Madrid, Nebraska, hereinafter referred to as the bank; A. H. Adams, hereinafter referred to as Adams; William Merrell; Farmers Cooperative Association, hereinafter referred to as the association; Cliff Hull, doing business as the Hull Grain Company, hereinafter referred to as Hull; John C. Riedel; and 5,482.20 bushels of 1960 wheat in storage at the association and with Hull.

The petition was filed August 25, 1960. The next day the association, Hull, and Apolius filed voluntary appearances and Riedel filed an answer and cross-petition asserting a one-third interest in the wheat as the landlord. On September 22, 1961, William Merrell filed the voluntary appearance of his wife as a necessary party (the court subsequently entered an order making her a party defendant), and with her filed an answer to the petition of the plaintiff, an answer to the cross-petition of Riedel, and also filed a cross-petition. They will hereinafter be referred to as the Merrells. In the cross-petition, the Merrells alleged the execution and delivery to them of a promissory note by Jim Apolius in the amount of $1,750 secured by a first chattel mortgage on the wheat in issue. On September 22, 1960, Adams filed a separate answer to the plaintiff's petition, an answer to the cross-petition of Riedel, and a cross-petition. He admitted the interest of Riedel in one-third of the wheat; alleged that Jim Apolius had executed and delivered to him a note in the amount of $3,000 secured by a chattel mortgage on the wheat in issue; that by mistake there was a misdescription in the chattel mortgage; and requested that the mortgage be reformed and corrected.

On September 23, 1960, Apolius filed an answer and cross-petition alleging ownership of two-thirds of the wheat, being the share of Jim Apolius, by virtue of a bill of sale executed before the chattel mortgages alleged by the Merrells and Adams, and alleged further that he had given a mortgage on this wheat to the bank as

security in the amount of $3,000. On October 3, 1960, Jim Apolius filed a voluntary appearance in the matter. On October 4, 1960, plaintiff filed a reply to the answer and an answer to the cross-petition of Apolius.

On October 24, 1960, defendant Adams filed a reply to the answer of Apolius, asserting in substance that the purported bill of sale was fraudulent and void. On October 25, 1960, the Merrells filed an answer to the cross-petitions of defendant Adams and defendant Apolius, and among other things asserted that the bill of sale to Apolius was fraudulent. On November 7, 1960, defendant Apolius filed his reply to the answer of Adams, and filed his reply to the answer and his answer to the cross-petition of the defendants Merrell.

On November 16, 1960, plaintiff Walkenhorst dismissed his petition without prejudice and paid the accrued costs. On the same day there was filed the consent of defendant Apolius to the dismissal, as follows: "Comes now Theodore E. Apolius and by his attorney, Frank B. Svoboda, herewith consents to the Dismissal as filed herein by the Plaintiff, Don Walkenhorst, and herewith withdraws any Cross-Petition or Counter-Claim which might have been filed in this action on behalf of Theodore E. Apolius." This dismissal was drawn by plaintiff's attorney and, as is apparent, was signed for Apolius by his attorney.

On the 28th of November 1960, defendant Riedel filed an answer to the cross-petition of defendants Merrell. On December 6, 1960, the court entered an order setting the cause for trial on the 19th day of December 1960. On the 16th day of December 1960, the Merrells replied to the answer of Riedel. On December 19, 1960, stipulations were filed by Riedel, the Merrells, and Adams as to their rights and the priority of mortgages as to each other.

When the case was called for trial, the Merrells' attorney called attention to the stipulations. The bill of exceptions then sets forth the following proceedings:

"MR. SVOBODA: We object at this time to these stipulations between A. H. Adams and the Merrells on the grounds that the stipulation is prejudicial to my client Mr. Apolius, as it sets forth the priority of liens and does not take into consideration the bill of sale of my client.

"THE COURT: The bill of sale will be subject to whatever rights they had in the property at the time the bill of sale was made?

"MR. SVOBODA: Absolutely.

"THE COURT: I can't see that that would affect your client in any way. Overruled.

"MR. SCHROEDER: If the Court please, the Defendants and Cross-Petitioners William and Doris Merrell, move for a summary judgment and against Theodore E. Apolius on the following grounds: * * * The Defendant and Cross-Petitioner Theodore E. Apolius withdrew his Cross-Petition, which are the only pleadings that he has on file in this case. Therefore, so far as any litigatable issues are concerned as between the mortgage holders, the Merrells and Mr. Adams, there are no issues to be determined by the Court. Wherefore the Defendants William Merrell and Doris Merrell pray for a summary judgment in accordance with their prayer in the Petition.

"MR. SVOBODA: At this time I would like to amend my pleadings to conform with the actual facts, which were that I intended at this time to dismiss any action against Don Walkenhorst, as Mr. Walkenhorst was paid. I did not intend at this time to dismiss any action I had against Mr. Merrell or Mr. Adams, and so far as the pleadings was concerned, if it was an error on my part I would like to amend the pleadings to conform with the facts.

"MR. HASTINGS: In order that the record might indicate, Mr. Schroeder representing Mr. Merrell and I have joined in this motion for summary judgment, and therefore the position which Mr. Schroeder has taken

with reference to Mr. Merrell is exactly the same position that Mr. Adams, the Defendant and Cross-Petitioner takes with reference to Theodore E. Apolius. * * *

"MR. SVOBODA: I would like to state, Your Honor, that this withdrawal of the action was prepared by Don Walkenhorst's attorney and at the time I was the only one objecting to Mr. Walkenhorst being paid for his work for cutting the wheat crop on the basis that he did not completely fulfill his contract; that he did not deliver approximately 3,300 bushels of wheat to town, and that was my only objection, and because of the fact he did put up the court costs for this action. I considered the court costs to be far beyond the amount it would cost to deliver the 3,300 bushel of wheat to town; and I dismiss any action against Don Walkenhorst at this time on the Cross-Petition—I would like to amend this dismissal and further plead my action against Mr. Merrell and Mr. Adams and the elevator to turn this wheat crop over to my client Mr. Ted Apolius.

"MR. SCHROEDER: We have the plain language of the dismissal before us and the plain language says he dismissed his Cross-Petition. He has asked for leave to amend. I might comment to the Court that several weeks ago Mr. Svoboda and I were talking on the telephone and he wanted to present this matter for trial. We came from a good long distance and I assumed he would have his pleadings in such shape that he was ready for trial. I told him that I would be; and we object to any amendment at this time.

"MR. CARROLL: It seems to me that this consent to dismiss is directed only towards the Plaintiff Don Walkenhorst in this case. The attorneys for the Defendant at this particular point had interpreted this to mean that it applies to all of them. I don't think that the Court at this particular time should look entirely at the plain language of this consent to dismissal. Obviously the intention was only to withdraw any Cross-Petition or Counter-Claim against the Plaintiff Don

Walkenhorst because of the fact he was paid and already out of the action. I think the Court should take into consideration how substantially justice can be obtained in this particular case, and I submit to the Court that in no manner or no form can justice be obtained granting this motion for summary judgment. It was obviously not the intention of counsel to dismiss his Cross-Petition as to any of the other defendants.

"THE COURT: I can't understand how you can do this by a motion unless it is a motion to file a Cross-Petition. I don't see any amendments that should be made. You just dismissed it, and that is all there is to it."

The record further indicates that Apolius then asked leave to call the plaintiff's attorney who prepared the dismissal as a witness. This request was not granted. Apolius then moved for leave to amend the consent to dismissal to conform to the facts so that the dismissal would apply only to the plaintiff, Walkenhorst. The bill of exceptions then contains the following:

"MR. SCHROEDER: We would have to object to it for the record.

"THE COURT: I will have to sustain the objections and sustain the motion for judgment on the pleadings."

The only motions before the court at that time were the motion for summary judgment and the motion to amend. It is now appellees' position that the motion for summary judgment was actually a motion for judgment on the pleadings, and that the court so considered it, as indicated above.

Inasmuch as we are only discussing the refusal to permit an amendment, this point is immaterial except as it may bear on the abuse of discretion. What a pleading may be denominated in the caption is not necessarily controlling. The character of a pleading is determined by its contents. From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441.

We do take occasion to note, however, that the sum-

mary judgment procedure is purely statutory. A motion for summary judgment does require compliance with all statutory requirements, and this compliance would preclude an oral motion. Further, a motion for summary judgment is not intended to take the place of a motion for judgment on the pleadings or any other procedure. As we have said in many cases, a motion for summary judgment serves a specific, limited purpose, and it is not intended to supplant other existing procedures.

We believe this situation to be one clearly covered by section 25-852, R. R. S. 1943, which provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment."

This court construed and applied that section in Louis Hoffman Co. v. Western Smelting & Refining Co., 150 Neb. 524, 34 N. W. 2d 889. Therein we held that: "The law of amendments should be liberally construed in order to prevent a failure of justice." In that same case we said: "Neither the statute nor any rule of court called to our attention requires a party seeking to amend a pleading to do so in any particular form or manner, nor to support his application therefor by affidavit, if the record discloses that the trial court was in some appropriate manner informed of the nature and purpose of the proposed amendment."

As early as Berrer v. Moorhead, 22 Neb. 687, 36 N.

W. 118, this court held: "The law of amendments should be liberally construed in order to prevent a failure of justice." The progressive evolution of procedure in our courts has not changed that rule, but has demonstrated the necessity of its continuing judicial application.

It is clear to us that Apolius should have been permitted, in the furtherance of justice, to amend his consent to dismissal to reflect the facts, and the court's failure to permit him to do so was an abuse of discretion and constituted prejudicial error. The issues would not have been changed. The suggested amendment would merely have reinstated the very issues the parties had expected to litigate. The trial would not have been delayed. All the parties were before the court. The appellees were well aware that Apolius was not abandoning his claim under the bill of sale and apparently expected to proceed with the litigation when they appeared for trial. They certainly had no reason to expect Apolius to dismiss the cross-petition as to them and could not help but understand it to be an obvious error on his part to fail to restrict it to the plaintiff. It does not appear that the appellees' rights would have been prejudiced in any manner by permitting Apolius to amend as requested. On the other hand, the refusal by an equity court to correct the obvious, arbitrarily and erroneously deprived Apolius of a substantial right. There can be no question but that the intention of Apolius was only to dismiss as to the plaintiff. If plaintiff's attorney, who drew the consent to dismissal, had been permitted to testify, this undoubtedly would have been even more apparent.

In view of our holding herein, it is unnecessary to discuss the other points referred to by the parties. We are convinced that they will not be repeated on a trial on the merits. We hold that it was an abuse of judicial discretion for the trial court to refuse to permit Apolius to amend his consent to dismissal to restrict it to the plaintiff's action. It follows that the default

judgment entered against him should have been vacated and the case should have been adjudicated on its merits.

For the reasons set out above, the judgment of the trial court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

WELDON SWANSON, APPELLANT, V. ROBERT J. MURRAY ET AL., APPELLEES.

112 N. W. 2d 11

Filed December 1, 1961. No. 35024.

1. **Negligence.** The doctrine of res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, but do not compel it. It is a rule of evidence and not of substantive law. It is a qualification of the general rule that negligence is not to be presumed but must be affirmatively proved. The inference takes the place of evidence in the matter of going forward with evidence in the proceeding but not as to the burden of proof.
2. ———. In a case presented under the res ipsa loquitur doctrine the burden of proof upon the issue of negligence does not shift during the progress of the trial, but rests throughout upon the party alleging negligence.
3. **Appeal and Error.** The submission of issues to a jury which find no support in the evidence is reversible error.
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, contributes to the injury complained of as a proximate cause.

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

David D. Tews, Frederick M. Deutsch, and *William I. Hagen,* for appellant.

Thomas E. Brogan, for appellee Murray.

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

YEAGER, J.

This is an action by Weldon Swanson, plaintiff and appellant, to recover damages for personal injuries from the defendant and appellee, Robert J. Murray. Charles Robeck Construction Company and Hartford Accident and Indemnity Company are also named as defendants and appellees, but they are not parties against whom liability for damages is claimed in this action. At the time this action accrued Charles Robeck Construction Company was the employer of the plaintiff and was insured against liability for workmen's compensation by the Hartford Accident and Indemnity Company. On account of this and the fact that workmen's compensation had been paid at the time this action was commenced they were made parties. For the purposes of this opinion Murray will be referred to as the defendant.

The case was tried to a jury and a verdict was returned in favor of the defendant on which judgment was duly rendered. In due course a motion for new trial was made which was overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

As grounds for his action plaintiff stated in substance, to the extent material here, that on August 30, 1958, he was employed as a worker and laborer by Charles Robeck Construction Company, which will be hereinafter referred to as Robeck, on the construction of a sanitary sewer project which this company was performing for the city of Norfolk, Nebraska; that at the same time the defendant was a subcontractor of Robeck on the project; that this subcontract, which was partly oral and partly written, was for the excavation of sewer ditches and to furnish all equipment, tools, fuel, and men for the excavation for that purpose for a fixed rate of pay, and a fixed rate of pay if any work should be done with a drag-

line; that on August 30, 1958, the plaintiff, in the course of his employment, was working in an excavation which was at the time in dimensions about 12 feet wide, east and west, 22 feet long, north and south, and 20 to 25 feet deep (the evidence is that it was at the time about 16 feet deep instead of 20 to 25 feet, however the parties make no point of this discrepancy and during the trial they treated it as being about 16 feet); that entrance to and exit from it was accomplished by the use of a ladder; that after the excavation had reached this depth the defendant procured a Shield Bantam dragline which was mounted on the rear of a truck which was placed at about the west center of the excavation with the boom thereof extended almost vertically over the hole; that a clamshell was attached to the boom which was lowered into the excavation by the defendant, but that it would not operate on account of the fact that it was obstructed by a ladder; that the defendant ordered the plaintiff to remove the ladder with which order he proceeded to comply; and that while plaintiff was so proceeding and while he was standing on the east side of the hole the boom fell striking and injuring him.

The plaintiff stated further that at the time the boom fell he was free from negligence and was at a place where he was required to be by reason of his employment.

The plaintiff stated further that the defendant was in the sole and exclusive control and management of the dragline; that he was an experienced operator of such equipment; that the falling which took place was such an occurrence as in the ordinary course of events does not happen if the person in charge exercises care in operation, maintenance, inspection, repair, and upkeep; and that the occurrence itself indicates a want of due care on the part of the defendant.

The plaintiff stated that he was unable to give the exact cause of the fall of the boom, but that it would

not have fallen except for some negligent act, wrong, or omission of the defendant.

The theory of the action of plaintiff is that he is entitled to recover under the doctrine of res ipsa loquitur. The definition of the doctrine together with certain rules of application are stated in Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 62 N. W. 2d 127, as follows: "The doctrine of res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel it. The doctrine is a rule of evidence and not a rule of substantive law. It is a qualification of the general rule that negligence is not to be presumed but must always be affirmatively proved. It merely takes the place of evidence as affecting the burden of proceeding with the case.

"When facts are adduced to which the doctrine of res ipsa loquitur has application an inference of negligence arises, that is, the thing speaks for itself. It then presents a question for the jury as to liability." See, also, Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N. W. 2d 224, 161 Neb. 280, 73 N. W. 2d 228.

These rules do not disturb the general rule that before a recovery may be had the cause of action must be sustained by a preponderance of the evidence. This is emphasized in Mercer v. Omaha & C. B. St. Ry. Co., 108 Neb. 532, 188 N. W. 296, in the following language: "The burden of proof upon the issue of negligence does not shift during the progress of the trial, but rests throughout upon the party alleging such negligence; and a proper application of the doctrine res ipsa loquitur does not change said rule." See, also, Olson v. Omaha & C. B. St. Ry. Co., 137 Neb. 216, 289 N. W. 356; Bohmont v. Moore, 138 Neb. 784, 295 N. W. 419, 133 A. L. R. 270; Myers v. Willmeroth, 150 Neb. 416, 34 N. W. 2d 756.

The defendant filed an answer in which he admitted the allegations contained in the petition as to the capacity of Robeck and the employment of the plaintiff by

Robeck. There are other admissions but they are of no moment here. The petition was otherwise denied. The defendant pleaded in substance affirmatively, to the extent necessary to set out here, that he entered into the written contract with Robeck which has been mentioned by plaintiff in his petition under which contract he was obligated among other things to dig the hole at which the parties were working at the time of the accident in which plaintiff was injured; that the contract was entered into prior to August 30, 1958; that he proceeded to dig the hole with his own equipment until the depth of about 16 feet was reached which was the maximum depth capacity of his equipment; that the required depth of the hole was about 25 feet; that equipment of sufficient depth capacity was located and the defendant was instructed by an agent of Robeck to obtain the equipment and to proceed; that the defendant did procure the equipment on or about August 29, 1958; that the defendant had never before seen it but that it appeared to be in good working condition; that it was of a type with which the defendant was familiar; that he tested and inspected it to some extent and it appeared to be in satisfactory working condition; that the hole was a lift station project; that the equipment was moved to the site by an employee of the defendant; that the equipment was placed in position at the west edge of the hole and the boom thereon moved to the south; that at that time several employees of Robeck including the plaintiff were working in the excavation and were ordered out by the defendant and warned to stay out; that the defendant then moved the boom to which a bucket or clam was attached so that it extended eastward across the hole where the clam was dropped; that about the same time the boom dropped and struck the plaintiff; that the plaintiff was in a place of safety when the defendant started to move the boom from the south to its position when it fell; and that the defendant has

no knowledge of what caused it to fall and did nothing to cause it to fall.

It was pleaded that the plaintiff knew of the dangers of this type of machine and he had been repeatedly warned, and took the risk of the danger by moving from a position of safety into one of danger.

It was further pleaded that the machine was at all times in the control and possession of Robeck. The theory advanced by this was that the defendant and plaintiff were fellow employees of Robeck and on that account plaintiff could not prevail in an action for damages against the defendant.

By reply the plaintiff denied generally the allegations of the answer.

As grounds for reversal on appeal the plaintiff has set forth assignments of error which are too numerous for separate reference here. The phases thereof which require consideration will therefore be considered rather than the specific assignments.

In the light of the rules stated and the review made of the pleadings, it is apparent that the plaintiff had in the first instance the burden of adducing evidence sufficient to warrant an inference of negligence on the part of the defendant. This burden was sustained. The defendant does not seriously contend otherwise.

The burden then devolved on the defendant to rebut the inference which flowed from the evidence of the plaintiff. The defendant did adduce evidence in rebuttal of the inference. He also adduced evidence the purpose of which was to sustain the charge of contributory negligence on the part of the plaintiff contained in the answer.

Whether or not the plaintiff, independent of and aside from the defense of contributory negligence, had proved his cause of action depended upon the question of whether or not the evidence preponderated in his favor. That question however is not here for determination in view of the assignments of error asserted by the plain-

tiff and the statement of the questions involved set out in the brief of the defendant.

The questions upon which a determination herein must be made are the following: Was there evidence upon which to submit the pleaded question of whether or not the plaintiff was guilty of negligence which proximately caused or contributed to the accident and his injuries? Was there evidence that the plaintiff by his own acts and conduct assumed the risk of the danger to himself, the consequence of which was to defeat a right of recovery from the defendant? If there was no such evidence there was no basis for instruction on contributory negligence. The plaintiff contends that there was none and on that ground that he is entitled to a reversal of the judgment and to a new trial. A third question is, if there was evidence, then did the court properly instruct the jury in relation thereto?

There is another theory presented by the defendant which he contends defeats a recovery by the plaintiff. He contends that the plaintiff and defendant were fellow employees and that under the law controlling in that situation and on the evidence adduced no recovery could be allowed. The simple answer to this is that there is no evidence from which it may be said that they were fellow employees.

In answer to the first and the second questions the view taken is that there was no evidence that the plaintiff was contributorily negligent in any degree or that he assumed any risk which would bar a right of recovery. There was therefore no basis for the submission of these questions to a jury, and the trial court erred prejudicially in doing so.

The law is of course well settled that the submission of issues which find no support in the evidence is reversible error. See, Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439; Anderson v. Nielsen, 162 Neb. 110, 75 N. W. 2d 372; Arnold v. Lance, 166 Neb. 834, 90 N. W. 2d 814.

The pertinent evidence which summarized makes clear the view stated that there was no evidence that plaintiff was guilty of contributory negligence is as follows: Robeck had a contract with the city of Norfolk, Nebraska, to lay a sewer line in that city. The defendant had a subcontract to excavate the line and in that line to dig the hole at which the plaintiff was injured. The plaintiff was an employee of Robeck in the capacity of a laborer. At the time the incidents of importance here transpired he was engaged in the performance of his duties for Robeck. It is true that his duties for Robeck also had some relationship to the work being done by the defendant but there is no evidence of any change in his employment status. The hole was dug by the defendant pursuant to requirement to a depth of about 16 feet. This was done with equipment owned and operated by the defendant. This depth was the maximum which could be reached by the use of this equipment, however the required depth of the hole was more than 20 feet. Equipment of the size and capacity to dig the hole to the required depth was located and the defendant went to examine it. This equipment was of a kind and character familiar in construction and operation to the defendant.

It does not appear that a detailed description is required here, but some pertinent details are the following: The operation controls including a motor for operation purposes were carried on a truck. The position for the operator was also on the truck. From this position a boom extended which could be elevated, lowered, and moved horizontally by the operator. From the seat of operation a cable or cables extended to the outer end of the boom and downward. At the downward end of the cable was attached a shovel or bucket called a clam or clamshell. This arrangement was used to pick up, lift, and convey objects to a changed position. These movements involved controls solely in the hands of the operator.

The mechanical condition of the equipment was open to view and subject to inspection and the ascertainment of defects, if any existed. This statement flows from the evidence of the defendant and about it there is no evidentiary dispute.

The defendant and an employee of his went to get the equipment. He attempted to operate it and found that in operation the boom fell part way a couple of times. He made some adjustment and satisfied himself that the equipment was in operating condition. He did not make a careful examination at that time or at any other time, even after the accident. He never did attempt to find out what caused the boom to fall. After this the equipment was taken to the vicinity of the hole.

At the hole at the direction of the defendant the truck was placed on the west side of the hole about 5 or 6 feet from the edge, the boom with the clam was extended over the hole, and the clam was lowered. At about the time the clam reached the bottom of the hole the boom dropped and in its fall struck the plaintiff.

Before the defendant started to lower the clam he directed collectively a number of Robeck workmen, including the plaintiff, to get out of the hole and to remove a ladder. They complied and the plaintiff of his own volition moved to a point about the middle of the east side for the expressed purpose of attempting to see to it that the clam did not disturb provisions which had been made to prevent caving in of the walls of the hole.

There is no evidence that the plaintiff or anyone else was informed or that there was any reason for the plaintiff to suspect that there was danger of a fall of the boom. In fact the complete gist of the evidence in this area from all witnesses purporting to have knowledge flowing from experience or observation was that the opposite was true. The plaintiff had 6 years of observation and had never heard of such a fall. The defendant had 13 or 14 years experience in the operation of this

kind of equipment and had never had a boom fall. Another witness had 13 years experience and had never had a boom fall in operation. This other witness knew that this equipment prior to this time was out of adjustment. There is nothing in any of this evidence from which it could be said or inferred that anything that plaintiff did amounted to negligence or contributory negligence.

It is clear that the plaintiff was not guilty of any positive or affirmative act which in itself was negligent. If he was guilty of contributory negligence it was on account of failure to exercise ordinary care for his safety. If the plaintiff was guilty of such failure then he was guilty of contributory negligence. See, Klement v. Lindell, 139 Neb. 540, 298 N. W. 137; Frazier v. Anderson, 143 Neb. 905, 11 N. W. 2d 764; Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041. In the light of this review it becomes apparent that there is no evidence that there was a failure of the plaintiff under the circumstances to exercise ordinary care for his own safety, hence it is repeated that the court erred in submitting the issue of contributory negligence to the jury.

The submission of the doctrine of assumed risk was erroneous under the evidence adduced for the same reason that the submission of the issue of contributory negligence was erroneous. There was no evidence adduced which supported any contention that the plaintiff subjected himself to any danger of which he knew, was informed, or in the exercise of ordinary care should have known or become informed. The total evidence supports the opposite view.

The answer to these two questions, as is apparent, renders unnecessary any response to the third. It renders unnecessary also a consideration at this time of the other matters tendered by the assignments of error.

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

REVERSED AND REMANDED.

FIRST NATIONAL BANK IN ORD, A CORPORATION, APPELLANT, v. DELORES MORGAN, APPELLEE.
112 N. W. 2d 26

Filed December 1, 1961. No. 35042.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed, but does not admit the pleader's conclusions of law or fact.
2. **Replevin.** It is an elemental rule that replevin lies only in behalf of one entitled to the possession of the property as against the defendant, at the time of the commencement of the action or issuance of the writ, and such right of possession must be immediate, exclusive, and unqualified.
3. ———. Generally, where a personal chattel is owned by several persons, one part owner cannot maintain replevin for it, for the reason that all joint owners, unless there is an agreement to the contrary, are equally entitled to the possession of the property, and neither has the right to the immediate and exclusive possession of the property as against the other.
4. **Tenancy in Common.** Ratification of a contract between fewer than all tenants in common and a third person, in order to be binding on the other cotenants, requires that they have full knowledge of such contract and of the facts and circumstances connected with its execution.
5. ———. Where a tenant in common does nothing to mislead a third person, or where the conduct of the tenant is not such as to warrant a third person's reliance thereon, the tenant is not estopped to assert that he is not bound by the unauthorized acts of his cotenant.

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

John R. Sullivan, for appellant.

D. A. Russell, for appellee.

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

BROWER, J.

This is a replevin action brought by the First National Bank in Ord, Nebraska, a corporation, appellant and plaintiff, against Delores Morgan, appellee and defendant.

Plaintiff's amended petition alleges that plaintiff had

a "special property, claim, interest or ownership" in a certain automobile. The special interest arose by virtue of a note secured by a chattel mortgage covering the same, both executed on May 19, 1959, by Curtis Morgan only, the defendant's husband. The note was in the amount of $3,939.28 payable in two installments, each for $1,969.64, which became due on March 1, 1960, and March 1, 1961. It contained the usual clause providing that the whole became due on failure to pay any installment. The petition alleges a default thereunder and that the plaintiff was entitled to the immediate possession of the automobile. The amended petition showed the car was purchased November 21, 1958, by Curtis Morgan and Delores Morgan, and a certificate of title was then issued in both their names jointly with full rights of survivorship. Endorsed on the certificate is the notation of the county clerk dated August 5, 1960, that the same was subject to this mortgage "Signed only by Curtis Morgan." This petition alleges that when the note and mortgage were executed on May 19, 1959, Curtis Morgan borrowed $3,500 secured by said mortgage, which amount was then deposited by Curtis Morgan in an account in the plaintiff bank, on which the defendant had the right to draw checks; and that the funds so deposited were for the use and benefit of defendant as well as Curtis Morgan, whom it is alleged then represented that they were to be used to remodel a farm house occupied by him and the defendant. On February 2, 1960, by way of prepaying the installment due on March 1, 1960, it is alleged the defendant delivered to the plaintiff bank her check drawn on it for $1,969.64, which was not paid because of insufficient funds; that though defendant did not execute the note and mortgage, by giving the check she acknowledged the debt and ratified the actions of her husband in mortgaging the automobile, and by her actions and dealings with the plaintiff agreed to be bound by the terms thereof; that her interest in the automobile was so bound; that defendant was estopped

to deny the plaintiff's right to replevin the car; and that plaintiff had an equitable lien on the defendant's interest therein.

Defendant filed an answer containing a general denial and an assertion of an ownership of an undivided half interest and right of possession in the automobile at the commencement of the action and sought damages for wrongful detention, to which plaintiff replied with a general denial.

Trial was had on December 12, 1960, and after empaneling a jury the plaintiff offered evidence, at which time the defendant demurred ore tenus on the ground that plaintiff's amended petition did not state a cause of action. The court sustained the demurrer and thereafter the matter proceeded to trial only on the question of the amount of damages due the defendant for the wrongful taking. Judgment was then entered for the return of the automobile and the damages assessed by the jury. A motion for new trial was overruled and plaintiff appealed to this court.

The sustaining of the demurrer ore tenus is the only error assigned. No bill of exceptions is filed with respect to the evidence regarding the damages assessed so that matter is not before us in view of our decision.

The questions involved here are whether a mortgagee of one cotenant can maintain an action in replevin against the owner of the other undivided half of a single article by its nature not subject to division between the co-owners, and whether the petition states facts which show the interest of the defendant in the automobile was bound under the chattel mortgage either by ratification or estoppel or because defendant's actions created an equitable mortgage on her interest therein.

It is an elemental rule that replevin lies only in behalf of one entitled to the possession of the property as against the defendant, at the time of the commencement of the action or issuance of the writ, and such right of possession must be immediate, exclusive, and

unqualified. See 77 C. J. S., Replevin, § 42, p. 29. It is also held that: "Generally, where a personal chattel is owned by several persons, one part owner cannot maintain replevin for it, for the reason that all joint owners, unless there is an agreement to the contrary, * * * are equally entitled to the possession of the property, and neither has the right to the immediate and exclusive possession of the property as against the other." 77 C. J. S., Replevin, § 49, p. 34. Accordingly the creditor of one cotenant secured by chattel mortgage on that cotenant's interest cannot maintain replevin against the other cotenant in possession of the common property of an indivisible character. See, 14 Am. Jur., Cotenancy, § 77, p. 144; McDonald v. Bailey, 25 Okl. 849, 107 P. 523, 37 L. R. A. N. S. 267; Trustees of Ashland Lodge No. 63, I.O.O.F. v. Williams, 100 Wis. 223, 75 N. W. 954, 69 Am. S. R. 912; Read v. Middleton, 62 Iowa 317, 17 N. W. 532; Sheldon v. Brown, 72 Minn. 496, 75 N. W. 709.

The general rules concerning replevin brought by one cotenant against another were discussed in Fines v. Bolin, 36 Neb. 621, 54 N. W. 990, where this court held that one cotenant could replevin from the other a quantity of corn because in the mass it was alike in quality and value, and was readily divisible by measure. In the discussion, however, the court stated that it was well settled that the owner of an undivided interest in a single piece of property not susceptible of division could not maintain an action against a cotenant to acquire its possession because neither has the right to the immediate and exclusive possession of the same as against the other.

Plaintiff, however, contends even if this rule is generally applicable that in this instance defendant has ratified the mortgage and is estopped to deny its validity and that plaintiff has an equitable lien on the mortgaged property.

A general demurrer admits all allegations of fact in the pleading to which it is addressed, but does not admit

the pleader's conclusions of law or fact. See, In re Estate of Halstead, 154 Neb. 31, 46 N. W. 2d 779; Richter v. City of Lincoln, 136 Neb. 289, 285 N. W. 593.

With this rule in mind we must examine the plaintiff's petition to determine what the defendant said or did that would constitute a ratification or estoppel. The automobile was purchased November 21, 1958, but the note and mortgage were not given until May 19, 1959, almost 6 months later. It is obvious that the loan had nothing to do with the purchase. It is alleged that Curtis Morgan represented that the proceeds were to be used for the remodeling of a farm house occupied by him and the defendant. The purpose for which it was actually used is not alleged. The petition is silent as to what was said or done by the defendant at that time and it cannot be inferred that she agreed to the mortgage on her property, or that she then knew anything about it. It is alleged that at the time of the execution of the mortgage $3,500 was placed in an account on which the defendant could draw, but it is not affirmatively shown that she ever drew on it. It is further alleged that defendant some 9 months later gave a check for the payment of the first installment of $1,969.64, shortly to become due. No consideration is shown for giving this check, nor are there any facts pleaded to throw light on what, if anything, the defendant said or did at that time. The plaintiff bank on which it was drawn knew at once that there were insufficient funds with which to pay it and could not have changed its position because of relying on its having been given. Though the defendant must have then known of an obligation of her husband which required this payment, it is not shown that at that time she knew of the mortgage, or that it purported to cover the entire ownership of the automobile.

On the giving of the mortgage by Curtis Morgan the unity of interest became extinguished and the cotenants became tenants in common. Whiteside v. Whiteside, 159 Neb. 362, 67 N. W. 2d 141.

"Ratification of a contract between fewer than all tenants in common and a third person, in order to be binding on the other cotenants, requires that they have full knowledge of such contract and of the facts and circumstances connected with its execution." 86 C. J. S., Tenancy in Common, § 109, p. 517. See, also, Mathias v. Mathias, 167 Iowa 81, 149 N. W. 87. From the facts stated, it does not affirmatively appear that defendant knew the nature of the transaction between her husband and the plaintiff bank or that she assented either expressly or by implication that her interest in the automobile be bound, and hence no ratification is shown.

"Where a tenant in common does nothing to mislead a third person, or where the conduct of the tenant is not such as to warrant a third person's reliance thereon, the tenant is not estopped to assert that he is not bound by the unauthorized acts of his cotenant." 86 C. J. S., Tenancy in Common, § 129, p. 540. See, also, Cooper v. Brown, 143 Iowa 482, 122 N. W. 144, 136 Am. S. R. 768.

The acts of the defendant as alleged in the petition cannot be said to have misled the plaintiff or estopped the defendant from asserting her rights in the common property.

Plaintiff cites the case of Schroeder v. Ely, 161 Neb. 252, 73 N. W. 2d 165, as authority for its contention that the actions of the defendant created an equitable lien on her interest in the automobile. The cited case was one where an elderly lady was imposed on by persons who stood in a confidential relation to her. She was prevailed upon to advance large sums of money for the express purpose of financing the purchase of real estate and the erection and furnishing of a motel thereon in which she was to have a home. The circumstances there showed fraud and overreaching justifying a court of equity in impressing an equitable lien on the property purchased with her funds. The case has no application to the one at bar nor are we able to find anything in the defendant's actions justifying a finding that such

a lien existed even if this were an equitable action to impress one.

Plaintiff mortgagee did not have the exclusive right of possession necessary to maintain replevin against the defendant, a cotenant of the mortgagor. Neither are facts shown in the petition which establish that her interest in the mortgaged property was bound either by defendant's ratifying her husband's action or by estoppel, nor was her interest therein subject to a lien of an equitable nature whether or not such a lien could be asserted in a replevin action.

The judgment of the trial court in sustaining the demurrer ore tenus was correct and is affirmed.

AFFIRMED.

KALE L. ASHER, APPELLEE, V. COCA COLA BOTTLING COMPANY OF SCOTTSBLUFF, A CORPORATION, APPELLANT.
112 N. W. 2d 252

Filed December 1, 1961. No. 35045.

1. **Negligence.** When a drink intended for human consumption is marketed in sealed containers, and such drink causes injury to a consumer, it is not necessary in a personal injury action to show that the container was within the physical control of a manufacturer in order to hold a manufacturer under the res ipsa loquitur doctrine.
2. **Sales.** The unexplained presence of a deleterious substance in a product manufactured and sold in a sealed container for human consumption is evidence of a breach of implied warranty that the product is wholesome and fit for human consumption.
3. **Negligence: Sales.** A consumer can recover either on the theory of negligence or implied warranty from a manufacturer for injuries resulting from presence of deleterious substance in a product manufactured and sold for human consumption where it is shown that the deleterious substance was present when the product left the manufacturer's control.
4. **Election of Remedies.** Before a case can arise for the application of the principle of election of remedies there must be two co-existing remedies and those remedies must be so inconsistent

that a party cannot logically choose one without renouncing the other.

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

Wright & Simmons and *James R. Hancock,* for appellant.

Lyman & Winner, for appellee.

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

CARTER, J.

This is an action by plaintiff to recover damages sustained in drinking a bottle of Coca Cola in which a dead mouse was found. The jury returned a verdict for the plaintiff in the amount of $2,000. The defendant has appealed.

The evidence shows that plaintiff on June 10, 1959, entered the Eagle Cafe in Scottsbluff, Nebraska, and ordered a bottle of Coca Cola. The uncapped bottle of Coca Cola was served by a waitress with a straw inserted in the bottle. After drinking most of the contents through the straw he drank the balance from the bottle. He swallowed some foreign substance and upon examination discovered a dead mouse in the bottle. The plaintiff had suffered from an emotional gastritis for several years. There is evidence the plaintiff became ill upon discovery of the dead mouse. There is medical testimony that the incident aggravated plaintiff's condition for 30 days or more, causing abdominal pains during that period.

The petition is in the form of a suit on two causes of action, one on the res ipsa loquitur doctrine for negligence, the other on the theory of an implied warranty by the manufacturer on contract. The trial court submitted both theories to the jury with a direction that only one recovery could be had. It is the contention of

defendant that the trial court erred in submitting either theory to the jury under the evidence.

The evidence shows that the defendant was the manufacturer and bottler of Coca Cola. It delivered Coca Cola to the Eagle Cafe regularly twice a week in wholesale quantities. The cases of Coca Cola were stacked along the wall near a cooling machine. The bottles were transferred to the cooling machine as needed. When a bottle of Coca Cola was ordered it was taken from the machine, uncapped, and served by the waitress serving the customer. Other manufacturers of soft drinks made similar deliveries of their products which were stacked in the same area as the Coca Cola.

The evidence of the defendant shows the method of washing, rinsing, filling, capping, and inspecting the bottles, which inspection took place before and after filling. The capped bottles were then stored in defendant's warehouse facility until removed to fill orders. There is evidence that opportunity existed at the Eagle Cafe for others, including the deliverymen of competitors, to exchange bottles and to remove and replace the caps placed on the bottle by the manufacturer. The testimony is that the cap could be removed, a mouse inserted, and the bottle recapped by a prankster or competitor. An employee of the Eagle Cafe testified that no recapping appliance had ever been maintained in the cafe and that all bottles of Coca Cola were opened immediately before serving.

It is the contention of the defendant that the divided control of the Coca Cola bottle containing the mouse by the defendant and the Eagle Cafe precludes a recovery by plaintiff under the doctrine of res ipsa loquitur. The doctrine of res ipsa loquitur is that if a thing which causes injury is shown to be under the control and management of a defendant and the occurrence causing injury is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the ab-

sence of explanation by the defendant that such occurrence arose from want of proper care. Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N. W. 2d 224. There appears to be some divergence of views in the holdings of other states as to the meaning of "exclusive control" in applying the doctrine of res ipsa loquitur to a manufacturer of bottled goods sold to a retailer who in turn sold the deleterious product to the consumer. Since this is a case of first impression on that question, we necessarily look to the decisions of other states for the reasoning to be applied. The defendant contends for the rule announced in Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S. W. 2d 721, 171 A. L. R. 1200, holding that in order for a plaintiff to recover in such a case "it must be made to appear, by a clear preponderance of the evidence, that there has been no such divided or intervening control of the bottle as to afford any reasonable opportunity for it or its contents to have been tampered with by another after it left the possession or control of the defendant or its agents." See, also, Jordan v. Coca Cola Bottling Co. of Utah, 117 Utah 578, 218 P. 2d 660, 52 A. L. R. 2d 108; Williams v. Paducah Coca Cola Bottling Co., 343 Ill. App. 1, 98 N. E. 2d 164; Coca-Cola Bottling Co. of Jonesboro v. Misenheimer, 222 Ark. 581, 261 S. W. 2d 775.

The plaintiff relies upon a line of cases holding that the doctrine of res ipsa loquitur is applicable and raises an inference or presumption of negligence on the part of the manufacturer or bottler of a beverage which, when sold in a bottle, can, or other sealed container, contains a foreign substance. Eisenbeiss v. Payne, 42 Ariz. 262, 25 P. 2d 162; Beaumont Coca Cola Bottling Co. v. Guillot (Tex. Civ. App.), 222 S. W. 2d 141; Crystal Coca-Cola Bottling Co. v. Cathey, 83 Ariz. 163, 317 P. 2d 1094. In the last case cited the court dealt with the question of the exclusive control of the deleterious product by the manufacturer as it relates to the rule of res ipsa loquitur as follows: "We hold that in this fourth class of

case (intervening vendor) in order to satisfy the exclusive control requisite of the res ipsa loquitur doctrine the plaintiff must either prove 'that there has been no reasonable opportunity for tampering' or that there was no tampering 'with the bottle, or its contents, in the interim between the physical control of the bottler or manufacturer, and that of the consumer.' This is a question of fact which the plaintiff may prove by circumstantial evidence for submission to the jury under proper instructions. In the instant case the court instructed the jury that in order for the res ipsa loquitur doctrine to apply, they must determine that the fly did not get into the bottle as a result of the intervening act of a third party and that the condition of the bottle was the same when it left the defendant bottling company's control as when it was received by the plaintiff."

The rule of res ipsa loquitur is a rule of evidence. It is not conclusive and the inference or presumption existing under the rule may be overcome by evidence. It is ordinarily for the jury to determine whether or not the act complained of was the result of the manufacturer's negligence. In this respect, the evidence shows the precautions taken by the defendant to avoid the contamination of its product. Inspection is an important phase of the precautions taken. Careless inspection of bottles before and after filling could well be the proximate cause of the wrong. The method of handling by the Eagle Cafe is fully explained, and the jury could find that the bottle containing the dead mouse was not tampered with while in the possession of the Eagle Cafe, or that a reasonable opportunity for tampering was not afforded. There is no evidence of tampering on the part of any one, the evidence being only that it was possible for tampering to have occurred. The condition of the dead mouse at the time of its discovery indicated that it had been in the bottle for some time. The jury in a consideration of all the evidence had a reasonable basis for its finding that the dead mouse was in the bottle at the

time of the delivery of the bottle to the Eagle Cafe. The trial court therefore did not err in submitting negligence on the theory of the res ipsa loquitur doctrine.

The defendant contends that it was error to submit the case on the theory of an implied warranty by the manufacturer. It contends that an implied warranty extends no further in time or effect than to the time of delivery to the Eagle Cafe. The basic contention is that plaintiff's case must fail because of the want of privity of contract between the manufacturer and consumer. The evidence is not disputed that defendant advertised its product as wholesome and fit for public consumption.

The early cases on the subject appear generally to have denied recovery on the basis of a lack of privity. But in the light of changed conditions relating to the manufacture, marketing, and distribution of goods, and the making of sales through intermediaries and advertising media, the requirement of privity has been generally abandoned. It is no longer an element to be established in an action upon an implied warranty that food products are wholesome and fit for public consumption where they are shown to be in the same condition as when they left the control of the manufacturer. The reason of the rule which we adopt is stated in the following cases: Manzoni v. Detroit Coca-Cola Bottling Co., 363 Mich. 235, 109 N. W. 2d 918; Freeman v. Navarre, 47 Wash. 2d 760, 289 P. 2d 1015; Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S. W. 2d 828; Colvin v. John Powell & Co., 163 Neb. 112, 77 N. W. 2d 900. The evidence was sufficient to sustain a recovery on the implied warranty theory.

The defendant asserts that the trial court erred in not sustaining defendant's motion to require plaintiff to elect as between negligence on the theory of res ipsa loquitur and contract on the basis of implied warranty. We point out that the petition alleges but a single wrong and prays for a single recovery for such wrong. Plaintiff asserts two remedies, neither of which is incon-

sistent with the other. Both remedies were available to the plaintiff as long as he claimed a single and not a double recovery. In State v. Bank of Commerce, 61 Neb. 22, 84 N. W. 406, this court passed directly upon the question in the following language: "Before a case can arise for the application of the principle of election there must be (1) two co-existing remedies; and (2) those remedies must be so inconsistent that a party can not logically choose one without renouncing the other." See, also, Anderson v. Tyler, 223 Iowa 1033, 274 N. W. 48; City of Alliance v. Cover-Jones Motor Co., 154 Neb. 900, 50 N. W. 2d 349. The assignment is without merit.

Errors in certain of the instructions are assigned. An examination of the instructions objected to reveals that they, together with the other instructions given, fairly submit the issues to the jury. We find no prejudicial error in the instructions.

Complaint is made of the action of the district judge in endorsing the words "Given as Modified" on four of the instructions given to the jury. Section 25-1113, R. R. S. 1943, requires that the trial court "must write the words 'given,' or 'refused,' as the case may be, on the margin of each instruction." The action of the trial court is not in accord with the statutory direction, but we find no prejudice in the present case in using the term "Given as Modified."

Defendant assigns the excessiveness of the verdict as grounds for a new trial. The question is not discussed in defendant's brief and we consider the assignment abandoned under Rule 8a2 (4) of the rules of this court.

We find the record to be free from prejudicial error and the judgment is affirmed.

AFFIRMED.

IN RE APPLICATION OF DENVER CHICAGO TRANSPORT CO., INC., OF NEBRASKA.

DENVER CHICAGO TRANSPORT CO., INC., APPELLEE, V. ORA E. POULSON, DOING BUSINESS AS O. E. POULSON, ELM CREEK, NEBRASKA, APPELLANT.

112 N. W. 2d 410

Filed December 8, 1961. No. 35026.

1. **Public Service Commissions: Appeal and Error.** The time for appeal from an order of the Nebraska State Railway Commission under sections 75-405 and 75-406, R. R. S. 1943, runs from the date that the parties are notified of the order as provided in section 84-915, R. S. Supp., 1959.
2. ———: ———. On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission in proceedings upon an application for a certificate of public convenience and necessity, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrary.
3. **Public Service Commissions: Public Utilities.** The primary object of the regulation of public utilities by the Nebraska State Railway Commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but, first and at all times, to serve the interests of the public.
4. **Motor Carriers.** The Motor Carrier Act does not condemn competition but does condemn unfair or destructive competitive practices.
5. **Public Service Commissions: Motor Carriers.** In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest.

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

Nelson, Harding & Acklie, for appellant.

Viren & Emmert, C. J. Burrill, and *K. E. Wolcott,* for appellee.

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

BOSLAUGH, J.

This is an appeal from the Nebraska State Railway Commission in proceedings upon the amended application of Denver Chicago Transport Co., Inc., of Nebraska, for authority to transport molasses as a common carrier over irregular routes in Nebraska on and west of U. S. Highway No. 183. A protest to the granting of the application was filed by Ora E. Poulson who has authority to provide such service.

A hearing upon the application was held before an examiner. The examiner in effect held that the protestant could not furnish adequate service at that time and recommended that the protestant be given approximately 30 days in which to make a showing that he could furnish adequate service. The final determination with respect to the application was then to be made after the further showing of the protestant.

Exceptions were filed to the report of the examiner by the applicant. After a hearing before the commission on the exceptions, the commission entered an order sustaining the exceptions and granting the authority requested in the amended application. The protestant then filed a motion for rehearing and reconsideration. After a hearing on the motion the commission entered an order on August 17, 1960, overruling it. A copy of this order was mailed to the applicant on August 24, 1960, but a copy was not mailed to the protestant or his attorney until January 13, 1961. The protestant then appealed to this court.

After the appeal had been filed in this court the applicant filed a motion to dismiss the appeal upon the ground that it had not been perfected within 1 month from the date of the entry of the order as required by section 75-405, R. R. S. 1943.

Where a motion for rehearing is filed, the time for appeal runs from the date of the ruling on the motion. § 75-406, R. R. S. 1943. Section 84-915, R. S. Supp., 1959, which became effective September 28, 1959, pro-

vides in part: "Parties to the proceeding shall be notified of the decision and order in person or by mail." The record fails to show that any notice of the ruling on the motion for rehearing was given to the protestant or his attorney until January 13, 1961.

The question presented is whether the time for appeal begins to run before the commission has notified the parties of its decision and order as required by the statute. We hold that it does not. In a similar situation (prior to the 1948 amendment of the rule) the Supreme Court of the United States suggested that where the clerk failed to notify the parties of the entry of judgment as required by Rule 77 (d) of the Rules of Civil Procedure, the time for appeal did not commence to run. In Hill v. Hawes, 320 U. S. 520, 64 S. Ct. 334, 88 L. Ed. 283, 149 A. L. R. 736, the court said: "It is true that Rule 77 (d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule."

The appeal in this case was perfected within 1 month from the date of the notice to the protestant of the ruling of the commission upon the motion for rehearing. This was sufficient to confer jurisdiction upon this court. For this reason the motion to dismiss was and is overruled.

The commission found that the applicant was fit, willing, and able to perform the service proposed and that the present and future public convenience and necessity required that the proposed service be authorized. The dispute here concerns the finding in regard to public convenience and necessity. The as-

signments of error are, in substance, that the order of the commission is contrary to the evidence and the law.

On an appeal to this court from an order of the commission in proceedings upon an application for a certificate of public convenience and necessity, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. Courts are without authority to interfere with the findings and orders of the railway commission except where it exceeds its jurisdiction or acts arbitrarily. Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

The evidence shows that the Industrial Molasses Corporation operates a molasses storage terminal at Gering, Nebraska. Molasses is shipped to the storage terminal or facility at Gering by rail. From Gering the molasses is delivered by truck to feed mills and feed lots located generally within a radius of from 100 to 150 miles of Gering. Prompt service is important to the shipper. Orders for immediate delivery require that equipment be made available upon short notice.

In the first 3 months of 1959 over 700 tons of molasses were shipped from Gering, Nebraska, by truck to Nebraska destinations. The total tonnage to be shipped into this area from Gering in 1959 was estimated to be 3,000 tons. During the preceding year about 500 tons had been shipped into this area by the predecesssor to the Industrial Molasses Corporation.

The molasses in question is used for animal feeds and must be free of all contamination and fit for consumption by animals at the time that it is delivered. For that reason, equipment that has been used to haul leaded gasoline is not considered suitable for hauling molasses. Tank trucks which haul molasses must be equipped with pumping facilities that will handle mo-

lasses and connect with the receiving facilities of the feed lots and mills.

The applicant and its parent company, a Colorado corporation, share a terminal at Gering, Nebraska. The applicant has interstate authority for the transportation of molasses and furnishes that service to the Industrial Molasses Corporation from the Gering terminal.

The protestant has authority to transport molasses in Nebraska from all points of origin, except Crete and Nebraska City, to all points and places in Nebraska over irregular routes. The headquarters of the protestant, and its only terminal, are located at Elm Creek, Nebraska. Elm Creek is approximately 250 miles from Scottsbluff.

Common carriage transportation is but a small part of the business of the protestant. The protestant farms approximately 2,200 acres of land in Dawson County, Nebraska, with hired labor and runs between 600 and 1,200 head of cattle the year around. The protestant also operates an oil bulk plant, three service stations, and an oil-jobbing business. The gross sales of the protestant from the petroleum-jobbing business were $350,000 in 1958. The gross revenue from common carriage of petroleum products in Nebraska was around $1,700 for that year. The revenue from common carriage transportation was described as an "infinitesimal" part of the protestant's gross income.

The protestant has only one permanent driver but keeps an active file on up to as many as three or four drivers who are subject to call.

The protestant submitted a list of equipment which included three trailers, one of which was described as a molasses trailer. This trailer, which was not equipped with a pump, had been used to haul petroleum products including leaded gasoline. A second trailer was used entirely for hauling gasoline. The third trailer had been used for the storage of asphalt since 1958.

The manager of the protestant estimated that it could

provide service to move a shipment of molasses from Gering, Nebraska, within 12 hours if requested to do so. This witness admitted that he did not know for sure where the equipment to move such a shipment would come from.

The evidence in this case established that the protestant was not equipped or situated so that it could provide adequate service to the Industrial Molasses Corporation or other shippers in the Gering area. This is in effect what the examiner found.

There was also evidence that the protestant had solicited business from the Industrial Molasses Corporation but had never been tendered a shipment of molasses; that the protestant had contacted other carriers and could obtain the equipment necessary to haul molasses; and that the protestant would establish terminal facilities at Gering if business was tendered to it. The most that can be said of this evidence is that it tended to show that the protestant was willing and able to obtain additional equipment and facilities so as to be able to provide adequate service in the Gering area if it could be assured that it would receive the business.

The commission was justified in concluding that the service available from the common carriers who were authorized was not adequate and that additional authority should be granted. See Johnson v. Peake, 163 Neb. 18, 77 N. W. 2d 670. Thus, the evidence is sufficient to sustain the finding of the commission that the present and future public convenience and necessity requires that the proposed service be authorized.

The protestant relies upon In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507, and Edgar v. Wheeler Transport Service, Inc., 157 Neb. 1, 58 N. W. 2d 496, as supporting his contention that the finding of the commission in this case in regard to public convenience and necessity is not supported by the evidence. The cases cited by the protestant involved factual situations which were different from the factual situation in this case.

In both the Canada case and the Edgar case a large number of carriers had been granted authority to perform the service for which the applicants sought authority. In this case there is no evidence concerning any competing carrier other than the protestant. A formal protest to the original application was filed by another carrier, but this carrier made no further appearance in the case and is not mentioned in the evidence.

In Young v. Morgan Drive Away, Inc., 171 Neb. 784, 107 N. W. 2d 752, this court interpreted and clarified its holding in the Canada case. In the Young case the court pointed out that the conclusion reached in the Canada case has very limited application to situations involving irregular route authority. In the Young case the court further stated that it is not the intent and purpose of the Motor Carrier Act that once irregular route authority has been granted on a statewide basis to a carrier able and willing to satisfactorily serve the entire state that the commission shall have no right to grant additional authority to other carriers.

The Motor Carrier Act does not condemn competition. It does condemn unfair or destructive competitive practices. The primary object of the regulation of public utilities by the Nebraska State Railway Commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but, first and at all times, to serve the interests of the public. Young v. Morgan Drive Away, Inc., *supra*.

In Basin Truck Co. v. R. B. "Dick" Wilson, Inc., 166 Neb. 665, 90 N. W. 2d 268, this court said: "In determining the issue of public convenience and necessity, the controlling questions are whether or not the proposed operation will serve a useful purpose responsive to a present or future public need, whether or not this purpose can or will be served as well by existing common carriers, and whether or not it can be provided by the applicant in the manner specified without endan-

gering or impairing the operations of existing common carriers contrary to the public interest. The primary purpose of commission control is to secure adequate sustained service for the public at a minimum cost and to protect and conserve investments already made for such purpose, and, in doing so, primary concern is that of the public rather than that of individuals. Houk v. Peake, supra. * * * It is not the purpose of commission control to establish an unbridled monopoly by the elimination of fair competition, nor is it intended to create unfair or destructive competition resulting in inadequate service to the public. It is a regulated competition, productive of efficient service at a minimum cost, operated for reasonable profit in the interest of public users of the service, without endangering or impairing the operations of certified common carriers in the field, that meets the objectives of commission control." See, also, Dalton v. Kinney, 160 Neb. 516, 70 N. W. 2d 464; Ferguson Trucking Co., Inc. v. Rogers Truck Line, 164 Neb. 85, 81 N. W. 2d 915.

The order of the commission in this case is not unreasonable or arbitrary and is affirmed.

AFFIRMED.

HENRY C. WELLENSIEK, APPELLEE, V. DRAINAGE DISTRICT NO. 1 OF OTOE AND JOHNSON COUNTIES, NEBRASKA, A PUBLIC CORPORATION, ET AL., APPELLANTS.
112 N. W. 2d 267

Filed December 8, 1961. No. 35038.

1. **Municipal Corporations: Drains.** By the terms of the statute a corporation which was created for the purpose of conducting the affairs of a drainage district had the power through its board of supervisors to levy and collect assessments to defray costs necessary to create the improvement.
2. ———: ———. By the terms of the statute a corporation created for the purpose of conducting the affairs of a drainage district was made liable for all injuries and damages caused

by the construction of such improvements arising by virtue of contract or tort.

3. ———: ———. The statute under which the defendant corporation was created does not provide specifically for maintenance of action against it after expiration of its charter, but the general statutes relating to corporations do provide for action after expiration of a charter or dissolution of a corporation.
4. **Corporations.** By the General Corporation Law of the State of Nebraska, enacted in 1941, the Legislature specifically preserved the rights, privileges, and immunities vested or accrued under prior statutes, and declared that no suits pending, no rights of action conferred, and no duties, restrictions, liabilities, and penalties imposed or required under such statutes should be impaired, diminished, or affected thereby.
5. ———. By statute a dissolved corporation may be sued in the corporate name.
6. **Municipal Corporations: Drains.** A corporation created for the purpose of conducting the affairs of a drainage district is a public corporation and a body politic, politically organized and engaged in the exercise of political functions.
7. **Municipal Corporations.** A public corporation which is a body politic has power to satisfy its obligations after lapse of its charter.
8. ———. After the expiration of the charter or the dissolution of a public corporation which is a body politic, a residuary power remains in it which the courts may compel it to exercise in the performance of the duties imposed upon it by statute.

APPEAL from the district court for Otoe County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Marti, O'Gara, Dalton & Sheldon, for appellants.

William B. Brandt, Healey, Wilson & Barlow, and *Patrick W. Healey,* for appellee.

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

YEAGER, J.

This is an action by Henry C. Wellensiek, plaintiff and appellee, against Drainage District No. 1 of Otoe and Johnson Counties, Nebraska, a public corporation, Carl Masters, Clarence Boettcher, John Brandt, Henry J. Nebelsick, and Walter Meyer, defendants and appel-

lants, the purpose of which is to obtain a judgment for damages against Drainage District No. 1, which will be referred to hereinafter as the corporation, and to have the court render a mandatory injunction against the defendants requiring the corporation to maintain, control, and repair a drainage ditch and a creek within the district of the corporation so as to stop loss and damage caused by rain and erosion to the lands of plaintiff.

The action was tried to the court and judgment was rendered for damages in favor of the plaintiff and against the corporation for $15,000. It was further adjudged that the defendants were authorized and ordered to make a levy to satisfy the judgment for damages. The right of other landowners in the district to object to levy of assessment was preserved.

A motion for new trial was overruled, and from the order overruling the motion for new trial and the judgment the defendants have appealed.

The commencement and background of this case, to the extent necessary to set out here, is substantially as follows: The corporation came into being as a body politic on confirmation by the district court on October 28, 1910, pursuant to the provisions of Chapter 31, article 4, Comp. St. 1929, which chapter in all particulars of importance here was enacted in the year 1905. The duration of the life of the corporation was 50 years, or until October 28, 1960. The purpose of the corporation was to create a drainage district pursuant to the provisions of the chapter with power to conduct the functions therein specified.

By the chapter the board of supervisors was empowered to levy and collect an assessment to defray the costs necessary to create the improvement.

In addition to this, by section 31-463, Comp. St. 1929, the board of supervisors was empowered at any time after final construction, if the improvement should become out of repair, obstructed, inefficient, or defective for any cause, to order an assessment upon the lands

and property benefited by the system for the purpose of placing the same in proper and suitable condition for drainage purposes, using the original assessment upon the property in the district as a basis to ascertain the ratio that the separate tracts bear to the whole amount to be levied.

By section 31-468, Comp. St. 1929, such a district was made liable for all injuries and damages caused by the construction of such improvements arising by virtue of contract or tort.

The action here was commenced on July 18, 1959, which was during the life of the corporation, by the filing of a petition the effect of which is to say that the plaintiff was damaged within the meaning of Chapter 31, Comp. St. 1929, and also that within the meaning of the chapter he is entitled to have the corporation, through its board of supervisors, levy an assessment upon the property in the district to pay his damages.

Throughout the pleadings the parties refer to the governing body as the board of directors but obviously they mean supervisors. This departure will not be treated as having significance.

The defendants filed an answer in the case but it requires no specific consideration herein. This is true since the parties have by written stipulation agreed that the determination herein shall depend upon the answers to the two following questions:

"1. What is the effect of the expiration of the term of existence of the District as provided in its charter with respect to whether or not the plaintiff's action herein is abated?

"2. In the event a judgment were rendered against the defendant District in this cause, would the Board of Directors of said District have the lawful authority to levy a special assessment for the purpose of defraying the expense which would be involved by compliance with any decree herein awarding judgment in favor of the plaintiff?"

It is further stipulated that if the answers to the two questions are in favor of the plaintiff the judgment shall be in the amount of $15,000.

It is of course obvious that the defendants do not urge either that the plaintiff was not damaged, or that he would not have the right to have exacted of the defendants the mandatory relief he seeks to satisfy his damage, if proceedings had been concluded for those purposes before the expiration of the corporate life of the corporation. They contend only that no enforceable rights existed in favor of the plaintiff after the expiration of the corporate life of the district.

Nothing has been found in the chapter of the statutes which deprives a person in the situation of the plaintiff of the right to maintain an action against the defendants after the corporate charter lapsed. See Ch. 31, art. 4, Comp. St. 1929. It is true that in this chapter the right to maintain action against a district after expiration of a charter is not specifically authorized but, as pointed out in section 31-468 thereof, the corporation is liable for injuries and damages.

Sections 24-107, 24-108, and 24-113, Comp. St. 1929, which were in full force and effect when the corporation came into being, do clearly provide for action against a corporation after expiration of a charter or dissolution of a corporation. These provisions fully declare the right of the plaintiff to maintain the action here.

The Legislature in the year 1941 enacted what was denominated the General Corporation Law of the State of Nebraska. This was Laws 1941, chapter 41, page 158. By this action there was a general revision and a repeal of previously existing statutory provisions but all rights of parties under the previously existing provisions were preserved and protected. The provision which grants this protection is section 21-1,156, R. R. S. 1943, as follows:

"All corporations now organized under articles 1, 2 or 3 of Chapter 24, Compiled Statutes of Nebraska, 1929,

as amended, or any law which said articles may have replaced, shall operate under and be subject to the provisions of this act; Provided, that no rights, privileges and immunities vested or accrued by and under prior statutes repealed by this act, no suits pending, no rights of action conferred, and no duties, restrictions, liabilities and penalties imposed or required by and under such statutes shall be impaired, diminished or affected thereby."

This corporation was not organized under either article 1, 2, or 3, of Chapter 24, but was organized under article 4 of Chapter 31, Comp. St. 1929. The situation therefore is controlled and protected by the language which preserves and protects the rights of parties under any and all preexisting statutes.

In the light of these provisions and the admissions in the stipulation that the plaintiff was damaged, it appears that his action to determine the amount of his damage and to have judgment therefor was proper.

The decisions of this court also support this view. In Heenan & Finlen v. Parmele, on rehearing, 80 Neb. 514, 118 N. W. 324, it was said: "Under section 4112, Ann. St. 1907, a dissolved corporation may be sued in the corporate name and service made upon the trustee or person in charge of the assets."

This was approved in Ruplinger v. Ruplinger, 154 Neb. 394, 48 N. W. 2d 73, as follows: "In any event, the corporation even if dissolved could sue to recover upon a cause of action accruing in favor of the corporation. * * * Such corporation could likewise be sued in its corporate name after dissolution."

The first question submitted by the stipulation is, in the light of these observations, answered in favor of the plaintiff.

No case or statutory provision has been found in this jurisdiction declaring the answer to the second question, that is the question of whether or not, in case a judgment is rendered in favor of the plaintiff, a manda-

tory judgment may be rendered requiring the corporation through its officers to levy and collect an assessment upon the property in the district sufficient to satisfy the judgment.

In approaching an answer to this question it appears well to point out that, by the statute under which the corporation was created, it is a public corporation and a body politic. See § 31-468, Comp. St. 1929. This means, in this instance, that it is a collective body of the State of Nebraska politically organized and exercising political functions. See Black's Law Dictionary (3d ed.), p. 232.

It may be assumed that where a private corporation has become extinct, is without assets, and without a source from which to obtain assets with which to satisfy existing obligations of the corporation that an action may not be maintained against the corporation. Such a rule however does not apply to a public corporation which is a body politic. The general rule in the various jurisdictions is that it does have power to satisfy its obligations after lapse of its charter. A statement of this general rule is found in 2 McQuillin, Municipal Corporations (3d ed.), § 8.15, p. 435, as follows: "By virtue of the clauses in the federal and state constitutions forbidding the impairment of the obligations of contracts, either directly or indirectly, by legislative act or otherwise, all contracts by virtue of the force of organic law, survive the dissolution, and creditors may enforce their claims in any mode permitted by law. * * * All contracts made while the corporation was in existence survive the dissolution and may be enforced in equity, so far as to subject, for their satisfaction, any property possessed by the corporation at the time."

The subject of expiration of corporate charters and the evolution which has taken place is exhaustively covered in a monograph in 47 A. L. R., starting at page 1297 and ending at page 1569, and an annotation in 97 A. L. R., starting at page 477 and ending at page 504. Analysis of these discloses that the courts generally sup-

port the foregoing pronouncements from McQuillin.

In Diekroeger v. Jones, 235 Mo. App. 1117, 151 S. W. 2d 691, a case bearing upon the precise matter presented by the second question contained in the stipulation, the court, after reviewing texts, the decisions of the courts of Missouri, and those of other jurisdictions, said: "We adhere to the doctrine announced by the Supreme Court of Texas that certain residuary powers remained unimpaired in the supervisors when the charter expired and that the court can compel them to perform the duties laid upon them by statute, even though the charter has expired." This pronouncement was made in a jurisdiction where, unlike this jurisdiction, there was no statute granting a right of action against a corporation after the expiration of the corporate charter. See, also, Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197; Drane v. Weston, 276 Ky. 810, 125 S. W. 2d 722.

The conclusion reached as to the second question presented by the stipulation is that it must also be answered in favor of the plaintiff.

Accordingly the judgment of the district court is affirmed.

AFFIRMED.

MARVIN C. NIEMEYER, APPELLEE, V. CLARENCE W. FORBURGER, APPELLANT, IMPLEADED WITH CORNHUSKER HEATING AND AIR-CONDITIONING, APPELLEE.
112 N. W. 2d 276

Filed December 8, 1961. No. 35051.

1. **Negligence.** Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances.
2. ———. Ordinary care is that amount or degree of care which common prudence and a proper regard for one's own safety and

the safety of others would require under the circumstances shown in the evidence.

3. ———. Invitees are those who are expressly or by implication invited to come upon the premises of another.
4. ———. The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition.
5. ———. The possessor of land is subject to liability for bodily harm caused to a business invitee by a natural or artificial condition thereon if he knows, or by exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk.
6. **Master and Servant: Negligence.** For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible.
7. **Workmen's Compensation.** Section 48-118, R. R. S. 1943, provides that where a third person is liable to an employee for an injury, the employer should be subrogated to the right of the employee. This section of the statutes does not prevent an employee from suing a third person for his injuries received in an accident, but it requires his employer, having paid compensation, to be made a party to such an action.
8. **Trial: Appeal and Error.** It is not error to refuse a requested instruction if the substance of the requested instruction is covered by other instructions given.
9. ———: ———. Instructions given to a jury must be construed together and if, when considered as a whole, they properly state the law it is sufficient.
10. **Trial: Damages.** A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law.

APPEAL from the district court for Lancaster County: ELMER M. SCHEELE, JUDGE. *Affirmed.*

Lester L. Dunn and *Thomas J. Gorham,* for appellant.

Robert R. Camp, for appellee Niemeyer.

Paul E. Haberlan, for appellee Cornhusker Heating and Air-Conditioning.

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

MESSMORE, J.

This is an action at law brought by Marvin C. Niemeyer, plaintiff, against Clarence W. Forburger, hereinafter referred to as defendant, and Cornhusker Heating and Air-Conditioning, also a defendant, to recover damages for injuries sustained by the plaintiff while working in a house being built by the defendant when a series of steps collapsed causing the plaintiff to fall and become injured. At the close of the plaintiff's case the defendant moved for an order to dismiss the plaintiff's cause of action, which motion was overruled. At the conclusion of all of the evidence the defendant moved to dismiss the plaintiff's cause of action and for a directed verdict. These motions were overruled. The plaintiff moved for a directed verdict, which was overruled. The jury returned a verdict in favor of the plaintiff, fixing the amount of his recovery in the sum of $5,000. The defendant filed a motion for new trial, which motion was overruled. Defendant perfected appeal to this court.

The plaintiff's petition in substance alleges that on November 18, 1959, he was an employee of Cornhusker Heating and Air-Conditioning, and had assisted in the installation of a central heating and air-conditioning system in a residence being constructed by the defendant in the city of Lincoln; that on that date the plaintiff returned to the premises owned by the defendant for the purpose of adjusting the heating system; and that as the plaintiff stepped on the top step of a stairway leading from the garage level to the basement, the stairway collapsed and the plaintiff fell to the cement floor of the basement receiving injuries which were proximately caused by the negligence of the defendant in the construction and maintenance of the stairway. The plaintiff charged the defendant with negligence substantially in the following particulars: (a) Failure to install and

construct said stairway in a proper and safe manner for persons properly using the same; (b) failure to maintain said stairway in a proper and safe manner; and (c) failure to warn the plaintiff of the alleged unsafe and dangerous condition of the stairway when the defendant knew or, in the exercise of ordinary care, should have known of said unsafe and dangerous condition. The petition detailed the injuries received by the plaintiff due to the accident, the extent of the same, and the expenses relative thereto, including loss of wages.

The defendant Cornhusker Heating and Air-Conditioning in its answer set forth certain payments made to the plaintiff in compliance with the Nebraska Workmen's Compensation Act, and prayed that it be subrogated to the rights of the plaintiff in the amount of $546.91.

The defendant's answer was a general denial of all of the allegations of the plaintiff's petition.

The record discloses that on November 18, 1959, Forburger was the owner of property located at 2815 South Forty-second Street in Lincoln, Nebraska, was building a house on such property for his own and his family's use, and had hired Cornhusker Heating and Air-Conditioning to do some furnace and air-conditioning work on the premises.

The plaintiff testified that he was a sheet metal worker whose work consisted of the installation of ducts, fans, air-conditioning, or anything that has to do with metal; that he installed a furnace at 2815 South Forty-second Street a week prior to November 18, 1959; and that the house being constructed there was a split-level type. He stated that this meant that from the ground level there was a half level up to the living part of the house and another half level up to the sleeping quarters, and also from the ground level there was a half level down to the basement. He testified that he was instructed by his employer, Cornhusker Heating and Air-Conditioning, to return to the premises to

finish some duct work in the garage part of the house which had been taken down on account of some overhead doors, and to check the furnace and air-conditioning; that he noticed some steps in place from the basement level up to the first-floor level; that he had occasion to walk over them; that when he negotiated these steps he went from the garage level to the first-floor level; that he walked up the steps to plug in a drop-cord on the first-floor level; that he then walked down to the garage level, finished his work, and walked back up the steps to the first floor to unplug the drop-cord and get a set of plans; and that as he stepped on the first step below the first-floor level the stairway collapsed and he fell to the basement level.

On cross-examination the plaintiff testified that before November 18, 1959, he had been on the premises 3 full working days; and that from the garage level to the first floor there was a plank to walk on at that time.

The defendant testified that the steps were reinstalled by Kermmoade who suggested that the steps would be better than the 2 x 6 plank, and would be safer. Kermmoade was there for the purpose of cleaning up after the workmen because they had left considerable debris. On cross-examination this witness testified that he helped Kermmoade to lift the stairs, but that Kermmoade nailed the steps, and he saw Kermmoade do it; that he did not inspect the stairway after the installation; that he was the president of the Forburger Stone Company; that Kermmoade was an employee of the company; that the payroll was kept in the office of the company; that he suggested that they might set up the steps temporarily; and that he helped Kermmoade move the steps because they were too heavy for one man.

Ben U. Kermmoade testified that he had occasion to go to the premises at 2815 South Forty-second Street and help clean up debris; that he had also helped in putting some sheeting on the roof; that he was ordered

to go to the premises by the defendant; that when he was on the premises to clean up the debris, he observed some steps lying on the garage floor; that he asked the defendant why they didn't reinstall the stairs; and that the defendant thought it was all right and would be safer to climb than the plank that they had in place. Kermmoade further testified that he and the defendant lifted the stairs and put them in place; that the steps were nailed with three nails, two on one side and one on the other side of the steps; and that all of his compensation came from the defendant.

Robert C. Newell testified that his business was building homes and he had been in that business for approximately 32 years; that he had a contract with the defendant to frame and finish a house at 2815 South Forty-second Street in Lincoln; that during his work on the house he had occasion to construct a series of steps, or a stairway, which was used to enter the basement or the main floor from the garage level; and that the finished set of steps consisted of 1 x 12s on the side, rabbeted out for one 1⅛ inch straight tread with ¾ square riser, a finished set of steps. They were fastened to the framework on the side of the building. The building was cut out and the framework was fit in snugly. They used finishing nails, which were 8-penny nails about 2¼ inches in length. At the top part of the stairway they used six nails on each side, and at the bottom there were another six, and if there was any place to fasten the steps in between, nails would be used in that place. A series of 24 finishing nails was used. He was helped in the installation of the stairway by George Gary who was working with him at the time. Subsequently the stairs were removed and placed on the garage floor. This witness further testified that he was working on the premises on November 18, 1959; that he saw the plaintiff working there, and saw him fall; that he first observed the plaintiff as he was proceeding through a narrow hallway leading to the steps;

and that he started down the steps, the steps collapsed, and he fell. This witness inspected the steps, or the stairway, immediately after the accident. He found that there were two finishing nails at the top of the stairs on the west side and one finishing nail on the east side of the steps; that there were no other nails anyplace in the series of steps to hold them to the sides; that these nails would have to go through a ¾ inch thickness in order to fasten on the siding; that the 8-penny nails, which were 2¾ inches long, extended 1¾ inches into the sidings where they were fastened; that these were temporary stairs; and that more nails should have been used on these stairs.

George Gary testified that he worked with Newell on the construction of the Forburger house; that he was standing at the head of the stairs; that he saw the plaintiff on the stairway and saw him fall onto the cement floor; that the stairs gave way; and that he and Newell looked at the stairs, and the steps were nailed with three 8-penny nails, two nails on one side and one nail on the other.

There is also evidence of Kermmoade to the effect that 10-penny nails were used, which would be longer than those testified to by Newell and Gary.

The defendant assigns as error that the trial court erred in refusing to dismiss the plaintiff's action against the defendant Forburger. This is based upon the proposition that Kermmoade was an employee of Forburger Stone Company, was paid by it, and was not an agent of Forburger at the time he was called to the house to clean up the debris. The defendant also contends that the evidence is insufficient to show negligence on his part; that there was no duty owed by him to the plaintiff; and that there was no agency relationship between himself and Kermmoade. We deem the following to be applicable.

Negligence is the doing of something which an ordinarily prudent person would not have done under the

same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances. Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557.

Ordinary care is that amount or degree of care which common prudence and a proper regard for one's own safety and the safety of others would require under the circumstances shown in the evidence. See, City of Mankato v. Barber Asphalt Paving Co., 142 F. 329; Cornovski v. St. Louis Transit Co., 207 Mo. 263, 106 S. W. 51.

In 35 Am. Jur., Master and Servant, § 161, p. 590, it is said: "Where the premises on which the stipulated work is executed remain under the control of the principal employer while the contract is in the course of performance, a servant of the contractor is in the position of an invitee, and as such entitled to recover for any injury which he may sustain by reason of the abnormally dangerous condition of the premises or plant thereon, if the evidence shows that the principal employer was, and the servant was not, chargeable with knowledge, actual or constructive, of the existence of that condition." See, also, Annotation, 44 A. L. R. 982-989; Annotation, 20 A. L. R. 2d 873, 899.

In Kruntorad v. Chicago, R. I. & P. Ry. Co., 111 Neb. 753, 197 N. W. 611, while the plaintiff was descending a stairway that had been erected against an embankment on the defendant's right-of-way, at a point near the intersection of Twenty-fifth and Monroe Streets in South Omaha, one of the steps gave way, causing plaintiff to fall and receive injuries. This court said: "There is much confusion from the failure of courts to distinguish between a license and an invitation, and particularly between an implied license and an implied invitation. An invitation is inferred where there is a common interest or mutual advantage, or where an owner or occupant of premises, by acts or conduct, leads another to believe the premises, or something thereon,

were intended to be used by such other person; that such use is not only acquiesced in by the owner or occupant, but is in accordance with the intention or design for which the way, place or thing was adapted or prepared or allowed to be used; while a license is implied where the object is the mere pleasure, convenience or benefit of the person enjoying the privilege." See, also, Shults v. Chicago, B. & Q. Ry. Co., 83 Neb. 272, 119 N. W. 463.

In Morse v. Gray, 166 Neb. 557, 89 N. W. 2d 842, it is said: "Invitees are those who are expressly or impliedly invited as a customer to a store. The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition. * * * A possessor of land is subject to liability for personal injuries to business visitors by a natural or artificial condition thereon if he knows, or by exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them." See, also, Restatement, Torts, § 343, p. 938.

In Dafoe v. Grantski, 143 Neb. 344, 9 N. W. 2d 488, quoting from LaFleur v. Poesch, 126 Neb. 263, 252 N. W. 902, this court stated: " 'The general rule of law applicable to this class of cases is accurately and concisely stated in Stone v. Hills, 45 Conn. 44, 29 Am. Rep. 635, and is as follows: "For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible."

" 'Whether the act was done in the execution of the master's business, within the scope of his employment,

is a question of fact. The rule cannot aid in the determination of the fact. Each case must be determined with a view to the surrounding facts and circumstances, the character of the employment and the nature of the wrongful act. Whether the act was or was not such as to be within the scope of his employment is, ordinarily, one of fact for the determination of the jury. 18 R. C. L. 795, sec. 254.' LaFleur v. Poesch, 126 Neb. 263, 275, 252 N. W. 902. See, also, 22 A. L. R. 1404; 45 A. L. R. 482; 68 A. L. R. 1055; 80 A. L. R. 727; 122 A. L. R. 863."

In the instant case the evidence discloses that Kermmoade was instructed to go to the premises owned by the defendant to do clean-up and carpenter work. The defendant's testimony is to the effect that he instructed Kermmoade to go to the premises. In fact, he took Kermmoade to the premises. They both helped in the installation of the stairway with Kermmoade nailing the steps of the stairway in the manner heretofore mentioned. The defendant observed him as he was doing it, and the defendant accepted the work as performed by Kermmoade. This work was within the scope of Kermmoade's employment in helping with the building of the home for the defendant. Kermmoade's work was warranted by the express authority conferred upon him.

The same rules of negligence apply to Kermmoade as to the defendant. Kermmoade, by not fastening the steps with sufficient nails to hold them in place and by placing the steps into position for temporary use, was aware that they were not right and that the tread would tilt inward. By such action the jury could well find that Kermmoade did not act as an ordinarily prudent person would have done under the same or similar circumstances.

Kermmoade's acts were within the express and implied authority granted him by the defendant in the execution of the defendant's business, and within the scope of Kermmoade's employment as he was being

instructed to perform; and for the acts of Kermmoade as a servant, the defendant is responsible and is liable to others who are harmed by the negligent acts of his servant.

The evidence was sufficient to submit the case to the jury. The defendant's assignment of error cannot be sustained.

The defendant assigns as error that the trial court erred in refusing to allow the defendant to introduce exhibit No. 9 showing the amount of compensation, hospital, and medical expense paid by Employers Mutual Casualty Company instead of Cornhusker Heating and Air-Conditioning who is not the real party at interest so far as this action is concerned.

Section 48-118, R. R. S. 1943, provides in part: "Where a third person is liable to the employee * * * for the injury * * * the employer shall be subrogated to the right of the employee * * * against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee * * * but such employer may recover any amount which such employee * * * should have been entitled to recover. * * * Provided, however, that nothing in this section or act shall be construed to deny the right of an injured employee * * * to bring suit against such third person in his own name * * * based upon such liability, but in such event an employer having paid or paying compensation to such employee * * * shall be made a party to the suit for the purpose of reimbursement, under the above provided right of subrogation, of any compensation paid."

This section does not prevent an employee from suing a third party responsible for his injury in his own name, but requires that the employer, having paid compensation, be made a party. See Oliver v. Nelson, 128 Neb. 160, 258 N. W. 69.

In Goeres v. Goeres, 124 Neb. 720, 248 N. W. 75, this court referred to what is now section 48-118, R. R. S.

1943, and stated: "* * * statutes which allow the employee to recover compensation from the employer and also to sue the tort-feasor, but, in case his recovery from the tort-feasor is greater than the amount paid in compensation, the employer is subrogated to that extent, which is the rule in Nebraska. The rights of the employee or his personal representative are not two separate remedies for the same wrong, for the right against the tort-feasor is a common-law remedy calculated to give damages for an injury caused by a wrong-doer. The right for compensation against the employer who is guilty of no wrong is not intended to make whole the injury to the employee, for compensation depends upon the fact that one was injured while in employment, and is measured, not by the extent of the injury suffered, but by the amount of the employee's weekly wages.

"When the accident occurs, the employee is sometimes forced by financial circumstances to take immediate compensation, and this does not, under the Nebraska law, deprive him, because of this necessity, of recovering from the tort-feasor his larger common-law liability." See, also, Annotation, 67 A. L. R. 249.

We find no merit to the defendant's contention that exhibit No. 9 should have been admitted in evidence. The trial court was correct in rejecting this exhibit.

The defendant predicates error on the part of the trial court in refusing to give instructions Nos. 1 and 2 requested by the defendant.

It is a well-established rule that it is not error to refuse a requested instruction if the substance of the requested instruction is covered by other instructions given. See Johnson v. Union P. R. R. Co., 111 Neb. 196, 196 N. W. 140.

The defendant does not challenge any of the instructions given by the trial court.

Instructions given to a jury must be construed together and if, when considered as a whole, they properly

state the law it is sufficient. Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831.

We conclude that the defendant's assignment of error relating to requested instructions offered but refused by the trial court is without merit.

The defendant assigns as error that the amount awarded the plaintiff was excessive based upon the time lost, and hospital and medical expense involved.

Dr. Lynn E. Sharrar testified that he examined the plaintiff on November 18, 1959, at St. Elizabeth Hospital; that the plaintiff had five fractured ribs; that the plaintiff was having severe pain due to his injury, and one of his ribs, the sixth one, was protruding in the wall of the left chest; that an operation was performed on the tenth day after the injury to remove a portion of the rib that was protruding into the skin; that there still remains a protrusion of the rib into the skin area below the one removed; that with a multiple fracture the plaintiff is bound to have muscle injury and chest injury, that is, injury to the tissue or to the frame of the chest, especially if he has to do stooping or reaching he will have moderate discomfort; and that he characterized plaintiff's injury as permanent in nature.

Dr. Paul Goetowski examined the plaintiff on February 23, 1961, 15 months after the accident and injury, and found upon palpation that there was a sharp protuberance from an old fracture that was quite tender, and that palpation in the spaces between the ribs indicated tenderness. He testified that the plaintiff would have radiation of the pain in his chest to other parts of his body, especially upon coughing or stretching.

Louis Meinecke was a fellow worker of the plaintiff and worked with him up until about 4 weeks prior to the date of trial on March 15, 1961. He testified that during this time he observed that the plaintiff was favoring his left side and seemed to have a lot of pain every once in a while and would have to have some assistance.

"A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law." Husak v. Omaha Nat. Bank, 165 Neb. 537, 86 N. W. 2d 604.

The question of the amount of damages is one solely for the jury, and its action in that respect may not be disturbed on appeal when there is no showing of passion, prejudice, mistake, or that the jury disregarded the evidence or controlling rules of law.

For the reasons given in this opinion, the judgment of the trial court is affirmed.

AFFIRMED.

CITY OF BEATRICE, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. ELMER L. WILLIAMS ET AL., APPELLANTS.
112 N. W. 2d 16

Filed December 8, 1961. No. 35056.

1. **Municipal Corporations.** Reasonable setback lines may be adopted by ordinance of a city.
2. ———. It is uniformly held that ordinances have the same force and effect within the corporate limits as do laws passed by the Legislature.
3. ———. The construction and effect of a building permit are determined by its terms and by the ordinance and law under which it is issued. Statutory provisions and ordinances limiting what may be authorized by permit become part of the permit as effectually as if written into it.
4. **Municipal Corporations: Equity.** The doctrine of laches has no application to the enforcement by a municipality of its ordinances.
5. **Municipal Corporations: Estoppel.** Ordinarily a municipal corporation cannot be estopped from enforcing a valid ordinance relating to setback lines.
6. **Municipal Corporations.** The term "street" is not confined to that portion of the public way which is devoted to vehicular traffic; it embraces everything from property line to property line.

APPEAL from the district court for Gage County: ERNEST A. HUBKA, JUDGE. *Affirmed as modified.*

Max G. Towle and *Carl H. Peterson,* for appellants.

Ann P. Carstens, for appellee.

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

MESSMORE, J.

This is an action brought by the City of Beatrice, a city of the first class, plaintiff, against Elmer L. Williams and Maxine C. Williams, defendants, in the district court for Gage County, the purpose of the action being to require the defendants to remove a part of a building which had been built in violation of the zoning ordinances of the city, and to enjoin the defendants from operating and conducting a business thereon. The trial court found that a building permit dated April 20, 1950, was a valid building permit; that a building permit dated April 25, 1956, was a valid building permit; that the north line of the defendant's property is the front line of such property; that the setback requirement under the ordinances of the city requires the defendants' building to be set back 20 feet from the north property line of the defendants' property; that the defendants knowingly violated the 20-foot setback provision of the city ordinance on the property owned by them and said building extends north beyond the setback line; that the defendants should be required, within 30 days of the date of the judgment, to remove all that portion of the building which extends north of the setback line; and that the defendants should be forever and perpetually enjoined from using any area north of said 20-foot setback line for business purposes of any kind or nature. Judgment was rendered in accordance with the findings.

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

The plaintiff's petition, insofar as necessary to be considered, claims that the defendant Elmer L. Williams, during July 1957, built an addition onto the northeast side of an existing building in violation of the setback requirements contained in the city ordinances, and prayed that the defendant be required to remove that part of said building which was constructed in violation of the city ordinances, and be enjoined from the operation of the business thereon.

The defendants, by amended answer to the plaintiff's petition, denied each and every allegation contained therein, and alleged that they were issued a building permit by the city clerk on April 20, 1950; that subsequent thereto they were issued another building permit by the city clerk on April 25, 1956; that pursuant to the latter building permit the defendants, on or about July 15, 1957, built an addition onto the northeast side of the existing building as provided for under said building permit; and that the plaintiff was estopped both by law and equity from proceeding further in the case.

The plaintiff, by reply, denied each and every allegation of the defendants' amended answer except that on or about July 15, 1957, the defendants built an addition onto the northeast side of the existing building.

The defendants' assignment of error is that the judgment of the trial court is contrary to the evidence and the law.

On July 13, 1948, Kyles and Wright subdivision was made a part of the city of Beatrice. The proceedings with reference to the defendants erecting a building to operate a drive-in lunch and soft drink business on the property purchased by them in such subdivision met all of the requirements of the city ordinances and the building permit at that time, which was on about April 20, 1950.

The record shows that the defendants' building is in a residential district of the city. The record also shows that on April 25, 1956, an application was filed by Elmer

L. Williams to provide for an addition to his place of business called the Rancho, on the southeast side of the original building, of a size of 15 x 24 feet, with the distance in feet of the front of the building from the front lot line indicated as "No change," and the address given as 2005 East Court Street. The addition actually constructed was 25 x 28 feet.

On April 25, 1956, a building permit was issued to Elmer L. Williams to construct an addition to his original building. The size of the addition was to be 15 x 24 feet, located on the north 150 feet of the west 150 feet of Block 2, Kyles and Wright subdivision, at 2005 East Court Street. This permit was granted on the express condition that Elmer L. Williams, in the erection of said building, should conform in all respects to the ordinances of the city of Beatrice regulating the construction of buildings in said city, and might be revoked at any time upon the violation of any of the provisions of said ordinances. The estimated cost of said addition was $500, and the completion date was to be on or before June 1, 1958.

George R. Miller was employed by the city in 1957 as general manager of the board of public works. He testified that during the summer of 1957, he went with the mayor of the city to investigate a reported violation by the defendants relating to the use of their property, and while on the defendants' property he observed an excavation north and east of the original building for footings which extended the building; and that he made an estimate of the extension with reference to the 20-foot setback requirement and determined that this construction extended considerably into the setback as provided by the ordinances of the city. In a conversation it was pointed out to Elmer L. Williams that a minimum setback of 20 feet was required in a residential district and that the construction he was doing was in violation of that requirement. It was suggested by this witness, and perhaps the mayor of the city, that the

best thing for Williams to do would be to observe the present setback and build the building due east, and not to the north, because if he proceeded to build in the manner in which he was building, he would be in violation of the setback requirement, and the best thing to do was to stop such construction.

On cross-examination this witness testified that Court Street, running east and west north of the Williams property, was one of the main thoroughfares of the city and a regular highway; and that he took no action to stop the construction and made no report to the city council.

Allen Davison testified that in 1957 he was the mayor of the city and was generally responsible for the enforcement of the city ordinances; that he went to the defendants' property, listed and designated as 2005 East Court Street, in the summer of 1957, in response to a report relating to a violation of the city ordinances; that he observed that Elmer L. Williams had a trench excavated and a cement base for putting in concrete blocks; that at that time it looked to him as if a violation of the city ordinances had been committed; and that he advised Mr. Williams that he thought Williams was in violation of the city ordinance relating to the setback line and should not proceed with the construction until he found out for sure. This witness was not sure as to whether or not Mr. Williams had violated the setback provided for by the ordinances, and he later went back to the defendants' property with Mr. Miller, and advised Mr. Williams to get at least on or back of the setback line, and that he would have to go further south to do that.

On cross-examination this witness testified that the building permit did not authorize the defendants to build to the north on their property; and that he objected to the defendants building to the north.

The testimony of the defendant Elmer L. Williams was to the effect that he informed both Miller and

Davison, the mayor of the city, that his frontage was on Twentieth Street, which runs north and south; that he, in constructing the addition to his original building, obeyed all of the ordinances of the city relating to the setback from the property lines; that he had heard nothing about this matter until the city started this action; that his addition to the original building was started in July 1957 and completed in September 1957; and that the contractor and the workmen worked on the addition during the daytime for that period of time.

There is also evidence to the effect that George R. Miller, manager of the board of public works for the city, was in charge of building permits and of inspection of electrical wiring, plumbing, and buildings; and that in his line of work he traveled around the city of Beatrice and was aware of what was going on with reference to building. The evidence shows that George R. Miller went by the defendants' place of business infrequently; that during the construction of the addition to the defendants' original building he had no occasion to travel in that direction; and that he did not believe he passed the defendants' place of business more than once or twice during such construction.

The ordinances of the city which are involved herein are in substance as follows:

Ordinance No. 4-401 provides that any person or persons intending to construct an addition to a building in the corporate limits of the city shall, before proceeding with said work, file in the office of the city clerk a written application designating the kind of addition he intends to erect or make, materials of which the same is to be composed, and the legal description and location of the real estate, the part or portion of the real estate to be occupied by the addition, and the probable cost thereof.

Ordinance No. 13-301 provides that buildings and houses shall be numbered.

Ordinance No. 13-303 provides that it shall be the

duty of the city clerk to assign the proper numbers to the several buildings, and upon the erection of a new building to assign the proper number of said new building and to give notice to the owner or owners, occupant or occupants of the same.

In the instant case there is no question but that the original building constructed by the defendants, which fronted on East Court Street, was numbered 2005.

Ordinance No. 16-401 provides in substance that in the residence district no enclosure wall of any building shall be nearer than 20 feet from the street line on the front of any lot, and that no building hereafter erected or altered shall project beyond the setback line so established.

Section 19-913, R. R. S. 1943, provides that the proper local authorities of the municipality may institute appropriate proceedings to prevent unlawful erection, construction, reconstruction, alteration, repair, maintenance or use, to restrain, correct, or abate such violation, and to prevent any illegal act, conduct, business or use in or about such premises.

In McCavic v. DeLuca, 233 Minn. 372, 46 N. W. 2d 873, it was held that reasonable setback lines may be adopted by ordinance of a city. The court said: "Neither are plaintiffs estopped from now seeking equitable relief. Defendant claims that plaintiffs should be denied a mandatory injunction because they did not proceed expeditiously in preventing the completion of his building by obtaining a restraining injunction, and that it would now cause defendant undue hardship to remove the protruding portion of his building. * * * The building inspector for the city advised him that he could not build beyond the setback line. In his application for a permit, he stated that he would abide by the ordinances of the city. In spite of all these warnings and agreements, he proceeded to build into an area which he knew was forbidden ground. If there is any hardship caused by the enforcement of this ordinance, it

has been brought about entirely by defendant's stubborn insistence upon proceeding, in violation of the ordinance, in the face of protests and warnings by everyone who had a right to protest." The foregoing language is applicable to the case at bar.

In Boardman v. Davis, 231 Iowa 1227, 3 N. W. 2d 608, the court said: "It is uniformly held that ordinances have the same force and effect within the corporate limits as do laws passed by the legislature. McQuillin on Municipal Corporations, 2d Ed., 1939 Revision, Section 674. Therefore, the provisions of the ordinance will be presumed to have been known to defendants."

In 9 McQuillin, Municipal Corporations (3d ed.), § 26.215, p. 511, it is said: "The construction and effect of a building permit are determined by its terms and by the ordinance and law under which it is issued. * * * Statutory provisions and ordinances limiting what may be authorized by permit become part of the permit as effectually as if written into it."

The defendants raise the issues of estoppel and laches.

With reference to laches, in City of Everett v. Capitol Motor Transportation Co., Inc., 330 Mass. 417, 114 N. E. 2d 547, the court said: "As to the finding of laches, it is enough to say that the doctrine of laches has no application to the enforcement by a municipality of its ordinances. Lincoln v. Giles, 317 Mass. 185."

Ordinarily a municipal corporation cannot be estopped from enforcing a valid ordinance relating to setback lines. See, City of Raleigh v. Fisher, 232 N. C. 629, 61 S. E. 2d 897; Donovan v. City of Santa Monica, 88 Cal. App. 2d 386, 199 P. 2d 51; 8 McQuillin, Municipal Corporations (3d ed.), § 25.349, p. 855.

The term "street" is not confined to that portion of the public way which is devoted to vehicular traffic; it embraces everything from property line to property line. The defendants' contention with reference to the street being confined to vehicular traffic only is without merit under the above definition of a street.

From a review of the evidence and authorities, we conclude that the trial court's judgment was correct in all respects except by perpetually enjoining the defendants from the use of the north 20 feet of the property described above for business purposes of any kind or nature. The defendants are not permitted to have any building construction of any kind within 20 feet north of the setback line as provided by the city ordinances. However, the use of the north 20 feet shall not be denied to the defendants for parking purposes or other purposes relating to their business, except as heretofore stated.

We affirm the judgment of the trial court as modified, and remand the cause with directions to render judgment in conformity with this opinion.

AFFIRMED AS MODIFIED.

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6. Where an issue is treated by the parties at the trial as though it were controverted, even though not sufficiently pleaded, it will be so considered in the Supreme Court. *Rickertsen v. Carskadon* 46

7. It is error to give an instruction to a jury after it has retired to deliberate out of the presence of the parties and their counsel, but if it clearly appears that prejudice did not and could not flow therefrom, it is error without prejudice and not ground for reversal. *Barry v. Moore* 57

8. The trial court has the duty to instruct the jury on issues presented by the pleadings and evidence, whether requested to do so or not, and a failure to do so constitutes prejudicial error. *Barry v. Moore* 57

9. Affidavits used in the trial of issues of fact must be preserved in the form of a bill of exceptions in order to be available to the complaining party on appeal or petition in error. *Wolff v. State* 65

10. Where a party has sustained the burden of a trial and has succeeded in securing the verdict of a jury on controverted issues of fact, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Langford v. Ritz Taxicab Co.* 153

11. Where in an action for wrongful death the evidence is sufficient to sustain the verdict of the jury under the limited liability provisions of the Wrongful Death Statute, the Supreme Court will not, in the absence of prejudicial error, interfere with the verdict and judgment, unless it is shown to be clearly wrong. *Langford v. Ritz Taxicab Co.* 153

12. Rule for trial of equity case de novo in Supreme Court stated. *Beebe v. Reichert* 172
Dartmouth College v. Rose 764

13. The rulings of a district court cannot be reviewed in the Supreme Court upon appeal before a judgment or final order has been entered in the action in the district court. *Rhodes v. Houston* 177
14. An appeal to the Supreme Court cannot be taken from an order or judgment of a district court in a habeas corpus proceeding where the order or judgment does not conclude or terminate the proceeding. *Rhodes v. Houston* 177
15. A party requesting instructions on a certain theory cannot be heard to complain on appeal that the trial court gave other instructions on the same theory. *Ballantyne v. Parriott* 215
Stevens v. County of Dawson 585
16. When a theory on any issue is relied upon by a party at the trial as the proper one, it will be adhered to on appeal without regard to its correctness. *Ballantyne v. Parriott* 215
17. A party cannot be heard to complain of an error which he himself has been instrumental in bringing about. *Ballantyne v. Parriott* 215
18. The district court on appeal has jurisdiction to examine and judicially ascertain the status of the account of a guardian. *Finn v. Whitten* 282
19. Neither the county court nor the district court on appeal has jurisdiction to render a money judgment against the guardian and in favor of the guardianship estate in the absence of proceedings involving finality of accounting at the time or ultimate finality in the county court. *Finn v. Whitten* 282
20. Review in the district court and in the Supreme Court of action of the State Real Estate Commission is required to be de novo. *Gillespie v. State Real Estate Commission* 308
21. On any appeal to the Supreme Court in a workmen's compensation case, the cause will be considered de novo upon the record. *McDuffee v. Seiler Surgical Co., Inc.* 325
22. The Supreme Court cannot determine whether counsel was guilty of misconduct while presenting his opening argument to a jury where the bill of exceptions does not contain all of such opening argument to which objection is made. *Garska v. Harris* 339
23. It is presumed in an action at law that controverted facts were decided by the jury in favor of the successful party, and its finding based on con-

flicting evidence will not be disturbed unless clearly wrong. *Pearson v. Schuler* 353
Hancock v. Parks 442

24. If the proceedings subsequent to conviction are erroneous, such errors can be reviewed and corrected by proceedings in error in the regular course of the law, but not by the writ of habeas corpus. *Rhodes v. Sigler* 439

25. For an error at law occurring at the trial to be considered by the Supreme Court, the alleged error must be properly presented to the trial court and properly preserved, otherwise the defendant is ordinarily precluded from raising it on appeal. *Hancock v. Parks* 442

26. Function of the Supreme Court in passing on sufficiency of evidence in jury case stated. *Hancock v. Parks* 442

27. It is not the province of the Supreme Court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. *Hancock v. Parks* 442

28. A party cannot complain of the giving of an instruction in harmony with one which he requested. *Spani v. Whitney* 550

29. One who at the close of a trial admits that there is evidence to establish an issuable fact in accord with a requested instruction cannot afterward be heard to say that there was no evidence received tending to prove that fact. *Spani v. Whitney* 550

30. The refusal to give an instruction is not reviewable where it was not assigned as error in the motion for new trial. *Stevens v. County of Dawson* 585

31. On dismissal of case at close of plaintiff's evidence the Supreme Court, on review, is required to resolve every controverted fact in his favor and to give him the benefit of every reasonable inference which may be deduced from the evidence. *Hutsell v. Edens* 592

32. 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 the Supreme Court for review. *Bland v. Fox* 662

33. Where the mandate of the Supreme Court is indefinite, the opinion of the court should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or

the action to be taken thereon. This is so, whether or not a copy of the opinion is attached to the mandate, if it is published in the court's reports. *Fuchs v. Parsons Constr. Co.* 719

34. It will not be presumed that passion and prejudice influence the action of jurors, but it must be affirmatively shown before a verdict will be disturbed. *Smith v. Damato* 811

35. Generally, the burden is on the appellant to show that the trial court erred in charging the jury. *Smith v. Damato* 811

36. A judgment of the district court is presumed to be correct. A party assailing the correctness of it must assume the burden of pointing out specifically the rulings of which he complains and the mistake made by the court. *Smith v. Damato* 811

37. An issue not raised by the pleadings and proof in the district court cannot be raised for the first time on appeal. *Maryland Cas. Co. v. Munnelly* 827

38. The submission of issues to a jury which find no support in the evidence is reversible error. *Swanson v. Murray* 839

39. The time for appeal from an order of the railway commission runs from the date that the parties are notified of the order. *Denver Chicago Transp. Co., Inc. v. Poulson* 862

40. On an appeal to the Supreme Court from an order of the railway commission in proceedings upon an application for a certificate of public convenience and necessity, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrary. *Denver Chicago Transp. Co., Inc. v. Poulson* 862

41. It is not error to refuse a requested instruction if the substance of the requested instruction is covered by other instructions given. *Niemeyer v. Forburger* 876

42. Instructions given to a jury must be construed together and if, when considered as a whole, they properly state the law it is sufficient. *Niemeyer v. Forburger* 876

Architects.

1. An architect employed by the owner to prepare plans and specifications, to supervise construction, and

to interpret the plans and specifications, is the agent of such owner. *Fuchs v. Parsons Constr. Co.* 719
2. In the absence of fraud or bad faith, the architect's certificate of compliance is ordinarily a defense to a claim for noncompliance with the plans and specifications. *Fuchs v. Parsons Constr. Co.* 719

Assignments.
1. An assignee generally acquires no greater right than that possessed by the assignor. *Mid-America Appliance Corp. v. Federated Finance Co.* 270
2. An assignee stands in the shoes of the assignor and is bound by the terms of the contract to the same extent as the assignor. *Mid-America Appliance Corp. v. Federated Finance Co.* 270

Attorney and Client.
1. Recovery of expenses and attorney's fees, in action brought on behalf of insured automobile owner which insurance company refused to defend, is not based on the relation of attorney and client, but on the equitable theory that one who incurs expenses for the recovery of money for the benefit of a holder of a right of equitable subrogation should be permitted to reimburse himself for the share of the expense that was for the benefit of the holder of the subrogation right. *United Services Automobile Assn. v. Hills* 128
2. The recovery of expenses including attorney's fees in declaratory judgment proceeding is not a claim in which an attorney's fee can be allowed as a part of the costs within the purview of small claims statute. *United Services Automobile Assn. v. Hills* 128
3. There is no statute providing for the allowance in a divorce suit of an attorney's fee against the wife, or fixing the amount which the husband is to pay his own attorneys. *Mislivec v. Mislivec* 290
4. A suspension from the practice of law differs from disbarment in that the latter is the severance of the status and privileges of an attorney, whereas the former is the temporary forced withdrawal from the exercise of office, powers, prerogatives, and privileges of a member of the bar. *State ex rel. Nebraska State Bar Assn. v. Butterfield* 645
5. A suspended lawyer is under the same obligation to comply with the Canons of Professional Ethics as

is a lawyer in the active practice. *State ex rel. Nebraska State Bar Assn. v. Butterfield* 645

6. The preparation of deeds, mortgages, releases, and income tax returns is a province of a lawyer and constitutes the practice of law, whether or not, under some circumstances, such service might properly be performed by persons not admitted to the bar. *State ex rel. Nebraska State Bar Assn. v. Butterfield* 645
7. Advertising in the public press for income tax work by a suspended lawyer is violative of Canon 27 of the Canons of Professional Ethics adopted by the Supreme Court. *State ex rel. Nebraska State Bar Assn. v. Butterfield* 645
8. The drafting of a will and the supervision of its execution constitutes the practice of law since it requires legal training and skill. *State ex rel. Nebraska State Bar Assn. v. Butterfield* 645
9. The drafting of a power of attorney constitutes the practice of law since the service requires legal training and skill. *State ex rel. Nebraska State Bar Assn. v. Butterfield* 645
10. The character of the respondent in a disciplinary proceeding and the question of his reformation as to his previous unethical conduct are of great importance in determining whether or not a reinstatement should be granted. *State ex rel. Nebraska State Bar Assn. v. Butterfield* 645
11. The burden is upon a suspended lawyer seeking reinstatement to show his present fitness to again exercise the privileges and functions of an attorney. *State ex rel. Nebraska State Bar Assn. v. Butterfield* 645

Auctions and Auctioneers.

An auctioneer who sells mortgaged property at an auction at the request of the mortgagor without the consent or knowledge of the mortgagee converts the mortgaged property and is liable to the mortgagee in conversion for damages sustained. *State Securities Co. v. Svoboda* 526

Automobiles.

1. The driver of an automobile entering an intersection of two highways is obligated to look for approaching vehicles and to see those within the

radius which denotes the limit of danger. *Pupkes v. Wilson* 15

2. If the driver of an automobile entering an intersection looks for approaching vehicles and fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. *Pupkes v. Wilson* 15

3. Where the driver of an automobile entering an intersection looks but fails to see an approaching vehicle not shown to be in a favored position, the presumption is that the driver of the approaching vehicle will respect his right-of-way, and the question of his contributory negligence in proceeding to cross the intersection is a jury question. *Pupkes v. Wilson* 15

4. Basis of family-purpose doctrine in use of automobile stated. *Christensen v. Rogers* 31
Garska v. Harris 339

5. The family-purpose doctrine is a departure from the law of master and servant, principal and agent, and respondeat superior. It is a development from these principles based solely on public policy. *Christensen v. Rogers* 31

6. If the negligent operation of motor vehicles has become such a menace as to require the imposition of extraordinary remedies, which exceed the scope of common-law liability, it is a matter for the Legislature and not the courts. *Christensen v. Rogers* 31

7. The initial permission of an owner of a motor vehicle to members of his family to use a family-purpose car does not include authority to delegate the driving of the motor vehicle to a third person not a member of the family. *Christensen v. Rogers* 31

8. Ordinarily the negligence of the driver of an automobile is not imputed to his guest. *Langford v. Ritz Taxicab Co.* 153

9. Where the negligence of the driver of an automobile in which a person is riding as a guest is the sole proximate cause of a collision in which the guest is injured, the guest cannot recover from a third person for such injury. *Langford v. Ritz Taxicab Co.* 153

10. Where a plaintiff is free from contributory negligence and two or more parties are guilty of negligence in the operation of automobiles causing or proximately contributing to an accident resulting

in injury to the plaintiff, one being the host of the plaintiff and free from liability because of the guest statute and the other or others not, the one or ones not being the host may be held liable for the entire damage. *Langford v. Ritz Taxicab Co.* 153

11. The fact that the plaintiff and the driver of a motor vehicle are fellow servants of a common employer and are both acting in the course of their master's employment and in furtherance of his business does not make them participants in a joint enterprise, whether the vehicle is owned by the master, the fellow-servant driver, or the plaintiff. *Hopwood v. Voss* 204

12. The test to be applied as to the family-purpose doctrine is not whether the son is an adult or a minor, but whether he was using the automobile for a purpose for which the parent provided it, with authority, express or implied. *Garska v. Harris* 339

13. Although the negligence of the driver of an automobile will not ordinarily be imputed to a passenger therein when the passenger has no control over the automobile or driver, the passenger may not recover from a third person for injuries suffered in a collision when the negligence of the driver is the sole proximate cause of the accident. *Pearson v. Schuler* 353

14. By statute, any person who operates or has in his actual physical control a motor vehicle upon a public highway in this state is deemed to have given his consent to submit to a chemical test of his blood or urine for the purpose of determining the amount of alcoholic content in his body fluid. *Prucha v. Department of Motor Vehicles* 415

15. By statute, the test is to be administered at the direction of a law enforcement officer whenever a person has been arrested for any offense involving operating a motor vehicle while under the influence of alcoholic liquor and when the arresting officer has reasonable grounds to believe that before his arrest the person was driving while under the influence of alcoholic liquor. *Prucha v. Department of Motor Vehicles* 415

16. By statute, a person arrested or taken into custody upon the charge of operating a motor vehicle while under the influence of alcoholic liquor may choose whether the test for intoxication required shall be a chemical test of his blood or urine. *Prucha v. Department of Motor Vehicles* 415

17. By statute, upon refusal of person arrested to submit to a blood or urine test to determine whether he is intoxicated, arresting officer is required to make a report required by implied consent law. *Prucha v. Department of Motor Vehicles* 415
18. By statute, notice of hearing is required to be given under implied consent law. *Prucha v. Department of Motor Vehicles* 415
19. By statute, after granting the person an opportunity to be heard, if it is not shown to the Director of Motor Vehicles that refusal to submit to chemical test was reasonable, the director shall summarily revoke the motor vehicle operator's license of such person for a period of 1 year from the date of such order. *Prucha v. Department of Motor Vehicles* 415
20. By statute, if the Director of Motor Vehicles revokes the operator's license, he shall reduce his order of revocation to writing, and shall notify the person in writing of the revocation. *Prucha v. Department of Motor Vehicles* 415
21. By statute, any person who feels himself aggrieved because of revocation of motor vehicle operator's license may appeal therefrom to the district court for the county where the alleged events occurred for which he was arrested. *Prucha v. Department of Motor Vehicles* 415
22. Where a person who refused to submit to a blood test at the time he was arrested and charged with driving while under the influence of alcoholic liquor was not convicted of such charge, subsequent revocation of his driver's license under another law was not precluded by such fact. *Prucha v. Department of Motor Vehicles* 415
23. A license to operate an automobile upon the highways of the state is a privilege and not a property right. The power given the Director of Motor Vehicles to suspend such operating privilege is an administrative and not a judicial function. *Prucha v. Department of Motor Vehicles* 415
24. A license to operate an automobile is not property, but a mere privilege, the suspension of which does not deprive the licensee of his property without due process of law. *Prucha v. Department of Motor Vehicles* 415
25. The essence of the "implied consent law" is that by driving a motor vehicle on the public highway, the operator consents to the taking of a chemical test

to determine the alcoholic content of his body fluid. By the act of driving his car, he has waived his constitutional privilege of self-incrimination. *Prucha v. Department of Motor Vehicles* 415

26. More than one act of negligence may in combination amount to gross negligence within the meaning of the motor vehicle guest statute. *Schlines v. Ekberg* 510

27. A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but is evidence of negligence. *Bland v. Fox* 662

28. In an action under the automobile guest statute, a verdict should be directed for defendant only where the evidence fails to approach the level of negligence in a very high degree. *Smith v. Damato* 811

29. No one act can be separated from the whole and held to be the independent cause of an accident. Each act is not to be segregated and weighed separately to determine whether or not it constituted gross negligence. *Smith v. Damato* 811

30. The several acts of negligence are to be considered as a whole. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, taken together, they may establish gross negligence. In such cases, it is for the jury to determine whether a defendant is guilty of gross or ordinary negligence. *Smith v. Damato* 811

Banks and Banking.

1. In general, questions as to jurisdiction and venue in actions against national banks are dependent on rules of general application in civil actions and are not controlled by the character of the bank as a national corporation. *Hills v. Burnett* 370

2. So far as civil actions by or against national banks are concerned, the state and the federal courts have concurrent jurisdiction, and questions as to state or federal jurisdiction in any particular case are governed ordinarily by the same considerations as govern with respect to any other action. *Hills v. Burnett* 370

3. As regards the venue of actions brought against national banks, federal statutes are held to be permissive rather than mandatory, are applicable to transitory rather than local actions, and do not apply to cases wherein a national bank has become

a joint party as an incident to the enforcement of an equitable or legal right. *Hills v. Burnett* 370
4. A national banking association organized under the laws of the United States doing business within this state is a foreign corporation within the contemplation of the language authorizing service of process on such a corporation. *Robertson v. Burnett* 385
5. The National Bank Act provides the venue for actions against a national bank. *Robertson v. Burnett* 385
6. The Supreme Court of this state adopts the majority rule that the National Bank Act does not deprive the state courts of jurisdiction of an action against a national bank located and doing business in another state, or in a county or city other than that in which the action is brought. *Robertson v. Burnett* 385
7. The provision of the National Bank Act relates to transitory actions only, and not to such actions as are by law local in their character. National banks are not exempted from the ordinary rules of law affecting the locality of actions founded on local things. *Robertson v. Burnett* 385

Bonds.

Where a contract with a bonding company for the furnishing of performance and maintenance bonds provides that extra work shall be covered at the same rate on the amount paid therefor as on the original contract price, the premium will be calculated on such amount, and not on the actual liability assumed. *Maryland Cas. Co. v. Munnelly* 827

Brokers.

1. In general the duties of a real estate broker are essentially the same as those which an agent owes to his principal. *Gillespie v. State Real Estate Commission* 308
2. A real estate broker who fails to disclose to his principal every material fact in a transaction which is the subject matter of the agency is guilty of fraud and bad faith. *Gillespie v. State Real Estate Commission* 308

Charities.

Property which is owned and used primarily for the purpose of furnishing low-rent housing is not property owned and used exclusively for charitable pur-

poses within the meaning of the Constitution and statutes of Nebraska. *County of Douglas v. OEA Senior Citizens, Inc.* 696

Chattel Mortgages.

1. A contract of conditional sale is not valid as against a mortgagee for value and without notice from a purchaser of the conditional vendee. *First State Bank of Scottsbluff v. Bear* 504
2. Where the mortgaged property is converted without the consent or knowledge of the mortgagee, he may bring conversion without first bringing an action to recover the mortgaged property or exhausting his remedies against the mortgagor. *State Securities Co. v. Svoboda* 526

Commerce.

1. The commerce clause of the Constitution of the United States of its own force established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. *United Air Lines, Inc. v. Nebraska State Railway Commission* 784
2. As to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. *United Air Lines, Inc. v. Nebraska State Railway Commission* 784
3. The line of division between cases where, in the absence of congressional action, the state is authorized to act, and those where state action is precluded by mere force of the commerce clause of the Constitution of the United States, is not always clearly marked. *United Air Lines, Inc. v. Nebraska State Railway Commission* 784
4. In the absence of congressional legislation, a state may constitutionally impose taxes and enact inspection laws, quarantine laws, and, generally, laws of internal police, although they may have an incidental effect upon interstate commerce. *United Air Lines, Inc. v. Nebraska State Railway Commission* 784
5. The commerce clause of the Constitution of the United States, of its own force, restrains the states from imposing direct burdens upon interstate com-

merce. *United Air Lines, Inc. v. Nebraska State Railway Commission* 784

Constitutional Law.

1. In this jurisdiction an opportunity to be heard with right of review upon the question of assessments for benefits is all that is required to satisfy the due process provisions of the Constitutions of Nebraska and the United States. *Elliott v. City of Auburn* 1
2. By the terms of Article VIII, section 1, of the Constitution, it is provided that taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises. *First Continental Nat. Bank & Trust Co. v. Davis* 118
3. By the terms of Article VIII, section 1, of the Constitution, taxes uniform as to class may be levied by valuation upon all other property. *First Continental Nat. Bank & Trust Co. v. Davis* 118
4. By the terms of Article VIII, section 2, of the Constitution, the Legislature is empowered to exempt by law certain specified property. *First Continental Nat. Bank & Trust Co. v. Davis* 118
5. There is no provision of the Constitution other than Article VIII, section 2, exempting property from taxation, or which permits exemption by the Legislature. *First Continental Nat. Bank & Trust Co. v. Davis* 118
6. By the terms of Article VIII, section 2, of the Constitution, no property is exempt from taxation except as provided in the Constitution. *First Continental Nat. Bank & Trust Co. v. Davis* 118
7. By statute, the property involved herein is intangible property on which, under the terms of Article VIII, section 2, of the Constitution, the tax must be in uniformity with that levied on the class to which it belongs. *First Continental Nat. Bank & Trust Co. v. Davis* 118
8. The Legislature has power to classify intangible property for the purpose of taxation, but it may not divide a class and enact different rates of taxation for different segments of the class. *First Continental Nat. Bank & Trust Co. v. Davis* 118
9. The validity and constitutionality of a classification for the purposes of taxation may not be sustained unless it rests upon real differences of situation and circumstances from those applicable to other persons

and property. *First Continental Nat. Bank & Trust Co. v. Davis* 118

10. Property may not be exempted from taxation by the Legislature unless power so to do is found in the Constitution. *First Continental Nat. Bank & Trust Co. v. Davis* 118

11. The Constitution provides that the heads of all executive departments shall be appointed by the Governor, and may be removed by him. *State ex rel. Beck v. Obbink* 242

12. Under the Constitution, the Governor is empowered to remove any officer appointed by him, in the case of incompetency, neglect of duty, or malfeasance in office. *State ex rel. Beck v. Obbink* 242

13. Under the Constitution, the supreme executive power is vested in the Governor. *State ex rel. Beck v. Obbink* 242

14. Legislation applicable alone to a portion of the state is not for that reason forbidden by the Constitution when there is a reasonable relation between the objects of the legislation and the area to which it is applicable. *Satterfield v. State* 275

15. The Constitution governs the disposition of all fines, penalties, and license money. *School Dist. No. 54 v. Howell* 404

16. Before a zoning ordinance can be declared unconstitutional, such ordinance must be either an arbitrary or an unreasonable pronouncement of the city council, or it must be without substantial relation to public health, safety, morals, or general welfare. *Schlientz v. City of North Platte* 477

17. By the state Constitution, the powers of government are divided into three distinct departments, the legislative, executive, and judicial, and no person or persons of any of these departments shall exercise any power properly belonging to either of the others, except as the Constitution directs or permits. *C. R. T. Corp. v. Board of Equalization* 540

18. The Legislature may not impose upon the courts the performance of nonjudicial duties nor delegate to them legislative power. *C. R. T. Corp. v. Board of Equalization* 540

19. The Constitution does not bar the right of the Legislature to confer upon the courts the power to review the propriety and legality of legislative action, or of administrative or ministerial action

taken pursuant to legislative grant of power. *C. R. T. Corp v. Board of Equalization* 540

20. The commerce clause of the Constitution of the United States of its own force established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. *United Air Lines, Inc. v. Nebraska State Railway Commission* 784

21. The line of division between cases where, in the absence of congressional action, the state is authorized to act, and those where state action is precluded by mere force of the commerce clause of the Constitution of the United States, is not always clearly marked. *United Air Lines, Inc. v. Nebraska State Railway Commission* 784

22. In the absence of congressional legislation, a state may constitutionally impose taxes and enact inspection laws, quarantine laws, and, generally, laws of internal police, although they may have an incidental effect upon interstate commerce. *United Air Lines, Inc. v. Nebraska State Railway Commission* 784

23. The commerce clause of the Constitution of the United States, of its own force, restrains the states from imposing direct burdens upon interstate commerce. *United Air Lines, Inc. v. Nebraska State Railway Commission* 784

Contempt.

1. A judicial officer, when required to exercise his judgment or discretion, is not liable criminally for any error which he commits, provided he acts in good faith. A judicial officer who acts fraudulently or corruptly is responsible by criminal contempt, whether he acts under the law or without the law. *McFarland v. State* 251

2. When a judge collaborates with one charged with crime to secure his release by the issuance of a void writ of habeas corpus and thereafter cites the judge of the court having jurisdiction of the criminal proceeding for criminal contempt for disregarding the void writ, such judge, under proper evidence, may be punished for criminal contempt. *McFarland v. State* 251

3. Where the evidence shows that the conduct of a

judge charged with contempt was calculated to destroy the authority, dignity, and integrity of another court and to obstruct the proceedings and hinder the administration of justice in such other court in a matter of which it had jurisdiction, the rule of judicial immunity may not be invoked in a contempt proceeding against the offending judge. *McFarland v. State* 251

4. The test of guilt in such a case is not necessarily found in the mental processes by which a defendant attempts to justify his acts. The motive of the defendant and the effect intended are subjects of judicial scrutiny, and evidence may be sufficient to refute oral testimony of innocence and the asserted intention to exercise a legal right. *McFarland v. State* 251

Contracts.

1. One who undertakes for a consideration to do work requiring special skill impliedly represents that he possesses, and will exercise, such reasonable degree of skill as the nature of the service may require. If he is to furnish his own tools, implements, or machinery, there is an implied representation as to their fitness for the use to which they are to be put. *Rickertsen v. Carskadon* 46
2. When the terms of an express contract are clear and unambiguous, they cannot be varied or contradicted by evidence of custom or usage. This is true whether the contract is oral or written. *Rickertsen v. Carskadon* 46
3. Where there is a conflict as to the terms of the contract, evidence is admissible to explain the meaning of the words or phrases used. Where the contract is silent as to certain points which may be inherent in the nature of the contract, such evidence is admissible. *Rickertsen v. Carskadon* 46
4. One cannot maintain an action on contract without a prior substantial compliance on his part, but this principle must have a reasonable application. If there is a substantial performance, the action may be maintained but without prejudice to any showing of damages on the part of the defendant for the failure to receive full and complete performance. *Rickertsen v. Carskadon* 46
5. If defendant relies on the nonperformance of the

contract by the plaintiff, he must allege that fact in his answer. *Rickertsen v. Carskadon* 46

6. In pleading nonperformance of a contract, the facts which constitute the breach must be alleged, and the breach assigned must conform to the terms of the contract. *Rickertsen v. Carskadon* 46

7. In a contract action, if the plaintiff has fully performed his contract he is entitled to the contract price. *Rickertsen v. Carskadon* 46

8. If plaintiff has substantially performed his contract he is entitled to the contract price less any damage proved by the defendant to be occasioned by less than full performance. *Rickertsen v. Carskadon* 46

9. In a contract action where the defendant may have received benefits which cannot be returned, and defendant contests on the theory that he received little or no benefit, he is entitled to an instruction that if such fact is proved the jury should allow the defendant to rescind the contract and pay only for the benefit, if any, he received. *Rickertsen v. Carskadon* 46

10. Substantial performance of a building contract is defined. *Jones v. Elliott* 96

11. Where defects in a building are remediable without materially injuring or reconstructing any substantial portion thereof, the damage which the owner is entitled to recover is the expense of making the work conform to contractual requirements. *Jones v. Elliott* 96

12. Where a contractor's violations of a building contract result in defects which cannot be remedied without reconstruction of or material injury to a substantial portion of a building, the measure of the owner's damages is the difference between its value when constructed and what its value would have been if built according to the contract. *Jones v. Elliott* 96

13. Rule with respect to usury applied to a building contract giving a choice as between a cash-payment plan and a time-payment plan. *Jones v. Elliott*..... 96

14. A cardinal principle of construction of written instruments is that an interpretation should be made which will reflect the true intention of the parties. *U. P. Terminal F. C. U. v. Employers M. L. Ins. Co.* 190

15. Ordinarily in construing a contract, due force will be given to the grammatical arrangement of the

clauses, unless by so doing it appears that this would be at variance with the intent of the parties as indicated by the contract as a whole. *U. P. Terminal F. C. U. v. Employers M. L. Ins. Co.* 190

16. If a clause contained in a written contract would by grammatical construction have one application, but from the tenor of the whole instrument it is manifest that the parties intended it to have a more extended application, it will be construed according to the manifest intention of the parties. *U. P. Terminal F. C. U. v. Employers M. L. Ins. Co.* 190

17. The power to create a contract by acceptance of an offer terminates a the time specified in the offer. *Wolf v. Tastee Freez Corp.* 430

18. While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration. *Wolf v. Tastee Freez Corp.* 430

19. Courts will not permit a party to avoid a contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form. *West v. Wagner* 692

20. The doctrine that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing the contents of such writing is not applicable in a suit thereon between the original parties thereto, where the defense is that such writing, by reason of fraud, does not embrace the contract actually made. *West v. Wegner* 692

21. A contractor will not be permitted to vary from prescribed plans and specifications. If work is performed in accordance therewith, he cannot be held liable as a guarantor that work will be free from defects. *Fuchs v. Parsons Constr. Co.* 719

22. The engagement of a contractor is fulfilled by compliance with the plans and specifications, and he remains liable only for defects resulting from improper workmanship or other fault on his part. *Fuchs v. Parsons Constr. Co.* 719

23. In the absence of fraud or bad faith, the architect's certificate of compliance is ordinarily a defense to a claim for noncompliance with the plans and specifications. *Fuchs v. Parsons Constr. Co.* 719

24. A contractor who is damaged as the result of delay

in the performance of the work which is caused by a breach of the contract by the other party may recover his damages in the absence of an express provision in the contract exempting the other party from liability. *Roberts Constr. Co. v. State* 819

25. A provision in the contract for an extension of time for delay resulting from causes beyond the control of the contractor is not the exclusive remedy of the contractor where the delay is the result of a breach of contract by the other party. *Roberts Constr. Co. v. State* 819

26. Where damage has occurred and the only uncertainty is the exact amount, it is sufficient if the record shows data from which the extent of the injury can be ascertained with reasonable certainty. Uncertainty as to the exact amount of damage does not justify a denial of all recovery. *Roberts Constr. Co. v. State* 819

Conversion.

1. Anyone who aids and assists in the conversion of property of another is liable therefor though he acted as agent of another. *State Securities Co. v. Svoboda* 526

2. If one sells the chattels of another without authority to do so, the act cannot be made any the less a conversion by proving that the party acted in good faith, believing he was the agent of one whom he regarded as the owner. *State Securities Co. v. Svoboda* 526

3. Where the mortgaged property is converted without the consent or knowledge of the mortgagee, he may bring conversion without first bringing an action to recover the mortgaged property or exhausting his remedies against the mortgagor. *State Securities Co. v. Svoboda* 526

4. In conversion the measure of damages is the value of the property at the time and place of conversion with interest from the date of conversion. *State Securities Co. v. Svoboda* 526

Corporations.

1. Where a foreign corporation has business transactions in this state with citizens and residents of the state out of which arise accounts or claims against the corporation, such accounts or claims may be enforced in the courts of this state if jur-

isdiction can be obtained by legal service of process. *Hills v. Burnett* 370
2. By statute, provision is made for service of process on the Secretary of State of this state when a foreign corporation is doing business within the state. *Robertson v. Burnett* 385
3. Statutory definition of foreign corporation is given. *Robertson v. Burnett* 385
4. A national banking association organized under the laws of the United States doing business within this state is a foreign corporation within the contemplation of the language authorizing service of process on such a corporation. *Robertson v. Burnett* 385
5. The Legislature gave to public power districts all the usual powers of a corporation organized for public purposes. They are intended to permit the business of the district to be operated in a successful and profitable manner. *York County Rural Public Power Dist. v. O'Connor* 602
6. The reasonableness or unreasonableness of rates charged or action taken by the board of directors of a public power district is a proper matter for judicial examination and review. *York County Rural Public Power Dist. v. O'Connor* 602
7. There is a presumption that a corporation is domiciled in the state of its incorporation and that its intangible personal property is taxable in such state. *Peter Kiewit Sons', Inc. v. County of Douglas* 710
8. Where a corporation conducts none of its business in the state of its incorporation and in fact carries on its business in another state where complete control and management of its corporate powers and purposes is exercised, the actual domicile of such corporation for tax purposes is in the latter state. *Peter Kiewit Sons', Inc. v. County of Douglas* 710
9. Bank deposits of a corporation kept in a bank outside of the state of the corporation's domicile are taxable in the state of its domicile unless shown to be within an exception to the general rule. *Peter Kiewit Sons', Inc. v. County of Douglas* 710
10. Stock in subsidiary and affiliated foreign corporations is taxable in the state of the corporation's actual domicile although kept in a foreign state for safekeeping. *Peter Kiewit Sons', Inc. v. County of Douglas* 710
11. Bills and accounts receivable owned by the corporation arising outside of the domiciliary state are

taxable in the state of the corporation's domicile unless shown to be within some recognized exception that makes them nontaxable in that state. *Peter Kiewit Sons', Inc. v. County of Douglas* 710

12. By the General Corporation Law enacted in 1941, the Legislature specifically preserved the rights, privileges, and immunities vested or accrued under prior statutes, and declared that no suits pending, no rights of action conferred, and no duties, restrictions, liabilities, and penalties imposed or required under such statutes should be impaired, diminished, or affected thereby. *Wellensiek v. Drainage Dist. No. 1* 869

13. By statute a dissolved corporation may be sued in the corporate name. *Wellensiek v. Drainage Dist. No. 1* 869

Costs.

The circumstances of each case are to be considered in determining to whom the fees of guardians ad litem are to be taxed, or from what source they are to be paid. Considerations of justice and equity are the controlling factors. *Copple v. Bowlin* 467

Counties.

1. A county is not an insurer of the safety of the bridges it constructs and maintains upon highways for the use of the public. *Stevens v. County of Dawson* 585

2. In an action to recover damages from a county under statute with respect to defective bridges, the burden is on the plaintiff to establish negligence on the part of the county. *Stevens v. County of Dawson* 585

3. In an action to recover damages from a county on account of injury or death caused by a defective bridge on a public highway, the plaintiff must prove by a preponderance of the evidence that the defect was known or that it existed for such a length of time that with reasonable diligence it could or should have been discovered by the county. *Stevens v. County of Dawson* 585

4. A county is not liable for negligence on account of latent defects in a bridge on a public highway but only for such as are patent and may be ascertained by reasonable inspection. *Stevens v. County of Dawson* 585

5. A county is not liable for negligence for injury or death on account of defects caused by climatic conditions beyond its control. *Stevens v. County of Dawson* 585

Courts.

1. "Discretion," when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular. It means that the court in its ruling must be guided and governed by applicable law. It means the application of statutes and legal principles to all the facts of a case. *Goebel v. County of Holt* 81
2. A court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, whether such jurisdiction is acquired in another habeas corpus proceeding or on appeal, or otherwise, unless the prior jurisdiction has been terminated. *McFarland v. State* 251
3. A writ of habeas corpus can be granted only by a court having jurisdiction. The exercise of power to grant the writ cannot be used to unsettle valid legal proceedings, or to interfere with the exercise of jurisdiction of other courts. *McFarland v. State* 251
4. The Legislature may not impose upon the courts the performance of nonjudicial duties nor delegate to them legislative power. *C. R. T. Corp. v. Board of Equalization* 540
5. The Constitution does not bar the right of the Legislature to confer upon the courts the power to review the propriety and legality of legislative action, or of administrative or ministerial action taken pursuant to legislative grant of power. *C. R. T. Corp. v. Board of Equalization* 540
6. A definition of that which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions. *C. R. T. Corp. v. Board of Equalization* 540
7. When a judicial controversy in fact arises, the courts have the inherent right to intervene, even

without or against the expressed will of the Legislature. *C. R. T. Corp. v. Board of Equalization* 540

8. It is competent for the Legislature to provide a procedure or multiple procedures for the bringing of judicial questions before the courts for determination. *C. R. T. Corp. v. Board of Equalization* 540

Criminal Law.

1. A plea of guilty waives all defenses except that the complaint or information is not sufficient to charge an offense. *Wolff v. State* 65
2. In a criminal case, a new trial may be granted for newly discovered evidence which is competent, material, and credible, which might have changed the result of the trial, and which the exercise of due diligence could not have discovered and produced at the trial. *Wolff v. State* 65
3. Unless the offense charged would require a preliminary hearing if filed in the county court, a preliminary hearing is not necessary if a complaint is filed in the district court as an original action. *Otte v. State* 110
4. The holding of an accused person for trial in the district court at the conclusion of a preliminary examination upon a valid complaint gives that court jurisdiction until he is discharged by due course of law. *McFarland v. State* 251
5. The Legislature may properly establish venue for prosecutions under the brand act in the county of origin of the cattle or in the counties through which the cattle pass in leaving the brand area. *Satterfield v. State* 275
6. A person charged with the commission of a crime who has reached the age of accountability is conclusively presumed to know the law of the land, including both common law and statutory law. *Satterfield v. State* 275
7. Ignorance of the law excuses no one. *Satterfield v. State* 275
8. Rule as to sufficiency of circumstantial evidence to sustain a conviction stated. *Henn v. State* 597
9. The corpus delicti is the body or substance of the crime, the fact that a crime has been committed without regard to the identity of the person committing it. *Henn v. State* 597
10. The corpus delicti may be proved by either direct or circumstantial evidence. *Henn v. State* 597

11. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with slight corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation. *Wilson v. Solomon* 616
12. A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of Article I, section 11, of the Constitution of Nebraska. *Wilson v. Solomon* 616

Damages.

1. 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 the cause of the injury. *Barry v. Moore* 57
2. Where defects in a building are remediable without materially injuring or reconstructing any substantial portion thereof, the damage which the owner is entitled to recover is the expense of making the work conform to contractual requirements. *Jones v. Elliott* 96
3. Where a contractor's violations of a building contract result in defects which cannot be remedied without reconstruction of or material injury to a substantial portion of a building, the measure of the owner's damages is the difference between its value when constructed and what its value would have been if built according to the contract. *Jones v. Elliott* 96
4. Where waters from different sources combine to cause damage, it is incumbent upon the plaintiff to establish either that his damage would have occurred from the waters for which defendant is liable, or to establish the amount of his damage that has been caused by the waters for which defendant is liable. *Baum v. County of Scotts Bluff* 225
5. Statute relating to liability for breaks, overflow, and seepage damage applies only to public power and irrigation districts. *Baum v. County of Scotts Bluff* 225
6. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or

that the jury disregarded the evidence or controlling rules of law. *Garska v. Harris* 339
Niemeyer v. Forburger 876

7. A contractor who is damaged as the result of delay in the performance of the work which is caused by a breach of the contract by the other party may recover his damages in the absence of an express provision in the contract exempting the other party from liability. *Roberts Constr. Co. v. State* 819
8. Where damage has occurred and the only uncertainty is the exact amount, it is sufficient if the record shows data from which the extent of the injury can be ascertained with reasonable certainty. Uncertainty as to the exact amount of damage does not justify a denial of all recovery. *Roberts Constr. Co. v. State* 819

Death.

Where in an action for wrongful death the evidence is sufficient to sustain the verdict of the jury under the limited liability provisions of the Wrongful Death Statute, the Supreme Court will not, in the absence of prejudicial error, interfere with the verdict and judgment, unless it is shown to be clearly wrong. *Langford v. Ritz Taxicab Co.* 153

Declaratory Judgments.

1. The Uniform Declaratory Judgments Act is applicable where there is a present controversy, all interested persons are made parties, and justiciable issues are presented. *York County Rural Public Power Dist. v. O'Connor* 602
2. The Uniform Declaratory Judgments Act is available to a public power district organized and existing under the Public Power District Act to secure a declaration as to the reasonableness of rates or charges where a controversy has arisen between the district and its customers. *York County Rural Public Power Dist. v. O'Connor* 602

Divorce.

1. 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. *Scholz v. Scholz* 184
Mislivec v. Mislivec 290
2. In an action for divorce, if the evidence is prin-

cipally oral and is in irreconcilable conflict, the conclusion of the trial court as to the reliability of witnesses will be carefully regarded by the Supreme Court on review. *Scholz v. Scholz* 184

3. Any unjustifiable conduct by either the husband or the wife which destroys the legitimate ends and objects of matrimony constitutes extreme cruelty as defined in divorce statute. *Scholz v. Scholz* 184

4. A divorce from bed and board is defined. *Scholz v. Scholz* 184

5. It was not intended that the parties in a limited divorce would have all of the benefits of an absolute divorce except the legal dissolution of the marriage. *Scholz v. Scholz* 184

6. While the court has the power to adjust all the respective property interests of the parties in a limited divorce, it will not be done any further than necessary to effect a proper separation under the facts of the particular case. *Scholz v. Scholz* 184

7. Condonation is forgiveness for the past upon the condition that the wrong will not be repeated. Condonation is complete if there is a resumption of marital relations after the breach of marital duty. *Mislivec v. Mislivec* 290

8. The absence of a plea of condonation does not bar its consideration and application by the court if the proof affords a proper basis for it. *Mislivec v. Mislivec* 290

9. A decree of divorce cannot be made solely on the declarations, confessions, or admissions of the parties, but the court should, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose. *Mislivec v. Mislivec* 290

10. There is no statute providing for the allowance in a divorce suit of an attorney's fee against the wife, or fixing the amount which the husband is to pay his own attorneys. *Mislivec v. Mislivec* 290

11. A decree of divorce does not become operative until 6 months after its rendition. During such 6-months' period the bonds of matrimony between the parties are not dissolved. *Copple v. Bowlin* 467

12. In determining if the 6-months' waiting period in a divorce case has elapsed, the rule is to exclude the first day and include the whole of the last day in said period. *Copple v. Bowlin* 467

13. Under circumstances stated in opinion, a husband who waited 20 years to attack a divorce decree was

estopped to assert its invalidity. *Attebery v. Attebery* 671
14. A divorce action is triable de novo in the Supreme court. *Reckling v. Reckling* 731
15. The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case. *Reckling v. Reckling* 731
16. Rule for determination of alimony in divorce case stated. *Reckling v. Reckling* 731
17. Generally, the allowance of alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time, is not approved. *Reckling v. Reckling* 731

Drains.

1. In an action for obstruction of the flow of a drainage ditch, the burden of proof is on the landowner to prove the obstruction, that there was an overflow, that the overflow would not have occurred if it were not for the obstruction, and the extent of the damage attributable to it. *Baum v. County of Scotts Bluff* 225
2. One who builds a structure in a drainage ditch is charged with a duty to provide for the passage of all waters, ice, and debris which may reasonably be anticipated to flow or be carried through the ditch. *Baum v. County of Scotts Bluff* 225
3. By the terms of applicable statute, a corporation which was created for the purpose of conducting the affairs of a drainage district had the power through its board of supervisors to levy and collect assessments to defray costs necessary to create the improvement. *Wellensiek v. Drainage Dist. No. 1* 869
4. By the terms of applicable statute a corporation created for the purpose of conducting the affairs of a drainage district was made liable for all injuries and damages caused by the construction of such improvements arising by virtue of contract or tort. *Wellensiek v. Drainage Dist. No. 1* 869
5. The statute under which the defendant corporation was created does not provide specifically for maintenance of action against it after expiration of its charter, but the general statutes relating to corporations do provide for action after expiration of a charter or dissolution of a corporation. *Wellensiek v. Drainage Dist. No. 1* 869

6. A corporation created for the purpose of conducting the affairs of a drainage district is a public corporation and a body politic, politically organized and engaged in the exercise of political functions. *Wellensiek v. Drainage Dist. No. 1* 869

Easements.

If an owner of an easement, by his own act, renders the use of the easement impossible, or obstructs it in a manner inconsistent with its further enjoyment, the easement will be considered as abandoned by him. *Toelle v. Preuss* 239

Election of Remedies.

1. One who has been induced by fraud to part with title to his property has his remedy either in an action because of the fraud, or he may rescind the contract and recover back the property while title still remains in the fraudulent vendee, but he cannot recover it when title has passed to a bona fide purchaser for value. *Guckeen Farmers Elevator Co. v. South Soo Grain Co.* 426
2. Before a case can arise for the application of the principle of election of remedies, there must be two co-existing remedies and those remedies must be so inconsistent that a party cannot logically choose one without renouncing the other. *Asher v. Coca Cola Bottling Co.* 855

Elections.

1. The special election authorized by the Reorganization of School Districts Act is governed by the general election laws and is subject to the contests provided therein. *Arends v. Whitten* 297
2. The county school district reorganization committee is the real party in interest in a contest over a reorganization plan submitted by them, rather than the legal voters of the districts involved. *Arends v. Whitten* 297
3. The laws regulating the privilege of absentee voting should generally receive a strict construction, for absentee voting is a privilege granted the elector and not an absolute right. *Arends v. Whitten* 297

Electricity.

1. The Legislature gave to public power districts all

the usual powers of a corporation organized for public purposes. They are intended to permit the business of the district to be operated in a successful and profitable manner. *York County Rural Public Power Dist. v. O'Connor* 602

2. The reasonableness or unreasonableness of rates charged or action taken by the board of directors of a public power district is a proper matter for judicial examination and review. *York County Rural Public Power Dist. v. O'Connor* 602

Equity.

1. Rule for trial of equity case de novo in Supreme Court stated. *Beebe v. Reichert* 172
2. The mere fact that more than one equitable remedy is sought does not establish that more than one cause of action is included in a plaintiff's petition. *Schlientz v. City of North Platte* 477
3. The particular nature of the wrong done by defendant may require the application of different remedies for the enforcement of plaintiff's right. The rules governing joinder of causes of action do not preclude plaintiff from presenting in the same pleading distinct and different grounds for recovery upon a single primary right. *Schlientz v. City of North Platte* 477
4. Where a court of equity has obtained jurisdiction of a case for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation. *Corn Belt Products Co. v. Mullins* 561
5. An adequate remedy at law means a remedy which is plain, complete, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *York County Rural Public Power Dist. v. O'Connor* 602
6. The doctrine of laches has no application to the enforcement by a municipality of its ordinances. *City of Beatrice v. Williams* 889

Estoppel.

Ordinarily a municipal corporation cannot be estopped from enforcing a valid ordinance relating to setback lines. *City of Beatrice v. Williams* 889

Evidence.

1. When the terms of an express contract are clear and unambiguous, they cannot be varied or contradicted by evidence of custom or usage. This is true whether the contract is oral or written. *Rickertsen v. Carskadon* 46
2. Where there is a conflict as to the terms of the contract, evidence is admissible to explain the meaning of the words or phrases used. Where the contract is silent as to certain points which may be inherent in the nature of the contract, such evidence is admissible. *Rickertsen v. Carskadon* 46
3. An extrajudicial admission is simply an item of evidence in the mass of evidence adduced during a trial, admissible in contradiction and impeachment of a present claim and other evidence of the party making the admission. *Aye v. Gartner* 162
4. An extrajudicial admission is not ordinarily final and conclusive upon the party by whom it was made in the absence of controlling elements of estoppel. *Aye v. Gartner* 162
5. Where the more favorable evidence relied on by a party to overcome the effect of his own self-injurious statement is 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 facts to decide the issue upon all the evidence. *Aye v. Gartner* 162
6. Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony. *Dworak v. City of Omaha* 209
7. Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. *Dworak v. City of Omaha* 209
8. Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false. *Dworak v. City of Omaha* 209
9. Negligence must be proved by direct evidence or

by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed. *Garska v. Harris* 339

10. The privilege against self-incrimination is limited to the giving of oral testimony. It does not extend to the use of the defendant's body as physical or real evidence. *Prucha v. Department of Motor Vehicles* 415

11. The admission of evidence under the provisions of evidence statute referred to in opinion falls within the area reserved to the sound discretion of the trial court. The trial court must determine whether the evidence offered is on the same subject. Its ruling will not be regarded as erroneous unless there is a clear abuse of discretion. *Spani v. Whitney* 550

12. If sufficient foundation is laid to show that the conditions they observed are the same as existed immediately following an accident, witnesses should be permitted to testify in regard to what they observed insofar as it is relevant and material to the issues involved. *Spani v. Whitney* 550

13. Direct evidence is evidence which if believed proves the existence of the fact in issue without any inference or presumption; while circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist. *Bland v. Fox* 662

14. Admission of facts by a defendant tending to establish a civil liability is generally considered direct and not circumstantial evidence. *Bland v. Fox* 662

15. General rule as to effect of party calling a witness stated. *Bland v. Fox* 662

Fines.

1. Since 1913 there has been no statutory or legally established formula for the division and distribution of funds collected on account of fines, penalities, and license money where parts of cities, villages, precincts, or other municipal subdivisions less than a county are situated in more than one school district. *School Dist. No. 54 v. Howell* 404

2. In order to reasonably and equitably comply with the constitutional mandate it is required that a division of fines, penalties, and license money shall be made in proportion to the number of persons of school age residing in the areas of the school dis-

tricts which are within the municipal subdivision according to the school census taken last before apportionment of funds. *School Dist. No. 54 v. Howell* 404

Fraud.

1. In a charge of fraud the facts showing such fraud must be pleaded, and a mere allegation of fraud is not sufficient. *Elliott v. City of Auburn* 1
2. The doctrine that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing the contents of such writing is not applicable in a suit thereon between the original parties thereto, where the defense is that such writing, by reason of fraud, does not embrace the contract actually made. *West v. Wegner* 692

Fraudulent Conveyances.

The question of whether a transfer of property was made with intent to defraud creditors is a question of fact. *First State Bank of Scottsbluff v. Bear* 504

Guardian and Ward.

1. The county court has jurisdiction to examine and judicially ascertain the status of the account of a guardian. *Finn v. Whitten* 282
2. The district court on appeal has jurisdiction to examine and judicially ascertain the status of the account of a guardian. *Finn v. Whitten* 282
3. Neither the county court nor the district court on appeal has judisdiction to render a money judgment against the guardian and in favor of the guardianship estate in the absence of proceedings involving finality of accounting at the time of ultimate finality in the county court. *Finn v. Whitten* 282
4. The appointment of a guardian by the county court is not conclusive as against the parents' right to the custody of their children, unless it appears that they had notice of the proceeding and that the question of their competency and suitability was adjudicated. *Walker v. Gehring* 398

Habeas Corpus.

1. The sufficiency of evidence adduced at a preliminary hearing may be raised and tried in habeas corpus proceedings. *McFarland v. State* 251

2. A court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, whether such jurisdiction is acquired in another habeas corpus proceeding or on appeal, or otherwise, unless the prior jurisdiction has been terminated. *McFarland v. State* 251
Rhodes v. Sigler 439
3. A writ of habeas corpus can be granted only by a court having jurisdiction. The exercise of power to grant the writ cannot be used to unsettle valid legal proceedings, or to interfere with the exercise of jurisdiction of other courts. *McFarland v. State* 251
4. Habeas corpus may properly be used in custody cases, and such proceedings are governed by considerations of expediency and equity. *Walker v. Gehring* 398
5. A writ of habeas corpus can be granted only by a court having jurisdiction. The exercise of power to grant the writ cannot be used to unsettle valid legal proceedings, or to interfere with the exercise of jurisdiction of other courts. *Rhodes v. Sigler* 439
6. If the proceedings subsequent to conviction are erroneous, such errors can be reviewed and corrected by proceedings in error in the regular course of the law, but not by the writ of habeas corpus. *Rhodes v. Sigler* 439
7. The writ of habeas corpus is not a writ for the correction of errors, and will not be allowed to be used for that purpose. *Rhodes v. Sigler* 439
8. The sufficiency of evidence adduced at a preliminary examination to hold an accused to answer for a crime may be raised and tried in habeas corpus proceedings. *Wilson v. Solomon* 616
9. In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of evidence taken at a preliminary examination to require a person to be tried on a criminal charge, the Supreme Court will not weigh the evidence but will only inquire as to the existence of evidence to sustain the charge. *Wilson v. Solomon* 616

Highways.

1. The driver of an automobile entering an intersection of two highways is obligated to look for approaching vehicles and to see those within the

radius which denotes the limit of danger. *Pupkes v. Wilson* 15
2. A spraying machine engaged in spraying an insecticide on trees, shrubbery, and grass along the side of a street is not engaged in work upon the surface of a highway within the meaning of highway statute. *Hopwood v. Voss* 204
3. Phrases used in highway statute relate to the center of and right-hand and left-hand sides of the main-traveled portion of the highway available to traffic at the time. *Spani v. Whitney* 550

Homesteads.

A homestead right does not attach to the title or interest of a purchaser under a real estate contract as against the enforcement of the consideration provided for in the contract. *Corn Belt Products Co. v. Mullins* 561

Independent Contractor.

1. The true test of a contractor would seem to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *Pearson v. Schuler* 353
2. The one indispensable element to the character of an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it. *Pearson v. Schuler* 353

Injunction.

1. Defendants who have a common interest and a common defense are properly joined in one suit for injunction. *Schlientz v. City of North Platte* 477
2. Where the act sought to be enjoined is threatened or being performed by more than one person, all may be joined as defendants. *Schlientz v. City of North Platte* 477

Insurance.

1. Where an insured, having partial insurance coverage, sustains a loss in excess of the amount of such coverage, he may properly proceed against the wrongdoer for the total loss sustained. *United Services Automobile Assn. v. Hills* 128

2. If in an interpleader proceeding, an insured collects the damages for which he was compensated by his insurance carrier, such insurance carrier is entitled to assert its right to an equitable subrogation thereto. *United Services Automobile Assn. v. Hills* 128
3. An insured is entitled to retain a proportionate share of the expense, including attorney's fee, incurred in making recovery on behalf of insured and his insurer from a wrongdoer where insurer fails to make itself a party to and fails to assist in the prosecution of the action. *United Services Automobile Assn. v. Hills* 128
4. A policy of insurance should be considered as any other contract to give effect to the intention of the parties at the time it was made as expressed therein. *Preferred Risk Mut. Ins. Co. v. Continental Ins. Co.* 179
5. The language of a policy of insurance should be considered not in accordance with what insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean. *Preferred Risk Mut. Ins. Co. v. Continental Ins. Co.* 179
6. In giving effect to rules of construction of contracts, it is equally important that the contract made by the parties shall be enforced, and that a new contract will not be interpolated by construction. *Preferred Risk Mut. Ins. Co. v. Continental Ins. Co.* 179
7. A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. *Preferred Risk Mut. Ins. Co. v. Continental Ins. Co.* 179
8. Where an insurance policy by its insuring clause covers an article, and an exemption clause does not clearly exclude it, the policy will be held to cover such article. *U. P. Terminal F. C. U. v. Employers M. L. Ins. Co.* 190
9. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense. *U. P. Terminal F. C. U. v. Employers M. L. Ins. Co.* 190

10. In case of ambiguity or uncertainty in an insurance policy the meaning thereof should be resolved against the insurer as the one who prepared the contract. *U. P. Terminal F. C. U. v. Employers M. L. Ins. Co.* 190

11. In interpretation of an insurance contract it is not proper to indulge in scholastic subtleties to make words with certainty of meaning ambiguous in order to make liable the insurer. *U. P. Terminal F. C. U. v. Employers M. L. Ins. Co* 190

12. Where waiver by denial of liability or coverage is involved, it is not necessary that the denial be express or unequivocal. It is sufficient if the facts and circumstances warrant the inference that liability was or would be denied. *Otteman v. Interstate Fire & Cas. Co., Inc.* 574

13. An insured may not be deprived of his rights by a narrow and technical construction of formal requisites by which that right is to be made available. On the contrary, a liberal and reasonable construction should be given. *Otteman v. Interstate Fire & Cas. Co.* 574

14. A provision against settlement by insured cannot be taken advantage of by an insurer where it unreasonably delays to take any action after notice of the claim. *Otteman v. Interstate Fire & Cas. Co., Inc.* 574

15. An unreasonable delay to process insured's claim will amount to a denial of coverage and will constitute a waiver of any policy provisions regarding defense or settlement of the claim. *Otteman v. Interstate Fire & Cas. Co., Inc.* 574

16. Where an insurer waives its right to defend, this leaves the insured free to defend the action to judgment or, in good faith, to make such settlement as ordinary and reasonable prudence and caution might indicate to be advisable. *Otteman v. Interstate Fire & Cas. Co., Inc.* 574

Interest.

The rate of interest on a debt payable in installments or partial payments is ascertained by applying the payments first to interest and the balance to the reduction of principal. *Wood v. Commonwealth Trailer Sales, Inc.* 494

Interpleader.

The right of a stakeholder to interplead and have the interests of adverse parties in the fund determined is an equitable proceeding. *United Services Automobile Assn. v. Hills* 128

Intoxicating Liquors.

1. Tests to be considered valid under statute relating to operating a motor vehicle while intoxicated must be performed according to methods approved by the Department of Health and by an individual possessing a valid permit to make the analysis. *Otte v. State* 110
2. A registered nurse will be authorized to withdraw blood for a test as provided in statute relating to operating a motor vehicle while intoxicated only if she is acting under the direction of a physician. *Otte v. State* 110
3. For the implied consent of a person to be effective, as provided by relevant statute, the person must have been arrested or taken into custody before the test is given. *Otte v. State* 110
4. A statute providing that a presumption of intoxication arises under a determination that the amount of alcohol in the subject's body fluid at the time in question is 0.15 percent or more by weight, as shown by chemical analysis, is in derogation of the common law and subject to strict construction. *Otte v. State* 110
5. Evidence of the drinking of alcoholic liquor by a guest in an automobile is not of itself evidence of negligence. *Langford v. Ritz Taxicab Co.* 153
6. By statute, any person who operates or has in his actual physical control a motor vehicle upon a public highway in this state is deemed to have given his consent to submit to a chemical test of his blood or urine for the purpose of determining the amount of alcoholic content in his body fluid. *Prucha v. Department of Motor Vehicles* 415
7. By statute, the test is to be administered at the direction of a law enforcement officer whenever a person has been arrested for any offense involving operating a motor vehicle while under the influence of alcoholic liquor and when the arresting officer has reasonable grounds to believe that before his arrest the person was driving while under

the influence of alcoholic liquor. *Prucha v. Department of Motor Vehicles* 415

8. By statute, a person arrested or taken into custody upon the charge of operating a motor vehicle while under the influence of alcoholic liquor may choose whether the test for intoxication required shall be a chemical test of his blood or urine. *Prucha v. Department of Motor Vehicles* 415

9. By statute, upon refusal of person arrested to submit to a blood or urine test to determine whether he is intoxicated, arresting officer is required to make a report required by implied consent law. *Prucha v. Department of Motor Vehicles* 415

10. By statute, notice of hearing is required to be given under implied consent law. *Prucha v. Department of Motor Vehicles* 415

11. By statute, after granting the person an opportunity to be heard, if it is not shown to the Director of Motor Vehicles that refusal to submit to chemical test was reasonable, the director shall summarily revoke the motor vehicle operator's license of such person for a period of 1 year from the date of such order. *Prucha v. Department of Motor Vehicles* 415

12. By statute, if the Director of Motor Vehicles revokes the operator's license, he shall reduce his order of revocation to writing, and shall notify the person in writing of the revocation. *Prucha v. Department of Motor Vehicles* 415

13. By statute, any person who feels himself aggrieved because of revocation of motor vehicle operator's license may appeal therefrom to the district court for the county where the alleged events occurred for which he was arrested. *Prucha v. Department of Motor Vehicles* 415

14. Where a person who refused to submit to a blood test at the time he was arrested and charged with driving while under the influence of alcoholic liquor was not convicted of such charge, subsequent revocation of his driver's license under another law was not precluded by such fact. *Prucha v. Department of Motor Vehicles* 415

15. The essence of the "implied consent law" is that by driving a motor vehicle on the public highway, the operator consents to the taking of a chemical test to determine the alcoholic content of his body fluid. By the act of driving his car, he has waived

his constitutional privilege of self-incrimination. *Prucha v. Department of Motor Vehicles* 415

Judges.

1. A judicial officer, when required to exercise his judgment or discretion, is not liable criminally for any error which he commits, provided he acts in good faith. A judicial officer who acts fraudulently or corruptly is responsible by criminal contempt, whether he acts under the law or without the law. *McFarland v. State* 251
2. When a judge collaborates with one charged with crime to secure his release by the issuance of a void writ of habeas corpus and thereafter cites the judge of the court having jurisdiction of the criminal proceeding for criminal contempt for disregarding the void writ, such judge, under proper evidence, may be punished for criminal contempt. *McFarland v. State* 251
3. Where the evidence shows that the conduct of a judge charged with contempt was calculated to destroy the authority, dignity, and integrity of another court and to obstruct the proceedings and hinder the administration of justice in such other court in a matter of which it had jurisdiction, the rule of judicial immunity may not be invoked in a contempt proceeding against the offending judge. *McFarland v. State* 251
4. The test of guilt in such a case is not necessarily found in the mental processes by which a defendant attempts to justify his acts. The motive of the defendant and the effect intended are subjects of judicial scrutiny, and evidence may be sufficient to refute oral testimony of innocence and the asserted intention to exercise a legal right. *McFarland v. State* 251

Judgments.

1. Collateral attack on judgment is defined. *Elliott v. City of Auburn* 1
2. It is proper for a court to make an entry nunc pro tunc in order to correct its records so that they shall speak the truth. *Satterfield v. State* 275
3. Conditions necessary for rendition of summary judgment stated. *Finn v. Whitten* 282
4. In considering a motion for summary judgment the court should view the evidence in the light most

favorable to the party against whom it is directed. *Wolf v. Tastee Freez Corp.* 430
Youngs v. Wagner 735

5. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom. *Schlines v. Ekberg* 510
Collett v. Hendrickson 571

6. A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered. *Wolf v. Tastee Freez Corp.* 430

7. The court examines the evidence on a motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists. *Schlines v. Ekberg* 510
Collett v. Hendrickson 571

8. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. *Schlines v. Ekberg* 510
Collett v. Hendrickson 571
Youngs v. Wagner 735

9. A motion for summary judgment is not a substitute for a demurrer, a motion to dismiss, or a motion for judgment on the pleadings. *Schlines v. Ekberg* 510

10. The summary judgment procedure is not intended to be used as a device to prevent a trial of an action on the merits, but is available only when no genuine issue of fact exists. *Otteman v. Interstate Fire & Cas. Co., Inc.* 574

11. In considering a motion for summary judgment the court should view the evidence bearing on the question of whether or not there is a genuine issue of material fact in the light most favorable to the party against whom it is directed. *Fay Smith & Associates, Inc. v. Consumers P. P. Dist.* 681

12. In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case and, second, that he is entitled to a judgment as a matter of law. *Fay Smith & Associates, Inc. v. Consumers P. P. Dist.* 681
Youngs v. Wagner 735

13. Summary judgment is effective and serves a separate useful purpose only when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. *Fay Smith & Associates, Inc. v. Consumers P. P. Dist.* 681
Youngs v. Wagner 735
14. The evidence offered on a motion for summary judgment is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, and affidavits which constitute only a part of the evidence available on a trial of the merits. *Fay Smith & Associates, Inc. v. Consumers P. P. Dist.* 681
15. The Summary Judgments Act authorizes summary judgment where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and where no genuine issue remains for trial. *County of Douglas v. OEA Senior Citizens, Inc.* 696
16. A judgment following the sustaining of a demurrer, after the party elects to stand on his pleading, which is based on a technical defect of pleading, a lack of jurisdiction, misjoinder of parties, or the like, does not involve the merits of the controversy and will not support a plea of res judicata. *Fuchs v. Parsons Constr. Co.* 719
17. The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. *Youngs v. Wagner* 735
18. A motion for summary judgment serves a specific limited purpose and is not intended to supplant other existing procedures. *Walkenhorst v. Apolius* 830

Juries.

Objections to the mode of selecting petit jurors must be made before the trial to be of any avail. *Satterfield v. State* 275

Landlord and Tenant.

1. The lessor may waive the requirement in a lease of notice by the lessee of renewal at or within a certain time. *Wolf v. Tastee Freez Corp.* 430
2. Where a lease contains a provision for extension or renewal on terms specified therein, the lessee holds for the extended term under the original

lease and not under the notice of intention to renew, and the statute of frauds does not apply to the notice. *Wolf v. Tastee Freez Corp.* 430

Licenses.

1. The State Real Estate Commission has power to revoke or suspend the license of a real estate broker after proper hearing for violation of any of the duties imposed on such broker by statute. *Gillespie v. State Real Estate Commission* 308
2. A license to operate an automobile upon the highways of the state is a privilege and not a property right. The power given the Director of Motor Vehicles to suspend such operating privilege is an administrative and not a judicial function. *Prucha v. Department of Motor Vehicles* 415
3. A license to operate an automobile is not property, but a mere privilege, the suspension of which does not deprive the licensee of his property without due process of law. *Prucha v. Department of Motor Vehicles* 415

Limitations of Actions.

1. A petition showing on its face that the cause of action stated therein is barred by the statute of limitations is subject to general demurrer. *Bame v. Lipsett, Inc.* 623
2. To establish title by adverse possession, a party must prove by a preponderance of the evidence that he has been in actual, continuous, notorious, and adverse possession of the property under claim of ownership during the full period required by the statute. *Dartmouth College v. Rose* 764
3. The statutory period for the establishment of title to real estate by adverse possession is 10 years. *Dartmouth College v. Rose* 764

Marriage.

A marriage contract between a man and a woman, one of whom is married, is contrary to public policy, illegal, and void. *Copple v. Bowlin* 467

Master and Servant.

1. The fact that the plaintiff and the driver of a motor vehicle are fellow servants of a common employer and are both acting in the course of their master's employment and in furtherance of his

business does not make them participants in a joint enterprise, whether the vehicle is owned by the master, the fellow-servant driver, or the plaintiff. *Hopwood v. Voss* 204

2. The true test of a contractor would seem to be, that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *Pearson v. Schuler* 353
3. The one indispensable element to the character of an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it. *Pearson v. Schuler* 353
4. Liability of master for acts of a servant stated. *Niemeyer v. Forburger* 876

Mortgages.

The mere fact that with the proceeds of a later mortgage a prior one was paid affords no ground for subrogating the junior mortgagee to the rights of the former mortgagee upon it being discovered that a lien has arisen intermediate between the two mortgages. *Rapp v. Rapp* 68

Motor Carriers.

1. The Motor Carrier Act does not condemn competition but does condemn unfair or destructive competitive practices. *Denver Chicago Transp. Co., Inc. v. Poulson* 862
2. Controlling questions to be determined in issuance of certificate of public convenience and necessity stated. *Denver Chicago Transp. Co., Inc. v. Poulson* 862

Municipal Corporations.

1. Governing body of any city of the second class has power to levy special assessment to pay cost of paving. *Elliott v. City of Auburn* 1
2. By statute, upon petition of abutting property owners, city council of city of second class may create a paving district and levy special assessments. *Elliott v. City of Auburn* 1
3. By statute, the sufficiency of the petitions as to ownership of the property in a paving district is to be determined by the record in the office of the county clerk or register of deeds at the time of the

adoption of the paving ordinance. *Elliott v. City of Auburn* 1

4. Article VII-A of the home rule charter of the city of Omaha, added to such charter in 1942, by vote of the electorate, did not repeal Article VI, section 2, of such charter. *Belitz v. City of Omaha* 36
5. Under Article VI, section 2, of the home rule charter of the city of Omaha, all rights to a fireman's pension are fixed at the date of his retirement, and his wife would be entitled to a pension upon his death in accordance with the charter provision as it then existed. *Belitz v. City of Omaha* 36
6. A petition for damages alleged to have been caused by the negligent construction of a curb by a city of the metropolitan class is subject to demurrer if it fails to allege that the notice required by statute was filed within the time required. *Knapp v. City of Omaha* 78
7. The purpose of the notice required by statute is to permit the city to make an investigation of the alleged occurrence while it is still fresh. *Knapp v. City of Omaha* 78
8. A city is a political subdivision of the state created as a convenient agency for the exercise of such governmental powers of the state as may be entrusted to it by constitutional provision or legislative act. *Schlientz v. City of North Platte* 477
9. In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation. *Schlientz v. City of North Platte* 477
10. To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory. *Schlientz v. City of North Platte* 477
11. In the exercise of police power delegated by the state Legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised. *Schlientz v. City of North Platte* 477
12. What is the public good as it relates to zoning ordinances is primarily a matter lying within the

discretion and determination of the municipal body and unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere. *Schlientz v. City of North Platte* 477

13. The Legislature may expressly or by implication grant to municipal corporations the right to exercise police power beyond and within a prescribed distance of the municipal limits. *Schlientz v. City of North Platte* 477

14. The word "street" is a generic term and embraces the entire width of the public way as delineated or described on the plat. It embraces everything from property line to property line. *Acton v. Wymore School Dist. No. 114* 609

15. A sidewalk in the public way is a part of the street. *Acton v. Wymore School Dist. No. 114* 609

16. When used as a measurement of distance, and nothing appears to the contrary, the commonly accepted meaning of a block is 300 feet. *Bland v. Fox* 662

17. By the terms of applicable statute, a corporation which was created for the purpose of conducting the affairs of a drainage district had the power through its board of supervisors to levy and collect assessments to defray costs necessary to create the improvement. *Wellensiek v. Drainage Dist. No. 1* 869

18. By the terms of applicable statute a corporation created for the purpose of conducting the affairs of a drainage district was made liable for all injuries and damages caused by the construction of such improvements arising by virtue of contract or tort. *Wellensiek v. Drainage Dist. No. 1* 869

19. The statute under which drainage corporation was created did not provide specifically for maintenance of action against it after expiration of its charter, but the general statutes relating to corporations do provide for action after expiration of a charter or dissolution of a corporation. *Wellensiek v. Drainage Dist. No. 1* 869

20. A corporation created for the purpose of conducting the affairs of a drainage district is a public corporation and a body politic, politically organized and engaged in the exercise of political functions. *Wellensiek v. Drainage Dist. No. 1* 869

21. A public corporation which is a body politic has power to satisfy its obligations after lapse of its charter. *Wellensiek v. Drainage Dist. No. 1* 869

22. After the expiration of the charter or the dissolution

of a public corporation which is a body politic, a residuary power remains in it which the courts may compel it to exercise in the performance of the duties imposed upon it by statute. *Wellensiek v. Drainage Dist. No. 1* 869

23. Reasonable setback lines may be adopted by ordinance of a city. *City of Beatrice v. Williams* 889

24. Ordinances have the same force and effect within the corporate limits of a municipality as do laws passed by the Legislature. *City of Beatrice v. Williams* 889

25. The construction and effect of a building permit are determined by its terms and by the ordinance and law under which it is issued. Statutory provisions and ordinances limiting what may be authorized by permit become part of the permit as effectually as if written into it. *City of Beatrice v. Williams* 889

26. The doctrine of laches has no application to the enforcement by a municipality of its ordinances. *City of Beatrice v. Williams* 889

27. Ordinarily a municipal corporation cannot be estopped from enforcing a valid ordinance relating to setback lines. *City of Beatrice v. Williams* 889

28. The term "street" is not confined to that portion of the public way which is devoted to vehicular traffic; it embraces everything from property line to property line. *City of Beatrice v. Williams* 889

Negligence.

1. If the driver of an automobile entering an intersection looks for approaching vehicles and fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. *Pupkes v. Wilson* 15

2. Where the driver of an automobile entering an intersection looks but fails to see an approaching vehicle not shown to be in a favored position, the presumption is that the driver of the approaching vehicle will respect his right-of-way, and the question of his contributory negligence in proceeding to cross the intersection is a jury question. *Pupkes v. Wilson* 15

3. Under the family-purpose doctrine the head of a family, who maintains a motor vehicle for the general use, pleasure, and convenience of the family,

is liable for the negligence of a member of the family having general authority to drive it while the vehicle is so used. *Christensen v. Rogers* 31

4. The family-purpose doctrine is a departure from the law of master and servant, principal and agent, and respondeat superior. It is a development from these principles based solely on public policy. *Christensen v. Rogers* 31

5. If the negligent operation of motor vehicles has become such a menace as to require the imposition of extraordinary remedies, which exceed the scope of common-law liability, it is a matter for the Legislature and not the courts. *Christensen v. Rogers* 31

6. The initial permission of an owner of a motor vehicle to members of his family to use a family-purpose car does not include authority to delegate the driving of the motor vehicle to a third person not a member of the family. *Christensen v. Rogers* 31

7. Evidence of the drinking of alcoholic liquor by a guest in an automobile is not of itself evidence of negligence. *Langford v. Ritz Taxicab Co.* 153

8. Ordinarily the negligence of the driver of an automobile is not imputed to his guest. *Langford v. Ritz Taxicab Co.* 153

9. Where the negligence of the driver of an automobile in which a person is riding as a guest is the sole proximate cause of a collision in which the guest is injured, the guest cannot recover from a third person for such injury. *Langford v. Ritz Taxicab Co.* 153

10. Where a plaintiff is free from contributory negligence and two or more parties are guilty of negligence in the operation of automobiles causing or proximately contributing to an accident resulting in injury to the plaintiff, one being the host of the plaintiff and free from liability because of the guest statute and the other or others not, the one or ones not being the host may be held liable for the entire damage. *Langford v. Ritz Taxicab Co.* 153

11. When contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is improper to submit to the jury issues involving contributory negligence and comparative negligence. *Langford v. Ritz Taxicab Co.* 153

12. Negligence in the conduct of another will not be imputed to a party if he neither authorized such

conduct, nor participated therein, nor had the right or power to control it. *Hopwood v. Voss* 204

13. Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. *Hopwood v. Voss* 204

14. An act of God is defined. *Baum v. County of Scotts Bluff* 225

15. Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed. *Garska v. Harris* 339

16. Contributory negligence is an affirmative defense, the burden of proving which is on the party pleading it. *Garska v. Harris* 339

17. Although the negligence of the driver of an automobile will not ordinarily be imputed to a passenger therein when the passenger has no control over the automobile or driver, the passenger may not recover from a third person for injuries suffered in a collision when the negligence of the driver is the sole proximate cause of the accident. *Pearson v. Schuler* 353

18. There is no fixed rule for the ascertainment of what is gross negligence, but whether or not gross negligence exists must be determined from the facts and circumstances in each case. *Schlines v. Ekberg* 510

19. More than one act of negligence may in combination amount to gross negligence within the meaning of the motor vehicle guest statute. *Schlines v. Ekberg* 510

20. In an action to recover damages from a county under statute with respect to defective bridges, the burden is on the plaintiff to establish negligence on the part of the county. *Stevens v. County of Dawson* 585

21. In an action to recover damages from a county on account of injury or death caused by a defective bridge on a public highway, the plaintiff must prove by a preponderance of the evidence that the defect was known or that it existed for such a length of time that with reasonable diligence it could or should have been discovered by the county. *Stevens v. County of Dawson* 585

22. A county is not liable for negligence on account of latent defects in a bridge on a public highway but only for such as are patent and may be ascer-

tained by reasonable inspection. *Stevens v. County of Dawson* 585

23. A county is not liable for negligence for injury or death on account of defects caused by climatic conditions beyond its control. *Stevens v. County of Dawson* 585

24. An invitee seeking to recover damages on account of a fall on the premises of an inviter, in order to recover, is required to furnish proof of actionable negligence and of proximate cause. *Hutsell v. Edens* 592

25. The fact alone that an invitee falls upon the stairway of an inviter does not raise a presumption of negligence on the part of the inviter, and in such instance the doctrine of res ipsa loquitur does not apply. *Hutsell v. Edens* 592

26. In an action in which the comparative negligence rule has application where the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant, the action should be dismissed or a verdict directed. *Buick v. Stoehr* 629

27. A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but is evidence of negligence. *Bland v. Fox* 662

28. The burden of proof 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. *Edmunds v. Ripley* 797

29. Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances. *Edmunds v. Ripley* 797
Niemeyer v. Forburger 876

30. 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 cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause. *Edmunds v. Ripley* 797
Swanson v. Murray 839

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 the injury would not have occurred. *Edmunds v. Ripley* 797

32. A recovery cannot be had for acts of negligence not alleged in the petition. The rule is that allegata and probata must agree. *Edmunds v. Ripley* 797

33. In an action under the automobile guest statute, a verdict should be directed for defendant only where the evidence fails to approach the level of negligence in a very high degree. *Smith v. Damato* 811

34. No one act can be separated from the whole and held to be the independent cause of an accident. Each act is not to be segregated and weighed separately to determine whether or not it constituted gross negligence. *Smith v. Damato* 811

35. The several acts of negligence are to be considered as a whole. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, taken together, they may establish gross negligence. In such cases, it is for the jury to determine whether a defendant is guilty of gross negligence or ordinary negligence. *Smith v. Damato* 811

36. In an action under the automobile guest statute, a verdict should not be directed nor a cause of action dismissed unless a court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach the degree of negligence that is considered gross. *Smith v. Damato* 811

37. Doctrine of res ipsa loquitur stated. *Swanson v. Murray* 839

38. In a case presented under the res ipsa loquitur doctrine the burden of proof upon the issue of negligence does not shift during the progress of the trial, but rests throughout upon the party alleging negligence. *Swanson v. Murray* 839

39. When a drink intended for human consumption is marketed in sealed containers, and such drink causes injury to a consumer, it is not necessary in a personal injury action to show that the container was within the physical control of a manufacturer in order to hold a manufacturer under the res ipso loquitur doctrine. *Asher v. Coca Cola Bottling Co.* 855

40. A consumer can recover either on the theory of negligence or implied warranty from a manufacturer for injuries resulting from the presence of a deleterious substance in a product manufactured and

sold for human consumption where it is shown that the deleterious substance was present when the product left the manufacturer's control. *Asher v. Coca Cola Bottling Co.* 855

41. Ordinary care is that amount or degree of care which common prudence and a proper regard for one's own safety and the safety of others would require under the circumstances shown in the evidence. *Niemeyer v. Forburger* 876

42. Invitees are those who are expressly or by implication invited to come upon the premises of another. *Niemeyer v. Forburger* 876

43. The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition. *Niemeyer v. Forburger* 876

44. The possessor of land is subject to liability for bodily harm caused to a business invitee by a natural or artificial condition thereon if he knows, or by exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk. *Niemeyer v. Forburger* 876

45. Liability of master for acts of a servant stated. *Niemeyer v. Forburger* 876

New Trial.

In a criminal case, a new trial may be granted for newly discovered evidence which is competent, material, and credible, which might have changed the result of the trial, and which the exercise of due diligence could not have discovered and produced at the trial. *Wolff v. State* 65

Notice.

Under a provision specifically designating the time within which notice must be given, time is of the essence, and such provision is to be strictly construed. *Wolf v. Tastee Freez Corp.* 430

Officers.

1. The Constitution provides that the heads of all executive departments shall be appointed by the Governor, and may be removed by him. *State ex rel. Beck v. Obbink* 242

2. Under the Constitution, the Governor is empowered to remove any officer appointed by him, in the case

of incompetency, neglect of duty, or malfeasance in office. *State ex rel. Beck v. Obbink* 242
3. Under the Constitution, the supreme executive power is vested in the Governor. *State ex rel. Beck v. Obbink* 242
4. By statute, the Department of Aeronautics is defined and provision is made for a Director of Aeronautics. *State ex rel. Beck v. Obbink* 242
5. In an instance where the term of an office is fixed by law the Governor may dismiss such officer only for incompetency, neglect of duty, or malfeasance, based upon specific charges, after hearing or opportunity for hearing. *State ex rel. Beck v. Obbink* 242
6. In the case of an office which has no fixed term the Governor may dismiss an officer without cause and without notice, hearing, or opportunity for hearing. *State ex rel. Beck v. Obbink* 242

Parent and Child.

1. Basis of family-purpose doctrine in use of automobile stated. *Garska v. Harris* 339
2. Where a son resides with his father he does not cease to be a member of the family merely by reason of the fact that he has arrived at his majority. *Garska v. Harris* 339
3. The test to be applied as to the family-purpose doctrine is not whether the son is an adult or a minor, but whether he was using the automobile for a purpose for which the parent provided it, with authority, express or implied. *Garska v. Harris* 339
4. The appointment of a guardian by a county court is not conclusive as against the parents' right to the custody of their children, unless it appears that they had notice of the proceeding and that the question of their competency and suitability was adjudicated. *Walker v. Gehring* 398
5. The habitation or residence of a minor child is by operation of law determined and fixed by that of the parents unless the parents have voluntarily surrendered such right. *Walker v. Gehring* 398
6. The statute declares, and nature demands, that the right to custody of children be in the parents, unless the parents are unfit to perform the duties imposed by the relation of parent and child or have in some manner forfeited that right. *Walker v. Gehring* 398
7. Habeas corpus may properly be used in custody

cases, and such proceedings are governed by considerations of expediency and equity. *Walker v. Gehring* 898

Parties.

1. Defendants who have a common interest and a common defense are properly joined in one suit for injunction. *Schlientz v. City of North Platte* 477
2. Where the act sought to be enjoined is threatened or being performed by more than one person, all may be joined as defendants. *Schlientz v. City of North Platte* 477

Payment.

1. In a proceeding to recover for services rendered, plaintiff is not required to show nonpayment therefor since payment is an affirmative defense. *Hancock v. Parks* 442
2. Payments made or credits given under a mistake of fact may be rescinded. *Corn Belt Products Co. v. Mullins* 561

Penalties.

1. The Constitution governs the disposition of all fines, penalties, and license money. *School Dist No. 54 v. Howell* 404
2. Since 1913 there has been no statutory or legally established formula for the division and distribution of funds collected on account of fines, penalties, and license money where parts of cities, villages, precincts, or other municipal subdivisions less than a county are situated in more than one school district. *School Dist. No. 54 v. Howell* 404
3. In order to reasonably and equitably comply with the constitutional mandate it is required that a division of fines, penalties, and license money shall be made in proportion to the number of persons of school age residing in the areas of the school districts which are within the municipal subdivision according to the school census taken last before apportionment of funds. *School Dist. No. 54 v. Howell* 404

Pensions.

1. Article VII-A of the home rule charter of the city of Omaha, added to such charter in 1942, by vote of the electorate, did not repeal Article VI, section 2, of such charter. *Belitz v. City of Omaha* 36

2. The purpose of pension laws is beneficial. Statutes of that character should be liberally construed in favor of those intended to be benefited. *Belitz v. City of Omaha* 36
3. Under Article VI, section 2, of the home rule charter of the city of Omaha, all rights to a fireman's pension are fixed at the date of his retirement, and his wife would be entitled to a pension upon his death in accordance with the charter provision as it then existed. *Belitz v. City of Omaha* 36

Pleading.

1. A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. *Elliott v. City of Auburn* 1
State ex rel. Beck v. Obbink 242
Prucha v. Department of Motor Vehicles 415
First Nat. Bank v. Morgan 849
2. In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof. *Elliott v. City of Auburn* 1
Prucha v. Department of Motor Vehicles 415
3. If defendant relies on the nonperformance of the contract by the plaintiff, he must allege that fact in his answer. *Rickertsen v. Carskadon* 46
4. In pleading nonperformance of a contract, the facts which constitute the breach must be alleged, and the breach assigned must conform to the terms of the contract. *Rickertsen v. Carskadon* 46
5. A petition for damages alleged to have been caused by the negligent construction of a curb by a city of the metropolitan class is subject to demurrer if it fails to allege that the notice required by statute was filed within the time required. *Knapp v. City of Omaha* 78
6. A party may at any and all times invoke the language of his opponent's pleading, on which the case is being tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner. *Aye v. Gartner* 162
7. A demurrer to an answer searches the entire record and is applicable to the first pleading found to be defective. *State ex rel. Beck v. Obbink* 242
8. Contributory negligence is an affirmative defense,

the burden of proving which is on the party pleading it. *Garska v. Harris* 339

9. The mere fact that more than one equitable remedy is sought does not establish that more than one cause of action is included in a plaintiff's petition. *Schlientz v. City of North Platte* 477

10. The particular nature of the wrong done by defendant may require the application of different remedies for the enforcement of plaintiff's right. The rules governing joinder of causes of action do not preclude plaintiff from presenting in the same pleading distinct and different grounds for recovery upon a single primary right. *Schlientz v. City of North Platte* 477

11. A petition which sets out the facts is sufficient and it is unnecessary to plead the legal conclusions to be drawn therefrom. *State Securities Co. v. Svoboda* 526

12. A petition showing on its face that the cause of action stated therein is barred by the statute of limitations is subject to general demurrer. *Baum v. Lipsett, Inc.* 623

13. What a pleading may be denominated is not necessarily controlling. The character of a pleading is determined by its contents. *Walkenhorst v. Apolius* 830

14. The law of amendments should be liberally construed. *Walkenhorst v. Apolius* 830

15. Neither statute nor any rule of court called to our attention requires a party seeking to amend a pleading to do so in any particular form or manner nor to support his application therefor by affidavit, if the record discloses that the trial court was in some appropriate manner informed of the nature and purpose of the proposed amendment. *Walkenhorst v. Apolius* 830

Principal and Agent.

1. In general the duties of a real estate broker are essentially the same as those which an agent owes to his principal. *Gillespie v. State Real Estate Commission* 308

2. A real estate broker who fails to disclose to his principal every material fact in a transaction which is the subject matter of the agency is guilty of fraud and bad faith. *Gillespie v. State Real Estate Commission* 308

Process.

1. Where a foreign corporation has business transactions in this state with citizens and residents of the state out of which arise accounts or claims against the corporation, such accounts or claims may be enforced in the courts of this state if jurisdiction can be obtained by legal service of process. *Hills v. Burnett* 370
2. By statute, provision is made for service of process on the Secretary of State of this state when a foreign corporation is doing business within the state. *Robertson v. Burnett* 385
3. Statutory definition of foreign corporation is given. *Robertson v. Burnett* 385

Public Service Commissions.

1. An order of the railway commission which fails to make findings of ultimate facts is irregular and will be set aside upon appeal. *Basin Truck Co. v. All Class I Rail Carriers* 28
2. The power of the railway commission over public power companies in the construction of their electric transmission lines carrying a voltage of 700 volts or more is limited by statute. *Consumers P. P. Dist. v. Twin Valleys P. P. Dist.* 315
3. The proviso contained in statutory provision regulating construction of electric transmission lines, that the railway commission shall take into consideration the fact of the prior occupancy of the senior company, is not a delegation of general regulation and control of public power companies to the railway commission. *Consumers P. P. Dist. v. Twin Valleys P. P. Dist.* 315
4. By statute, the railway commission, in considering an application, route map, and specifications for a proposed electric transmission line, will require a construction of the line that will protect the safety, operation, and efficiency of transmission, telephone, and telegraph lines already in the area. *Consumers P. P. Dist. v. Twin Valleys P. P. Dist.* 315
5. Where an application is made by a railroad company to discontinue an existing service operating at a loss, the primary question to be determined is the public need therefor. *Chicago, B. & Q. R.R. Co. v. Drayton* 321
6. It is the duty of a carrier to seek the aid of regulatory agencies to permit the elimination of those

services and facilities that are no longer needed or used by the public to any substantial extent. *Chicago, B. & Q. R.R. Co. v. Drayton* 321

7. The matter of time necessary to devote to the performance of duties by station agents, whose agencies are sought to be combined, is a matter of importance in determining whether or not the railway commission acted arbitrarily and unreasonably in denying a railroad's application for permission to combine such agencies. *Chicago, B. & Q. R.R. Co. v. Drayton* 321

8. Unless public necessity requires, the discretion of a railroad company in establishing a dual agency should not be interfered with by the railway commission, and where the undisputed evidence shows that the essential needs of a community can be served as a part of a dual agency, an order denying an application for the establishment of such an agency is arbitrary and unreasonable. *Chicago, B. & Q. R.R. Co. v. Drayton* 321

9. When the service sought to be discontinued or modified is one of convenience rather than necessity, the question of expense to the company, the volume of business done, the community need, the revenue return, and the relative benefit to the public are factors that cannot be disregarded. *Chicago, B. & Q. R.R. Co. v. Drayton* 321

10. The time for appeal from an order of the railway commission runs from the date that the parties are notified of the order. *Denver Chicago Transp. Co., Inc. v. Poulson* 862

11. On an appeal to the Supreme Court from an order of the railway commission in proceedings upon an application for a certificate of public convenience and necessity, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrary. *Denver Chicago Transp. Co., Inc. v. Poulson* 862

12. The primary object of the regulation of public utilities by the railway commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but, first and at all times, to serve the interests of the public. *Denver Chicago Transp. Co., Inc. v. Poulson* 862

13. Controlling questions to be determined in issuance of certificate of public convenience and necessity stated. *Denver Chicago Transp. Co., Inc. v. Poulson* 862

Public Utilities.

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Quantum Meruit.

1. An action based on quantum meruit for labor and materials furnished is grounded upon an implied promise to pay the reasonable value thereof. *Hancock v. Parks* 442
2. Since there is no specific standard by which reasonable value of labor and materials furnished may be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced. *Hancock v. Parks* 442

Railroads.

1. Where an application is made by a railroad company to discontinue an existing service operating at a loss, the primary question to be determined is the public need therefor. *Chicago, B. & Q. R.R. Co. v. Drayton* 321
2. It is the duty of a carrier to seek the aid of regulatory agencies to permit the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent. *Chicago, B. & Q. R.R. Co. v. Drayton* 321
3. The matter of time necessary to devote to the performance of duties by station agents, whose agencies are sought to be combined, is a matter of importance in determining whether or not the railway commission acted arbitrarily and unreasonably in denying a railroad's application for permission to combine such agencies. *Chicago, B. & Q. R.R. Co. v. Drayton* 321
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5. When the service sought to be discontinued or modified is one of convenience rather than necessity, the

question of expense to the company, the volume of business done, the community need, the revenue return, and the relative benefit to the public are factors that cannot be disregarded. *Chicago, B. & Q. R.R. Co. v. Drayton* 321

References.

1. Where no exceptions are filed to the findings of fact of a referee prior to confirmation by the trial court, the findings of fact are binding on all parties. *Corn Belt Products Co. v. Mullins* 561
2. Objections to the appointment of a referee, or to the qualifications of the person appointed as referee, must be made at the time of the appointment and will not be considered when made for the first time after the report of the referee has been filed and confirmed by the court. *Corn Belt Products Co. v. Mullins* 561

Replevin.

1. An action in replevin in this state is properly triable to a jury. *First State Bank of Scottsbluff v. Bear* 504
2. Replevin lies only in behalf of one entitled to the possession of the property as against the defendant, at the time of the commencement of the action or issuance of the writ, and such right of possession must be immediate, exclusive, and unqualified. *First Nat. Bank v. Morgan* 849
3. Generally, where a personal chattel is owned by several persons, one part owner cannot maintain replevin for it, for the reason that all joint owners, unless there is an agreement to the contrary, are equally entitled to the possession of the property, and neither has the right to the immediate and exclusive possession of the property as against the other. *First Nat. Bank v. Morgan* 849

Sales.

1. The essential thing in the passing of a title to personal property is that the vendor and the vendee intend that the title shall pass, and not what induced them to have that intention, *Guckeen Farmers Elevator Co. v. South Soo Grain Co.* 426
2. When property is sold and delivered to a fraudulent vendee, an innocent purchaser of the property from

the fraudulent vendee will take good title. *Guckeen Farmers Elevator Co. v. South Soo Grain Co.* 426

3. If after seller delivers possession to the buyer pursuant to a sale induced by the buyer's fraud the property has passed into the hands of a bona fide purchaser for value, the right of the original seller to recover the property is lost. *Guckeen Farmers Elevator Co. v. South Soo Grain Co.* 426

4. An essential of a time sale price is a price agreed upon between the parties where the buyer is actually informed of and has at the time the sale is made an opportunity to choose between a cash and a time sale price. *Wood v. Commonwealth Trailer Sales, Inc.* 494

5. 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, may not be regarded as being tainted with usury. *Wood v. Commonwealth Trailer Sales, Inc.* 494

6. The form of a transaction may properly be considered in determining whether the price charged was a cash or time sale price. *Wood v. Commonwealth Trailer Sales, Inc.* 494

7. Legal necessity requires looking beyond the form to the substance to ascertain whether a sale is a cash or time sale. *Wood v. Commonwealth Trailer Sales, Inc.* 494

8. A contract of conditional sale is not valid as against a mortgagee for value and without notice from a purchaser of the conditional vendee. *First State Bank of Scottsbluff v. Bear* 504

9. The unexplained presence of a deleterious substance in a product manufactured and sold in a sealed container for human consumption is evidence of a breach of implied warranty that the product is wholesome and fit for human consumption. *Asher v. Coca Cola Bottling Co.* 855

10. A consumer can recover either on the theory of negligence or implied warranty from a manufacturer for injuries resulting from the presence of a deleterious substance in a product manufactured and sold for human consumption where it is shown that the deleterious substance was present when the product left the manufacturer's control. *Asher v. Coca Cola Bottling Co.* 855

Schools and School Districts.

1. The special election authorized by the Reorganization of School Districts Act is governed by the general election laws and is subject to the contests provided therein. *Arends v. Whitten* 297
2. The county school district reorganization committee is the real party in interest in a contest over a reorganization plan submitted by them, rather than the legal voters of the districts involved. *Arends v. Whitten* 297
3. Included within "county purposes" is the amount necessary to be raised by taxation as provided in the annual budget of the school districts for school purposes. *C. R. T. Corp. v. Board of Equalization* 540
4. There is a presumption that the officers of a school district acted within their authority and did not transgress the scope thereof. *C. R. T. Corp. v. Board of Equalization* 540
5. When it is charged that the action of the officers of a school district was beyond their authority, the burden is upon the one making the charge to adduce proof to sustain the charge. *C. R. T. Corp. v. Board of Equalization* 540
6. The amount of taxes to be levied for school purposes is not capable of exact determination, and if the levy appears to be reasonable in the light of contingencies to which regard must be given, even though a surplus may be anticipated, the levy will be sustained. *C. R. T. Corp. v. Board of Equalization* 540

Set-Off and Counterclaim.

1. By statute, a motion for directed verdict or dismissal may be made by defendant without withdrawing a counterclaim or cross-petition. *Edmunds v. Ripley* 797
2. In the event a motion for directed verdict or dismissal is sustained, the counterclaim or cross-petition shall be continued for further proceedings according to law. *Edmunds v. Ripley* 797

Statutes.

1. In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found. The

intent as deduced from the whole will prevail over that of a particular part considered separately. *Belitz v. City of Omaha* 36

2. Long-continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law. *Belitz v. City of Omaha* 36

3. By statute, the Department of Aeronautics is defined and provision is made for a Director of Aeronautics. *State ex rel. Beck v. Obbink* 242

4. Legislation applicable alone to a portion of the state is not for that reason forbidden by the Constitution when there is a reasonable relation between the objects of the legislation and the area to which it is applicable. *Satterfield v. State* 275

5. Nature of rule-making power of administrative agency stated. *Satterfield v. State* 275

6. Where a statute is amended or reenacted in different language, it will be presumed that the language was intentionally changed for the purpose of effecting a change in the law itself. *Hills v. Burnett* 370

7. In considering an amendatory or substituted statute, it is proper to consider the provisions of the law which was repealed in connection with the law which takes its place in order to ascertain the legislative intent, and all provisions of the original statute which are not carried forward into or repeated in the new law are annulled by the repealing statute. *Hills v. Burnett* 370

8. On the adoption of a code or revision by the Legislature, all laws of a general or permanent nature which previously existed but which were omitted therefrom cease to be law, except as it may be otherwise provided in the code or revision or in the act adopting it. *School Dist. No. 54 v. Howell* 404

9. All persons are presumed to know and are bound to take notice of general public laws of the country or state where they reside as well as the legal effect of their acts. *Prucha v. Department of Motor Vehicles* 415

10. A mere change of phraseology or punctuation, or the addition or omission of words in the revision or codification of statutes does not necessarily change the operation or effect thereof, and will not be deemed to do so unless the intent to make such change is clear and unmistakable. *Stephenson School Supply Co. v. County of Lancaster* 453

11. No presumption arises from changes made that the revisors or the Legislature in adopting the revision intended to change the existing law; but the presumption is to the contrary, unless an intent to change it clearly appears. *Stephenson School Supply Co. v. County of Lancaster* 453
12. Where a right has been created by statute which did not exist at the common law, the Legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the statute and must be fully complied with in the manner therein prescribed. *Bame v. Lipsett, Inc.* 623

Subrogation.

1. Subrogation will be applied where one, not acting voluntarily, pays the debt for which another is primarily liable, and which in equity and good conscience the latter should have discharged. *Rapp v. Rapp* 68
2. Legal and conventional subrogation are defined and applied. *Rapp v. Rapp* 68
3. Subrogation is a creature of the equity courts, invented and applied to do justice or to prevent an injustice being done in a particular case and under a particular state of facts, where the law is powerless in the premises. *Rapp v. Rapp* 68
4. The mere fact that with the proceeds of a latter mortgage a prior one was paid affords no ground for subrogating the junior mortgagee to the rights of the former mortgagee upon it being discovered that a lien has arisen intermediate between the two mortgages. *Rapp v. Rapp* 68
5. The right of one seeking subrogation must have greater equity than the rights of those opposing it. *Rapp v. Rapp* 68
6. If in an interpleader proceeding, an insured collects the damages for which he was compensated by his insurance carrier, such insurance carrier is entitled to assert its right to an equitable subrogation thereto. *United Services Automobile Assn. v. Hills* 128
7. An insured is entitled to retain a proportionate share of the expense, including attorney's fee, incurred in making recovery on behalf of insured and his insurer from a wrongdoer where insurer fails to make itself a party to and fails to assist in the prosecution of the action. *United Services Automobile Assn. v. Hills* 128

8. Recovery of expenses and attorney's fees, in action brought on behalf of insured automobile owner which insurance company refused to defend, is not based on the relation of attorney and client, but on the equitable theory that one who incurs expenses for the recovery of money for the benefit of a holder of a right of equitable subrogation should be permitted to reimburse himself for the share of the expense that was for the benefit of the holder of the subrogation right. *United Services Automobile Assn. v. Hills* 128

Taxation.

1. Governing body of any city of the second class has power to levy special assessment to pay cost of paving. *Elliott v. City of Auburn* 1
2. By statute, upon petition of abutting property owners, city council of city of second class may create a paving district and levy special assessments. *Elliott v. City of Auburn* 1
3. By statute, the sufficiency of the petitions as to ownership of the property in a paving district is to be determined by the record in the office of the county clerk or register of deeds at the time of the adoption of the paving ordinance. *Elliott v. City of Auburn* 1
4. The Legislature has provided no appeal to the district court from the action of a city council of a city of the second class sitting as a board of equalization in levying special assessments for paving. In such a situation, the only way a district court gets jurisdiction is by proceedings in error. *Elliott v. City of Auburn* 1
5. In this jurisdiction an opportunity to be heard with right of review upon the question of assessments for benefits is all that is required to satisfy the due process provisions of the Constitutions of Nebraska and the United States. *Elliott v. City of Auburn* 1
6. Notice is required by statute to be given of meeting of city council of city of the second class to fix the amount to be charged against abutting property owners on account of paving improvement. *Elliott v. City of Auburn* 1
7. It is the duty of the county board to determine where within the county personal property shall be assessed when questions arise, and its decision

will not be disturbed unless an abuse of discretion is shown. *Goebel v. County of Holt* 81
Ramm v. County of Holt 88

8. The term "farm" as used in tax statutes, means a tract of land used for cultivation or production of crops of any nature, or the raising of any type of animal embraced within the term "livestock." *Goebel v. County of Holt* 81
Ramm v. County of Holt 88

9. Where the owner of cattle resides in one taxing district and his cattle are kept on a farm in another taxing district, which farm is entirely disconnected from the home of the owner, such cattle are properly taxed in the taxing district where kept. *Goebel v. County of Holt* 81

10. The Supreme Court cannot say as a matter of law that a county board abused its discretion when it held contiguous tracts of land in two different school districts constituted one farm rather than two where taxpayers had different parts of a cattle operation in each of the districts. *Ramm v. County of Holt* 88

11. By the terms of Article VIII, section 1, of the Constitution, it is provided that taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises. *First Continental Nat. Bank & Trust Co. v. Davis* 118

12. By the terms of Article VIII, section 1, of the Constitution, taxes uniform as to class may be levied by valuation upon all other property. *First Continental Nat. Bank & Trust Co. v. Davis* 118

13. By the terms of Article VIII, section 2, of the Constitution, the Legislature is empowered to exempt by law certain specified property. *First Continental Nat. Bank & Trust Co. v. Davis* 118

14. There is no provision of the Constitution other than Article VIII, section 2, exempting property from taxation, or which permits exemption by the Legislature. *First Continental Nat. Bank & Trust Co. v. Davis* 118

15. By the terms of Article VIII, section 2, of the Constitution, no property is exempt from taxation except as provided in the Constitution. *First Continental Nat. Bank & Trust Co. v. Davis* 118

16. By statute, the property involved herein is intangible property on which, under the terms of Article VIII, section 2, of the Constitution, the tax must

be in uniformity with that levied on the class to which it belongs. *First Continental Nat. Bank & Trust Co. v. Davis* 118

17. The Legislature has power to classify intangible property for the purpose of taxation, but it may not divide a class and enact different rates of taxation for different segments of the class. *First Continental Nat. Bank & Trust Co. v. Davis* 118

18. The validity and constitutionality of a classification for the purposes of taxation may not be sustained unless it rests upon real differences of situation and circumstances from those applicable to other persons and property. *First Continental Nat. Bank & Trust Co. v. Davis* 118

19. Property may not be exempted from taxation by the Legislature unless power so to do is found in the Constitution. *First Continental Nat. Bank & Trust Co. v. Davis* 118

20. The Legislature intended by transferring book accounts to Class A in intangible tax law to include therein those accounts, demands, claims, and credits which are not usually evidenced by written acknowledgment. *Stephenson School Supply Co. v. County of Lancaster* 453

21. In listing book accounts for taxation, the taxpayer cannot deduct therefrom his accounts payable or debts owed by him to others. *Stephenson School Supply Co. v. County of Lancaster* 453

22. In listing bills and accounts receivable for taxation, the taxpayer may not properly deduct bills and accounts payable therefrom. *Peter Kiewit Sons', Inc. v. County of Douglas* 710

23. The doctrine of immunity from taxation has been said not to be undergoing a process of expansion; rather, the more recent cases indicate a tendency to restrict more sharply than ever the various exemptions which arise out of the doctrine. *Stephenson School Supply Co. v. County of Lancaster* 453

24. Statutes exempting property from taxation should be strictly construed. One contending that his property is exempt from such tax must show clearly that he is within the exceptions provided by statute. *Stephenson School Supply Co. v. County of Douglas* 453

25. Open accounts of a governmental subdivision of the state not bearing interest and not liquidated in the hands of a creditor of the subdivision are not

exempt from taxation. *Stephenson School Supply Co. v. County of Lancaster* 453
26. The county board of equalization is required to make the levy of taxes for all county purposes. *C. R. T. Corp. v. Board of Equalization* 540
27. Included within "county purposes" is the amount necessary to be raised by taxation as provided in the annual budget of the school districts for school purposes. *C. R. T. Corp. v. Board of Equalization* 540
28. A taxpayer may appeal from the action of the county board of equalization, if in the judgment of the taxpayer the levy is for an unlawful or unnecessary purpose, or in excess of the amount necessary to perform the purposes of the levy. *C. R. T. Corp. v. Board of Equalization* 540
29. The amount of taxes to be levied for school purposes is not capable of exact determination, and if the levy appears to be reasonable in the light of contingencies to which regard must be given, even though a surplus may be anticipated, the levy will be sustained. *C. R. T. Corp. v. Board of Equalization* 540
30. By the terms of the Constitution of Nebraska, the Legislature is empowered to exempt from taxation by general law property which is owned and used exclusively for educational, religious, or charitable purposes, when such property is not owned or used for financial gain or profit to the owner or user. *County of Douglas v. OEA Senior Citizens, Inc.* 696
31. By statute, the Legislature implemented the Constitution of Nebraska so as to exempt from taxation property owned and used exclusively for educational, religious, or charitable purposes, when such property is not owned or used for financial gain or profit to either the owner or user. *County of Douglas v. OEA Senior Citizens, Inc.* 696
32. The question of taxability of property being a subject of inquiry yearly and in the first instance each year by the county assessor, an adjudication that it is exempt from taxation in any one year is not res judicata of the question of whether or not it is exempt in any succeeding year. *County of Douglas v. OEA Senior Citizens, Inc.* 696
33. An independent action is proper in which to determine whether or not property which has been placed upon the assessment rolls is exempt from taxation, and this is true notwithstanding the availability of

a statutory remedy. *County of Douglas v. OEA Senior Citizens, Inc.* 696
34. Property which is owned and used primarily for the purpose of furnishing low-rent housing is not property owned and used exclusively for charitable purposes within the meaning of the Constitution and statutes of Nebraska. *County of Douglas v. OEA Senior Citizens, Inc.* 696
35. Where a person reports intangible property but does not return it for taxation, the property reported and not returned is omitted and undervalued property within the meaning of statute relating thereto. *Peter Kiewit Sons', Inc. v. County of Douglas* 710
36. There is a presumption that a corporation is domiciled in the state of its incorporation and that its intangible personal property is taxable in such state. *Peter Kiewit Sons', Inc. v. County of Douglas* 710
37. Where a corporation conducts none of its business in the state of its incorporation and in fact carries on its business in another state where complete control and management of its corporate powers and purposes is exercised, the actual domicile of such corporation for tax purposes is in the latter state. *Peter Kiewit Sons', Inc. v. County of Douglas* 710
38. The general rule is that intangible personal property has a situs at the domicile of the owner for tax purposes. *Peter Kiewit Sons', Inc. v. County of Douglas* 710
39. In the absence of evidence that intangible personal property is not within a recognized exception to the general rule, such intangible property is properly taxable in the state of the domicile of the corporation. *Peter Kiewit Sons', Inc. v. County of Douglas* 710
40. Bank deposits of a corporation kept in a bank outside of the state of the corporation's domicile are taxable in the state of its domicile unless shown to be within an exception to the general rule. *Peter Kiewit Sons', Inc. v. County of Douglas* 710
41. Stock in subsidiary and affiliated foreign corporations are taxable in the state of the corporation's actual domicile although kept in a foreign state for safekeeping. *Peter Kiewit Sons', Inc. v. County of Douglas* 710
42. Bills and accounts receivable owned by the corporation arising outside of the domiciliary state are taxable in the state of the corporation's domicile unless shown to be within some recognized excep-

tion that makes them nontaxable in that state. *Peter Kiewit Sons', Inc. v. County of Douglas* 710

Telecommunications.

1. The power of the railway commission over public power companies in the construction of their electric transmission lines carrying a voltage of 700 volts or more is limited by statute. *Consumers P. P. Dist. v. Twin Valleys P. P. Dist.* 315
2. The proviso contained in statutory provision regulating construction of electric transmission lines, that the railway commission shall take into consideration the fact of the prior occupancy of the senior company, is not a delegation of general regulation and control of public power companies to the railway commission. *Consumers P. P. Dist. v. Twin Valleys P. P. Dist.* 315
3. By statute, the railway commission, in considering an application, route map, and specifications for a proposed electric transmission line, will require a construction of the line that will protect the safety, operation, and efficiency of transmission, telephone, and telegraph lines already in the area. *Consumers P. P. Dist. v. Twin Valleys P. P. Dist.* 315

Tenancy in Common.

1. Ratification of a contract between fewer than all tenants in common and a third person, in order to be binding on the other cotenants, requires that they have full knowledge of such contract and of the facts and circumstances connected with its execution. *First Nat. Bank v. Morgan* 849
2. Where a tenant in common does nothing to mislead a third person, or where the conduct of the tenant is not such as to warrant a third person's reliance thereon, the tenant is not estopped to assert that he is not bound by the unauthorized acts of his cotenant. *First Nat. Bank v. Morgan* 849

Time.

In determining if the 6-months' waiting period in a divorce case has elapsed, the rule is to exclude the first day and include the whole of the last day in said period. *Copple v. Bowlin* 467

Torts.

Where the independent tortious acts of two persons combine to produce an injury indivisible in its na-

ture, either tortfeasor may be held for the entire damages, 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. *Barry v. Moore*..... 57

Trial.

1. A final order within the meaning of a statute authorizing a petition in error is one which determines the action and prevents a judgment. *Belitz v. City of Omaha* 36
2. An order is final only when no further action is required to dispose of the cause pending, but when the cause is retained for further action the order is interlocutory. *Belitz v. City of Omaha* 36
3. In a contract action where the defendant may have received benefits which cannot be returned, and defendant contests on the theory that he received little or no benefit, he is entitled to an instruction that if such fact is proved the jury should allow the defendant to rescind the contract and pay only for the benefit, if any, he received. *Rickertsen v. Carskadon* 46
4. In a case where it becomes necessary to give further instructions to a jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel. *Barry v. Moore* 57
5. It is error to give an instruction to a jury after it has retired to deliberate out of the presence of of the parties and their counsel, but if it clearly appears that prejudice did not and could not flow therefrom, it is error without prejudice and not ground for reversal. *Barry v. Moore* 57
6. The trial court has the duty to instruct the jury on issues presented by the pleadings and evidence, whether requested to do so or not, and a failure to do so constitutes prejudicial error. *Barry v. Moore* 57
7. Affidavits used in the trial of issues of fact must be preserved in the form of a bill of exceptions in order to be available to the complaining party on appeal or petition in error. *Wolff v. State* 65
8. In stating the issues of fact in its charge to the jury, the court should submit to the jury only such issues as are in controversy and which find support in the evidence. *Langford v. Ritz Taxicab Co.* 153

9. Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. *Langford v. Ritz Taxicab Co.* 153
Hopwood v. Voss 204
10. Where a party has sustained the burden of a trial and has succeeded in securing the verdict of a jury on controverted issues of fact, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Langford v. Ritz Taxicab Co.* 153
11. A party may at any and all times invoke the language of his opponent's pleading, on which the case is being tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner. *Aye v. Gartner* 162
12. Where the more favorable evidence relied on by a party to overcome the effect of his own self-injurious statement is 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 facts to decide the issue upon all the evidence. *Aye v. Gartner* 162
13. Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony. *Dworak v. City of Omaha* 209
14. Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. *Dworak v. City of Omaha* 209
15. Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false. *Dworak v. City of Omaha* 209
16. It is the duty of the trial court to correctly instruct on the issues reflected by the pleadings.

However, a trial court is entitled to assume that tendered instructions express the theory of the party tendering them on the point involved. *Ballantyne v. Parriott* 215

17. A party requesting instructions on a certain theory cannot be heard to complain on appeal that the trial court gave other instructions on the same theory. *Ballantyne v. Parriott* 215

18. When a theory on any issue is relied upon by a party at the trial as the proper one, it will be adhered to on appeal without regard to its correctness. *Ballantyne v. Parriott* 215

19. In every action for the recovery of money only, the jury may render a general or special verdict. *Baum v. County of Scotts Bluff* 225

20. A general verdict is one by which a jury pronounces generally upon all or any of the issues either in favor of the plaintiff or defendant. *Baum v. County of Scotts Bluff* 225

21. A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented that nothing remains to the court but to draw from them conclusions of law. *Baum v. County of Scotts Bluff* 225

22. Conditions necessary for rendition of summary judgment stated. *Finn v. Whitten* 282

23. The Supreme Court cannot determine whether counsel was guilty of misconduct while presenting his opening argument to a jury where the bill of exceptions does not contain all of such opening argument to which objection is made. *Garska v. Harris* 339

24. Statements constituting alleged misconduct of counsel in argument to the jury must be taken by the court reporter at the trial, together with the objections made thereto and the ruling thereon. *Garska v. Harris* 339

25. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that the jury disregarded the evidence or controlling rules of law. *Garska v. Harris* 339
Niemeyer v. Forburger 876

26. By statute, a motion for directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict. The trial court cannot,

either upon its own motion or upon motion for judgment notwithstanding the verdict, set aside a verdict and enter a judgment notwithstanding the verdict where no preliminary motion for a directed verdict has been made. *Pearson v. Schuler* 353

27. Instructions must be construed together, and if, when construed as a whole they properly state the law, they are sufficient. *Pearson v. Schuler* 353
Stevens v. County of Dawson 590
Niemeyer v. Forburger 876

28. It is presumed in an action at law that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. *Pearson v. Schuler* 353
Hancock v. Parks 442

29. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed. *Wolf v. Tastee Freez Corp.* 430
Youngs v. Wagner 735

30. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom. *Schlines v. Ekberg* 510
Collett v. Hendrickson 571

31. A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered. *Wolf v. Tastee Freez Corp.* 430

32. Rule for consideration of motion for directed verdict or judgment notwithstanding the verdict stated. *Hancock v. Parks* 442

33. Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined. *Hancock v. Parks* 442

34. An action in replevin in this state is properly triable to a jury. *First State Bank of Scottsbluff v. Bear* 504

35. The court examines the evidence on a motion for summary judgment, not to decide any issue of fact

presented, but to discover if any real issue of fact exists. *Schlines v. Ekberg* 510
Collett v. Hendrickson 571
36. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. *Schlines v. Ekberg* 510
Collett v. Hendrickson 571
Youngs v. Wagner 735
37. A motion for summary judgment is not a substitute for a demurrer, a motion to dismiss, or a motion for judgment on the pleadings. *Schlines v. Ekberg* 510
38. One who at the close of a trial admits that there is evidence to establish an issuable fact in accord with a requested instruction cannot afterward be heard to say that there was no evidence received tending to prove that fact. *Spani v. Whitney* 550
39. Where no exceptions are filed to the findings of fact of a referee prior to confirmation by the trial court, the findings of fact are binding on all parties. *Corn Belt Products Co. v. Mullins* 561
40. Objections to the appointment of a referee, or to the qualifications of the person appointed as referee, must be made at the time of the appointment and will not be considered when made for the first time after the report of the referee has been filed and confirmed by the court. *Corn Belt Products Co. v. Mullins* 561
41. The summary judgment procedure is not intended to be used as a device to prevent a trial of an action on the merits, but is available only when no genuine issue of fact exists. *Otteman v. Interstate Fire & Cas. Co., Inc.* 574
42. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. *Buick v. Stoehr* 629
Edmunds v. Ripley 797
43. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law, rather than submit it to a jury for determination. *Buick v. Stoehr* 629
44. Where undisputed physical facts demonstrate that

a collision out of which injuries arose was not caused by negligence of defendant, the evidence is not sufficient to support a verdict for plaintiff. *Buick v. Stoehr* 629

45. In an action in which the comparative negligence rule has application where the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant, the action should be dismissed or a verdict directed. *Buick v. Stoehr* 629

46. Rule as to consideration of motion for judgment notwithstanding the verdict stated. *Buick v. Stoehr* 629

47. Rule for consideration of motion for directed verdict stated. *Bland v. Fox* 662
Edmunds v. Ripley 797

48. In an action wherein 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. *Bland v. Fox* 662

49. 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 the Supreme Court for review. *Bland v. Fox* 662

50. In considering a motion for summary judgment the court should view the evidence bearing on the question of whether or not there is a genuine issue of material fact in the light most favorable to the party against whom it is directed. *Fay Smith & Associates, Inc. v. Consumers P. P. Dist.* 681

51. In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case and, second, that he is entitled to a judgment as a matter of law. *Fay Smith & Associates, Inc. v. Consumers P. P. Dist.* 681
Youngs v. Wagner 735

52. Summary judgment is effective and serves a separate useful purpose only when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. *Fay Smith & Associates, Inc. v. Consumers P. P. Dist.* 681
Youngs v. Wagner 735

53. The evidence offered on a motion for summary judgment is for the purpose of showing that no

issue of fact exists, not to try issues on pleadings, depositions, and affidavits which constitute only a part of the evidence available on a trial of the merits. *Fay Smith & Associates, Inc. v. Consumers P. P. Dist.* 681

54. The Summary Judgments Act authorizes summary judgment where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and where no genuine issue remains for trial. *County of Douglas v. OEA Senior Citizens, Inc.* 696

55. The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. *Youngs v. Wagner* 735

56. The burden of proof 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. *Edmunds v. Ripley* 797

57. A mere scintilla of evidence is not enough to require the submission of an issue to the jury. It is the duty of a trial court to direct a verdict where the evidence is undisputed or where the evidence, though conflicting, is so conclusive that it is insufficient to sustain a verdict and judgment. *Edmunds v. Ripley* 797

58. A recovery cannot be had for acts of negligence not alleged in the petition. The rule is that allegata and probata must agree. *Edmunds v. Ripley* 797

59. By statute, a motion for directed verdict or dismissal may be made by defendant without withdrawing a counterclaim or cross-petition. *Edmunds v. Ripley* 797

60. In the event a motion for directed verdict or dismissal is sustained, the counterclaim or cross-petition shall be continued for further proceedings according to law. *Edmunds v. Ripley* 797

61. In an action under the automobile guest statute, a verdict should not be directed nor a cause of action dismissed unless a court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach the degree of negligence that is considered gross. *Smith v. Damato* 811

62. It will not be presumed that passion and prejudice influence the action of jurors, but it must be affirmatively shown before a verdict will be disturbed. *Smith v. Damato* 811

63. Generally, the burden is on the appellant to show that the trial court erred in charging the jury. *Smith v. Damato* 811
64. A judgment of the district court is presumed to be correct. A party assailing the correctness of it must assume the burden of pointing out specifically the rulings of which he complains and the mistake made by the court. *Smith v. Damato* 811
65. A motion for summary judgment serves a specific limited purpose and is not intended to supplant other existing procedures. *Walkenhorst v. Apolius* 830
66. It is not error to refuse a requested instruction if the substance of the requested instruction is covered by other instructions given. *Niemeyer v. Forburger* 876

Trusts.

When one person obtains property of another by theft or fraud, equity will raise a constructive trust in favor of the defrauded party. *Corn Belt Products Co. v. Mullins* 561

United States.

As to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. *United Air Lines, Inc. v. Nebraska State Railway Commission* 784

Usury.

1. Rule with respect to usury applied to a building contract giving a choice as between a cash-payment plan and a time-payment plan. *Jones v. Elliott* 96
2. The Industrial Loan and Investment Company Act is violated if a loan is made repayable over a period exceeding 36 months. *Dougherty v. Commonwealth Co.* 330
3. By the terms of the Industrial Loan and Investment Company Act, no industrial loan and investment company shall induce or permit any person to become obligated, directly or contingently or both, under more than one contract at the same time for the purpose of obtaining a higher rate of charge than would be permitted if all of the obligations of such person to such company were consolidated into one obligation. *Dougherty v. Commonwealth Co.* 330
4. By the penalty section of the Industrial Loan and Investment Company Act, a loan which is violative

of the prohibitive terms of any section thereof is void and the lender has no right to collect and receive any principal, interest, or charges. *Dougherty v. Commonwealth Co.* 330

5. By a violation of the Industrial Loan and Investment Company Act, the lender becomes obligated to return to the borrower the payments made. *Dougherty v. Commonwealth Co.* 330

6. 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. *Hills v. Burnett* 370

7. The permissive provisions of the Installment Loan Act apply to licensees, but every inhibitory provision contained therein applies alike to licensees and nonlicensees and the officers and employees of either or both, and the violation thereof by such persons in connection with any indebtedness, however acquired by them, renders such entire indebtedness void and uncollectible. *Robertson v. Burnett* 385

8. A loan made by a nonlicensee under the Installment Loan Act which is not secured by a real estate mortgage and is not due or payable within the period of 36 months as provided for in the act is violative of said act and is void. *Robertson v. Burnett* 385

9. Maximum amount of interest rates that may be charged on loans is prescribed by the Installment Loan Act. When the charge exceeds the maximum rate prescribed, the loan is rendered void. *Robertson v. Burnett* 385

10. 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, may not be regarded as being tainted with usury. *Wood v. Commonwealth Trailer Sales, Inc.* 494

11. Under statute and court decision, neither a licensee nor any other person may legally, directly or indirectly, charge, contract for, or receive a greater rate of interest than 9 percent per annum upon any loan or upon any part or all of any aggregate indebtedness of the same person, in excess of $3,000. *Wood v. Commonwealth Trailer Sales, Inc.* 494

12. Under statute, an installment loan is unlawful if payments are contracted to be made over a period exceeding 36 calendar months from the date of

making the contract. *Wood v. Commonwealth Trailer Sales, Inc.* 494

13. By statute, it is required that installments for repayment of principal and charges shall be arranged, with exceptions which are not important to note here, so that no installment is substantially greater than any preceding installment. *Wood v. Commonwealth Trailer Sales, Inc.* 494

14. Any contract of loan, made knowingly or without the exercise of due care to prevent the same in violation of Installment Loan Act, is void and the lender has no right to collect or receive any principal, interest, or charges thereon. *Wood v. Commonwealth Trailer Sales, Inc.* 494

Vendor and Purchaser.

1. Where the owner of two adjoining tracts of land sells one of them, the purchaser takes the tract sold with all the benefits and burdens which appear at the time of the sale to belong to it as between it and the tract which the vendor retains. *Meier v. Maguire* 52

2. Whether or not a conveyance is one of implied grant or implied reservation is dependent on whether or not the dominant or servient estate is first conveyed. If the dominant estate is first conveyed, the question is one of implied grant. If the servient estate is first conveyed, the doctrine of implied reservations is applicable. *Meier v. Maguire* 52

3. Whether or not the law applied is that of an implied grant or an implied reservation, the rule of strict necessity is inherently in it and neither an implied grant nor an implied reservation will be decreed unless it is established that it is strictly necessary to the enjoyment of the estate. *Meier v. Maguire* 52

4. The extent of an implied grant is that which is reasonably necessary to convey the benefit intended to have been conveyed by the vendor. *Meier v. Maguire* 52

5. Strict foreclosure of a real estate contract will be granted under peculiar and special circumstances, where in the exercise of a sound judicial discretion it would be inequitable or unjust to refuse it. *Corn Belt Products Co. v. Mullins* 561

Venue.

1. The Legislature may properly establish venue for prosecutions under the brand act in the county of origin of the cattle or in the counties through which the cattle pass in leaving the brand area. *Satterfield v. State* 275
2. Venue in a transitory action is a matter which may be waived and is waived where timely objection is not made. *Corn Belt Products Co. v. Mullins* 561

Waters.

1. In an action for obstruction of the flow of a drainage ditch, the burden of proof is on the landowner to prove the obstruction, that there was an overflow, that the overflow would not have occurred if it were not for the obstruction, and the extent of the damage attributable to it. *Baum v. County of Scotts Bluff* 225
2. One who builds a structure in a drainage ditch is charged with a duty to provide for the passage of all waters, ice, and debris which may reasonably be anticipated to flow or be carried through the ditch. *Baum v. County of Scotts Bluff* 225
3. In order for a flood to come within the term act of God, it must have been so unusual and extraordinary a manifestation of nature as could not under normal conditions have been reasonably anticipated or expected. *Baum v. County of Scotts Bluff* 225
4. An act of God is defined. *Baum v. County of Scotts Bluff* 225
5. Where waters from different sources combine to cause damage, it is incumbent upon the plaintiff to establish either that his damage would have occurred from the waters for which defendant is liable, or to establish the amount of his damage that had been caused by the waters for which defendant is liable. *Baum v. County of Scotts Bluff* 225
6. Statute relating to liability for breaks, overflow, and seepage damage applies only to public power and irrigation districts. *Baum v. County of Scotts Bluff* 225
7. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of

its surface level from any cause. *Dartmouth College v. Rose* 764

Wills.

1. The cardinal rule of testamentary construction is to ascertain the intention of the testator as expressed in his will, and to give it effect, unless the testator attempts to accomplish a purpose or make a disposition contrary to some rule of law or public policy. *Carroll v. Hastings College* 20
2. The intention of a testator is to be ascertained from a liberal interpretation and comprehensive view of all the provisions of a will. *Carroll v. Hastings College* 20
3. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. *Carroll v. Hastings College* 20
Gaughen v. Gaughen 740
4. In the interpretation of language used in a will where a word or words are used in a definite and clearly stated sense, and again used in the same paragraph, it is presumed to be meant in the same sense unless there is a clear intention to the contrary. *Carroll v. Hastings College* 20
5. The intention of the testator is to be ascertained from the whole will and from a consideration of all of its provisions, not merely from isolated clauses, sentences, or words. *Carroll v. Hastings College* 20
6. The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law. *Gaughen v. Gaughen* 740
7. The intention required to be ascertained is the one expressed by the testator by the language employed in his will and does not refer to an entertained intention not expressed therein. *Gaughen v. Gaughen* 740
8. A patent ambiguity in a will must be removed by interpretation according to legal principles. The intention of the testator must be found within the four corners of the will. *Gaughen v. Gaughen* 740
9. Where the language in a will showing a different intention is effectively manifested, statute relating

to cross-remainders is not applicable. *Gaughen v. Gaughen* 740
10. The presumption of a per capita distribution is not a strong one and is easily overborne. It will yield to a very faint glimpse of a contrary intention in the context, or a contrary intention deduced from a study of the will as a whole. *Gaughen v. Gaughen* 740
11. Under language of will, three life estates consisting of a one-third interest each were created, with remainder in fee descending in thirds at three distinct times. *Gaughen v. Gaughen* 740

Witnesses.

1. A consultation with a physician for some purpose other than the ultimate curative or alleviative treatment is not privileged, nor is a communication made at some time when the professional relation is not pending. *Garska v. Harris* 339
2. Any privilege existing between a physician and a patient is a privilege of a personal nature and may be waived by the patient. *Garska v. Harris* 339
3. If sufficient foundation is laid to show that the conditions they observed are the same as existed immediately following an accident, witnesses should be permitted to testify in regard to what they observed insofar as it is relevant and material to the issues involved. *Spani v. Whitney* 550
4. It is an elementary rule that credibility of witnesses and the weight to be given their testimony are for the jury's consideration. *Buick v. Stoehr* 629
5. General rule as to effect of party calling a witness stated. *Bland v. Fox* 662

Words and Phrases.

When a matter is held in abeyance it is in a condition of being undetermined. It is not finally settled. *Belitz v. City of Omaha* 36

Work and Labor.

1. One who undertakes for a consideration to do work requiring special skill impliedly represents that he possesses, and will exercise, such reasonable degree of skill as the nature of the service may require. If he is to furnish his own tools, implements, or machinery, there is an implied representation as to their fitness for the use to which they are to be put. *Rickertsen v. Carskadon* 46

2. An action based on quantum meruit for labor and materials furnished is grounded upon an implied promise to pay the reasonable value thereof. *Hancock v. Parks* 442
3. Since there is no specific standard by which reasonable value of labor and materials furnished may be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced. *Hancock v. Parks* 442
4. In a proceeding to recover for services rendered, plaintiff is not required to show nonpayment therefor since payment is an affirmative defense. *Hancock v. Parks* 442

Workmen's Compensation.

1. A compensable injury within the meaning of the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment. *Hladky v. Omaha Body & Equipment Co.* 197
McDuffee v. Seiler Surgical Co., Inc. 325
2. An accident within the meaning of the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury. *Hladky v. Omaha Body & Equipment Co.* 197
3. 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. *Hladky v. Omaha Body & Equipment Co.* 197
McDuffee v. Seiler Surgical Co., Inc. 325
4. Mere exertion, which is no greater than that ordinarily incident to the employment, cannot of itself constitute an accident, and if combined with preexisting disease such exertion produces disability, it does not constitute a compensable accidental injury. *Hladky v. Omaha Body & Equipment Co.* 197
5. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence. *Hladky v. Omaha Body & Equipment Co.* 197
6. Rule of liberal construction of the Workmen's Compensation Act stated. *Hladky v. Omaha Body & Equipment Co.* 197
Dworak v. City of Omaha 209

7. A workmen's compensation case is triable de novo in the Supreme Court. To entitle the plaintiff to a recovery he must sustain the burden of proving by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment. *Dworak v. City of Omaha* 209
8. The Workmen's Compensation Act creates new remedies, new rights, and new liabilities. It provides both the adjective and substantive law. *Shada v. Whitney* 220
9. The appellate jurisdiction of the district court and the Supreme Court is limited to those matters which were properly at issue in the Nebraska Workmen's Compensation Court. *Shada v. Whitney* 220
10. On any appeal to the Supreme Court in a workmen's compensation case, the cause will be considered de novo upon the record. *McDuffee v. Seiler Surgical Co., Inc.* 325
11. Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. *McDuffee v. Seiler Surgical Co., Inc.* 325
12. Where an employee leaves the place where his duties are to be performed or where his service requires his presence to engage in a personal objective, not incidental to his employment, the relation of employer and employee does not exist until he returns to a place where by the terms of his employment he is required to perform services. *McDuffee v. Seiler Surgical Co., Inc.* 325
13. An injury is not compensable under the Workmen's Compensation Act when it is incurred at a time and place not within the terms of the employment. *McDuffee v. Seiler Surgical Co., Inc.* 325
14. The primary test in determining whether the relationship of employer-employee exists is whether the alleged employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be done as well as the result which is to be accomplished. *Gardner v. Kothe* 364
15. Generally, an independent contractor is one who contracts to do a piece of work according to his own methods and is not subject to the control of the other contracting party except as to the result of the work. *Gardner v. Kothe* 364

16. An indispensable element to the creation of the relationship of an independent contractor is that the party must contract to do a specified piece of work for a specified price. *Gardner v. Kothe* 364
17. The absence of mutual interest in the profits or benefits is conclusive that a partnership or joint adventure does not exist. *Gardner v. Kothe* 364
18. A contractor who fails to require a subcontractor to carry compensation insurance is a statutory employer under the Workmen's Compensation Act, and is jointly and severally liable with the subcontractor to the employees of the subcontractor. *Gardner v. Kothe* 364
19. The immediate employer is not a necessary party to a proceeding to recover workmen's compensation brought by an employee against a statutory employer. *Gardner v. Kothe* 364
20. Under Workmen's Compensation Act, a child living in the home and dependent upon the deceased employee, who is not a child, adopted child, or stepchild of the deceased, does not qualify as a beneficiary of death benefits. *Copple v. Bowlin* 467
21. A son of a deceased employee by a former marriage who resides with his mother under an order of court granting his custody to her is not constructively living with his father, even though the father contributes to his support. *Copple v. Bowlin* 467
22. Where a deceased father, pursuant to court order, contributed $30 per month to the support of a child residing with a former wife, and the evidence shows that such amount only partially supported the child, such child is a partial dependent under the Workmen's Compensation Act. *Copple v. Bowlin* 467
23. When a question of dependency is involved under Workmen's Compensation Act, and there is no question of heirship or right of inheritance, paternity may be established as provided by legislative act relating to children born out of wedlock. *Copple v. Bowlin* 467
24. Where a child is wholly dependent upon a deceased father, he takes the death benefits accruing under the Workmen's Compensation Act to the exclusion of partial dependents by the express provisions of Workmen's Compensation Act. *Copple v. Bowlin* 467
25. Where a determination of paternity is a necessary incident to the determination of dependency under the Workmen's Compensation Act, the workmen's

compensation court has power and authority to make such determination. *Copple v. Bowlin* 467
26. An injury sustained by an employee while going to and from his work does not arise out of and in the course of his employment. *Acton v. Wymore School Dist. No. 114* 609
27. Walking on the employer's premises to and from the street and a building where one is employed is a necessary incident of employment, and an injury sustained in so doing is compensable. *Acton v. Wymore School Dist. No. 114* 609
28. In case of a latent injury the employee, in order to avail himself of the benefits of the Workmen's Compensation Act, must commence action within the statutory period of 1 year after he has knowledge that the accident has caused a compensable injury. *Bame v. Lipsett, Inc.* 623
29. In case of payments of compensation having been made the limitation shall not take effect until 1 year from the time of making the last payment. *Bame v. Lipsett, Inc.* 623
30. A plaintiff employee in a workmen's compensation case who seeks to toll the statute of limitations contained in Workmen's Compensation Act by payments made by an employer must affirmatively show in his petition that the payment was made within the space of 1 year from commencing action in order to state a cause of action as against a general demurrer. *Bame v. Lipsett, Inc.* 623
31. There is no exception provided by the statute of limitations in the Workmen's Compensation Act for the tolling thereof because of the incapacity of the employee's attorney and the courts can read none into it. *Bame v. Lipsett, Inc.* 623
32. Right of subrogation of employer under Workmen's Compensation Act does not prevent an employee from suing a third person for his injuries received in an accident, but it requires his employer, having paid compensation, to be made a party to such an action. *Niemeyer v. Forburger* 876

Zoning.

1. A zoning regulation may not operate retroactively to deprive a property owner of a previously vested right to a use to which his property was put before the zoning regulation became effective. *Board of Commissioners v. Petsch* 263

2. Rights of property owner acquired prior to effective date of zoning regulation stated. *Board of Commissioners v. Petsch* 263
3. The determination as to whether or not a vested nonconforming use exists is usually a question of fact, and each case must be decided on its own merits. *Board of Commissioners v. Petsch* 263
4. The right to a vested nonconforming use under zoning regulations is, when established, a property right, and any statute or law purporting to take away such right is invalid. *Board of Commissioners v. Petsch* 263
5. Before a zoning ordinance can be declared unconstitutional, such ordinance must be either an arbitrary or an unreasonable pronouncement of the city council, or it must be without substantial relation to public health, safety, morals, or general welfare. *Schlientz v. City of North Platte* 477
6. A zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning ordinance cannot deprive the owner of a use to which his property was put before the enactment of the ordinance. *Schlientz v. City of North Platte* 477
7. What is the public good as it relates to zoning ordinances is primarily a matter lying within the discretion and determination of the municipal body and unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere. *Schlientz v. City of North Platte* 477