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STATE OF NEBRASKA EX REL. CITY OF GRAND ISLAND, A MUNICIPAL CORPORATION, PLAINTIFF, V. RAY C. JOHNSON, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF NEBRASKA, DEFENDANT.

122 N. W. 2d 240

Filed June 28, 1963. No. 35518.

1. **Municipal Corporations: Bonds.** All bonds issued by a city are required to be registered in the office of the Auditor of Public Accounts. § 10-201, R. R. S. 1943.
2. **Municipal Corporations.** Under the provisions of Article XI, section 2, of the Constitution of Nebraska, a home rule charter must be consistent with and subject to the Constitution and laws of this state.
3. **Statutes: Municipal Corporations.** Where the Legislature has enacted a law affecting municipal affairs, but which is of statewide concern, such law takes precedence over the provisions of a home rule charter.
4. **Courts: Municipal Corporations.** It is a judicial question as to whether an act of the Legislature pertains to a matter of statewide concern or to a matter of purely local concern.
5. **Statutes: Municipal Corporations.** There is no sure test by which matters of strictly municipal concern may be distinguished from matters of statewide concern. The court must consider each case as it arises and draw the line of demarcation.
6. ———: ———. Chapter 18, article 5, R. R. S. 1943, relating to municipal sewage disposal systems, pertains to a matter of statewide concern and takes precedence over any provision in a home rule charter which is in conflict therewith.

Original action. Writ denied. Action dismissed.

Richard L. Huber, Cline, Williams, Wright, Johnson, Oldfather & Thompson, and Allen L. Graves, for plaintiff.

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

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

BOSLAUGH, J.

This is an original action brought by the City of Grand

Island, Nebraska, against Ray C. Johnson, as Auditor of Public Accounts of the State of Nebraska, to obtain a writ of mandamus compelling the auditor to register a storm sewer bond of the city. Leave to docket the action was granted by this court on April 12, 1963, and an alternative writ was issued.

The pleadings consist of the petition of the city and the answer of the auditor, and raise only questions of law.

The proposition of issuing general obligation bonds in the amount of $1,350,000 for the purpose of constructing storm sewers was submitted to the electors of the city on November 6, 1962. At the election, 4,203 votes were cast for the proposition and 3,653 votes were cast against the proposition. The city then adopted an ordinance authorizing the issuance of a bond. On March 19, 1963, the bond was presented to the auditor for registration, but the auditor refused to register the bond.

All bonds issued by a city are required to be registered in the office of the Auditor of Public Accounts. § 10-201, R. R. S. 1943. The city is required to file with the auditor a statement containing a copy of the notice of election and showing the manner and time of publication of the notice; the question submitted; the adoption of the proposition pursuant to which the bond was issued; the vote on the proposition; the date, amount, and number of the bond; and when and where it is payable. § 10-202, R. R. S. 1943. The auditor is required to register all proper bonds when presented. State ex rel. City of Columbus v. Price, 127 Neb. 132, 254 N. W. 889.

The city of Grand Island operates under a home rule charter which provides that before sewer bonds shall be issued, the question of issuance shall be submitted to the electors of the city and "authorized by a majority vote" of the electors voting thereon. § 7, Art. 15, Charter of the City of Grand Island. Section 18-506.01, R. R. S. 1943, provides that general obligation bonds for the construction of sewers may be issued only after "more than sixty per cent of the electors voting at the election"

vote in favor of the issuance of the bonds. The auditor contends that the statute controls over the provision of the charter and that the bond is not entitled to registration since only 53.49 percent of the electors who voted, voted in favor of the issuance of the bond. The question of whether the statute or the charter is controlling is the principal issue in the case.

The Constitution authorizes any city having a population of over 5,000 inhabitants to "frame a charter for its own government, consistent with and subject to the constitution and laws of this state." Art. XI, § 2, Constitution of Nebraska. Where the Legislature has enacted a law affecting municipal affairs, but which is of statewide concern, such law takes precedence over the provisions of a home rule charter. Nagle v. City of Grand Island, 144 Neb. 67, 12 N. W. 2d 540.

It is a judicial question as to whether an act of the Legislature pertains to a matter of statewide concern or to a matter of purely local concern. Dell v. City of Lincoln, 170 Neb. 176, 102 N. W. 2d 62. There is no sure test by which matters of strictly municipal concern may be distinguished from matters of statewide concern. The court must consider each case as it arises and draw the line of demarcation. Carlberg v. Metcalfe, 120 Neb. 481, 234 N. W. 87.

In Michelson v. City of Grand Island, 154 Neb. 654, 48 N. W. 2d 769, 26 A. L. R. 2d 1346, the city had adopted an ordinance which provided for the issuance and sale of revenue bonds to construct additions to its sewerage system and disposal plant. The city had also adopted an ordinance providing rates and charges for the use of the sewerage system and disposal plant. The action was brought to declare these ordinances invalid. The plaintiff in that action argued that the matter of sewage disposal and the financing of such an improvement was of purely local concern and that Chapter 18, article 5, R. R. S. 1943, did not apply to the city of Grand Island. The city argued that Chapter 18, article 5, R. R. S. 1943,

took precedence over the home rule charter. This court held that sanitation and health were matters of statewide concern, that the state had entered the field, and that Chapter 18, article 5, R. R. S. 1943, was applicable to a city having a home rule charter. We believe that the decision in the Michelson case is controlling in this case.

At the election in which the question of the issuance of the bonds involved in this case was submitted, only 53.49 percent of the electors voting voted in favor of the issuance of the bond. The statute requires that more than 60 percent of the electors voting at the election vote in favor of the issuance of the bond. Consequently, the issuance of the bond was not authorized and it is not entitled to registration.

The writ is denied and the action dismissed.

WRIT DENIED. ACTION DISMISSED.

IN RE APPLICATION OF FRONTIER AIRLINES, INC.
FRONTIER AIRLINES, INC., APPELLANT, V. NEBRASKA DEPARTMENT OF AERONAUTICS ET AL., APPELLEES.
122 N. W. 2d 476

Filed July 5, 1963. No. 35315.

1. **Constitutional Law: Commerce.** The power of Congress to regulate commerce among the several states and with foreign nations is supreme and plenary; it is complete in itself and knows no limitations except the prohibitions and limitations of the United States Constitution and its amendments.
2. **Commerce.** Wherever interstate and intrastate transactions are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the state, and not the nation, would be supreme within the national field.
3. ———. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential

or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

4. ———. While Congress cannot delegate power to regulate foreign or interstate commerce to a state or municipal corporation, it may leave certain matters or details to officers, departments, or commissions without violating the rule.
5. ———. The execution by Congress of its power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective control of interstate commerce by the federal Congress incidentally controls intrastate commerce.
6. **Commerce: Aviation.** It appears that Congress has pre-empted the field of interstate air transportation in regard to the routes and points to be served by interstate air carriers to the exclusion of conflicting regulation by the states.
7. **Public Service Commissions: Aviation.** The Nebraska State Railway Commission lacks authority to compel a carrier licensed by the Civil Aeronautics Board to continue operations over a segment which that board has authorized to be discontinued, since the federal authority is paramount in this area and the conflicting directive of the state's agency interferes with the national policy.

Appeal from the Nebraska State Railway Commission. Reversed.

Marti, O'Gara, Dalton & Sheldon and William A. Nelson, for appellant.

Clarence A. H. Meyer, Attorney General, Rush C. Clarke, Bevin B. Bump, John C. Coupland, John B. Cassel, Andrew D. Mapes, Henry L. Holst, and Harry C. Sundblad, for appellees.

Lee Loevinger, Lionel Kestenbaum, Michael I. Miller, John H. Wanner, Joseph B. Goldman, O. D. Ozmont, Arthur R. Schor, John E. Stephen, and James E. Landry, for amici curiae.

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

BROWER, J.

This proceeding was commenced on March 22, 1961, by

the filing of an application by Frontier Airlines, Inc., before the Nebraska State Railway Commission. The application requested that the commission disclaim any jurisdiction over the matter of discontinuance of service over applicant's segment No. 13; and in the alternative that the commission authorize the discontinuance of that service.

The Department of Aeronautics of the State of Nebraska; the cities of Chadron, Valentine, Ainsworth, Norfolk, and Lincoln, Nebraska; the Chambers of Commerce of Valentine and Norfolk; and the Airport Authority of the city of Lincoln, filed protests to the granting of said application.

For convenience at times hereafter the Frontier Airlines, Inc., will be referred to as the applicant or Frontier; the protestants as such; and the Nebraska State Railway Commission as the commission.

The commission conducted extensive hearings in Ainsworth, Nebraska, during June and August of 1961, and a supplemental hearing at Lincoln, Nebraska, on January 5, 1962. On April 6, 1962, the commission entered its order denying the application in its entirety.

Frontier thereafter timely filed its motion for a rehearing which was overruled by the commission on May 2, 1962. Thereafter, Frontier brought the matter to this court on appeal.

Frontier is engaged in interstate commerce as a common carrier of persons, property, and mail. The whole system which it operates is properly described as its "route." The route consists of numerous segments, which together serve portions of the States of Arizona, New Mexico, Utah, Colorado, Wyoming, Montana, North Dakota, South Dakota, Missouri, Kansas, and Nebraska.

The route segments over which Frontier operates were established by virtue of a certificate of public convenience and necessity issued by the Civil Aeronautics Board, which for convenience will at times be referred to herein as the Federal Board, pursuant to

the provisions of the Federal Aviation Act of 1958, 49 U. S. C. A., § 1301 et seq. Applicant's total system is designated by the Federal Board as Route No. 73. The particular segment involved herein is No. 13 which, according to the certificate extended between Omaha, Nebraska, and Casper, Wyoming, via the intermediate points of Lincoln, Columbus, Norfolk, Ainsworth, Valentine, and Chadron in Nebraska, and Douglas and Lusk in Wyoming.

Applicant's certificate of public convenience and necessity was issued by the Federal Board on December 8, 1958. It reflected amendments to a prior certificate authorized by it also. The order was entered at the conclusion of an extended hearing generally called the Seven States Area Investigation, a proceeding in which the State of Nebraska and some, but not all, of the present protestants participated. The service authorized by that board clearly appeared from its order to be on an experimental basis in order to extend local service to small communities with unknown or marginal traffic potentialities contingent upon there being sufficient service to justify the heavy expenditures of federal subsidy, which would be required and which are authorized under 49 U. S. C. A., section 1376, subsection (b), which reads in part: "In determining the rate in each case, the Board shall take into consideration, among other factors, (1) the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; (2) such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and (3) the need of each such air carrier (other than a supplemental air carrier) for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and

efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

The Federal Board's order contained the following provisions:

"Keeping in mind the extensive new services awarded in the Seven States area at considerable expense to the carriers and the Government, we are adopting a companion policy looking toward an early and critical reassessment of the traffic results of the new authorizations to see whether the cities are making sufficient use of the air service they requested or should lose it. Specifically, under our 'use it or lose it' policy, each city will be required to meet a minimum standard of use, e. g., enplane an average of five or more passengers daily. Unless a city enplanes an average of at least five passengers daily for the 12 months following the initial six months of service, we will, in the absence of unusual or compelling circumstances, institute a formal investigation to determine whether that city should lose its air service for lack of use. This policy will be applicable regardless of whether the city has been certificated for a temporary or an indefinite period. And, it must be emphasized that those cities enplaning the bare minimum—an average of five daily passengers during the trial period—should not assume that continued air service for them is assured. * * *

"As in the case of individual cities, we will also reassess the traffic results of each new route segment for the same 12-month period, with a view toward suspension or deletion of segments that do not adequately respond to air service. If the passenger load on each flight serving a segment in question averages less than five passengers, we will begin appropriate proceedings to determine whether to suspend or delete the route segment. * * *

"In particular, where a community or segment fails to make adequate use of a subsidized service, the carrier is free to seek a voluntary suspension of service, even in advance of a proceeding to terminate the certification. Indeed, if a carrier fails to exercise adequate vigilance in this regard, it may reflect upon the economy and efficiency of management in subsidy mail pay proceedings under Section 406 of the Act."

The Federal Board, in appendix H attached to its decision and order, estimated the total revenue to be obtained in the future from all service revenue on segment No. 13 to be annually $503,461; and that the total annual expenses of the operation would be $782,687, requiring $279,226 to break even. It also estimated the return element for Frontier on its investment should be $37,335, and that the total mail subsidy needed from the United States for the operation of segment No. 13 would be $279,226 per year.

Frontier had prior to the making of the order of the Federal Board in the Seven States Area Investigation applied for and received a certificate of public convenience and necessity from the commission as a class B carrier for the year 1958, on September 25, 1958. It gave the holder of the certificate authority to engage in intrastate commerce in conformity with the laws of Nebraska and the rules of the commission and "in accordance with the authority heretofore granted the carrier by the Civil Aeronautics Board * * * and in accordance with the authority which may be hereafter granted the carrier by the Civil Aeronautics Board during the year 1958; provided, any suspension, cancellation, termination, or revocation by the Civil Aeronautics Board of the carrier's authority for any operation or service within the State of Nebraska shall likewise and simultaneously suspend, cancel, terminate, or revoke corresponding authority granted by this certificate; provided, further, termination or cancellation of the carrier's insurance or other security, as

approved by the Commission for the protection of the public, shall automatically and simultaneously terminate and nullify the authority granted hereby."

Such certificates from the commission are issued according to its rules, Chapter II, article 2, section 3, to class B aircraft carriers described as interstate operators on filing their certificates obtained from the Federal Board without other showing.

With respect to other classes of carriers the rules and regulations prescribe a considerable number of requirements.

A like certificate was received by Frontier for the year 1959 dated February 13, 1959.

On August 9, 1960, the Federal Board entered an order granting a temporary suspension of segment No. 13 of Frontier's route and instituting an investigation with respect to the segment's permanent deletion under the "use it or lose it" policy of the board. Its order recited Frontier's having filed its application on February 8, 1960, and that all of the protestants in the proceeding now before us with other persons there filed a joint answer and a petition for an investigation into the adequacy of the service of Frontier in Nebraska and for the substitution of another carrier in place of Frontier. The board's order discloses that the contentions of the protestants then were much the same as are now raised by them herein. The Federal Board found that no intermediate point served only on segment No. 13 enplaned the required coverage number of five daily passengers, either during the 6 months' initial period of operation or in the 12 months following; that the passenger load figures for segment No. 13 averaged 3.8 passengers in 12 months ending March 31, 1960, and that in no month, except June 1959, had the average passenger load reached the minimum of seven passengers per flight as required in the board's order; that this average passenger load, instead of increasing, was declining; that all the cities on the route except Ainsworth and Valentine would con-

tinue to receive air service either from other segments of Frontier's route or from other airlines; that Ainsworth and Valentine enplaned only an average of 1.9 and 2.6 daily passengers, respectively, during the 12 months' period following the 6 months' period; and that the total subsidy cost of segment No. 13 operations was estimated to be $239,213. Consequently, more than $200,000 in subsidy would be required to furnish air service for those two towns generating an average of less than five passengers a day. The findings in the order recite: "It was not our intent in the Seven States case to afford air service to marginal points at unreasonable costs to the Government. * * * In other words, the energies which Frontier has expended on segment 13 have produced only meager passenger traffic which is not sufficient to warrant continued service; and Frontier could well utilize the same efforts on other more remunerative segments of its route, where there will be greater traffic response with an attendant increase in the margin of profit and better utilization of the subsidy dollar. Moreover, a substantial portion of the total subsidy attributable to segment 13 will be saved by the Government if service is suspended over that segment. This factor should not be overlooked."

The Federal Board also dismissed the request for an investigation as to the adequacy of Frontier's service contained in the answer and cross-petition of the protestants.

The various Nebraska parties to the proceedings before the Federal Board sought review from the order in federal court. The Court of Appeals, Eighth Circuit, affirmed the decisions of the Federal Board in its opinion filed January 4, 1962. Nebraska Department of Aeronautics v. Civil Aeronautics Board, 298 F. 2d 286. The proceedings heretofore set out are described in that opinion but the questions of jurisdiction between the federal and state authorities here considered are not touched upon.

On August 19, 1960, the commission adopted a rule which provides as follows: "Notwithstanding any other rule or regulation heretofore adopted by the Nebraska State Railway Commission, no aircraft carrier operating in intrastate commerce within the State of Nebraska as a scheduled operator shall discontinue any portion of such intrastate commerce until application has been made to this Commission and its permission had for that purpose." Ch. II, art. 2, § 3.7.

On August 29, 1960, the district court for Cherry County, Nebraska, made its order allowing a temporary injunction enjoining Frontier from abandoning any of its air transportation route between the cities of Chadron and Lincoln, Nebraska, and through intermediate cities of Valentine, Ainsworth, and Norfolk, Nebraska, except as to mail unless and until authority to do so is granted by the commission or the further order of the court.

Frontier was at the time of the hearing before the commission operating the service between Chadron and Lincoln in obedience to this injunction.

Thereafter, on October 19, 1961, subsequent to the commencement of this proceeding before the commission the Federal Board in a proceeding instituted on its own motion, in which the protestants herein and others from Nebraska were parties, permanently deleted segment No. 13 from Frontier's certificate of public convenience and necessity.

The applicant Frontier in the present case before us contends that the Federal Board had exclusive jurisdiction to discontinue the service over segment No. 13 and that its order temporarily suspending such service and thereafter permanently deleting and discontinuing the same was effective not only with respect to interstate commerce but intrastate commerce within the State of Nebraska as well, and that the commission had no right nor jurisdiction to require service over segment No. 13 thereafter.

It assigns error in the commission's ruling in not disclaiming jurisdiction over service on said segment. We sustain this assignment.

Though perhaps not necessary to this decision, the testimony taken in this proceeding clearly shows that the traffic over segment No. 13 was of both an interstate and intrastate character.

Exhibits of the applicant indicated that for the first 9 months in 1960 and the first 5 months of 1961, approximately 39 percent of the passengers using segment No. 13 were engaged in travel which involved interstate commerce. It clearly appears the protestants and the commission expected and desired that such a commingling of traffic continue. The record is replete with testimony of those complaining of service originating without the state and bound thereto and of those desiring to use the service for trips therefrom. Many witnesses from the territory about Valentine, Ainsworth, and elsewhere, gave evidence as to their desire that cattle buyers from Iowa, Illinois, Indiana, and elsewhere have this service available to them. Evidence of expert witnesses and others complained of the inadequacy of connections with airlines to Denver, Kansas City, and other points without the state. The protestants complained that the schedule on the segment was not inserted in the Official Airline Guide which is circulated throughout the nation and estimates of the loss of traffic from without the state because thereof were attempted. Segment No. 13 described in the Federal Board's order and certificate ran from Omaha to Casper, Wyoming. It was obviously an interstate segment. After the temporary suspension of this service by the Federal Board on August 9, 1960, Casper, a city of 30,000 inhabitants, together with the Wyoming cities of Douglas and Lusk were no longer served. The remaining operations of segment No. 13 continued under the injunction and by the commission ended on the west at Chadron, a city whose population was 5,079 in 1960. After the suspension of segment No.

13, Frontier was and is still engaged in interstate commerce. Frontier's segment No. 10, operated from Rapid City, South Dakota, through Hot Springs, South Dakota, and on through Chadron, Alliance, and Scottsbluff, Nebraska, and from there to Cheyenne, Wyoming, with a terminal at Denver, Colorado. It still operated segment No. 12 from Omaha, Nebraska, through Lincoln, Grand Island, North Platte, and Sidney in Nebraska, and to Cheyenne, Wyoming, with a terminal at Denver, Colorado. This was commonly referred to as the Central Nebraska Route. Its segment No. 11 began at the terminal at Denver, Colorado, through Sterling, Colorado, Sidney, Imperial, McCook, Kearney, Hastings, and Lincoln, Nebraska, with a terminal at Omaha. It was known as the Southern Nebraska Route. There was also segment No. 14 from the terminal at Omaha through Lincoln and Beatrice, Nebraska, on to St. Joseph, Missouri, with a terminal at Kansas City, Missouri. Planes on segment No. 13 flew into the airports at Chadron, Lincoln, and Omaha, and passengers could and did change planes at these airports. Its whole route No. 73 operated in the 11 states as formerly.

Moreover, Frontier's route No. 73 was engaged in carrying the mail and was heavily subsidized by the United States government. In 1960, its passenger revenue was $6,352,584. From cargo it received $469,183, and from charter and miscellaneous income $250,746. Its income from the United States for carrying the mail, which is spoken of as the mail subsidy, was $6,687,600. Its operational flying expense was $13,227,107. It is obvious that but for the mail subsidy it could not operate. The figures for 1959 are in substance proportionately the same.

At this point we turn our attention to the general law which we deem to be applicable to the case before us.

In 11 Am. Jur., Commerce, § 9, p. 11, it is stated: "The power of Congress to regulate commerce among the several states and with foreign nations is supreme and ple-

nary; it is complete in itself and knows no limitations except the prohibitions and limitations of the United States Constitution and its amendments, and includes the power in certain circumstances to prohibit interstate and foreign commerce." See, also, National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352; Kentucky Whip & Collar Co. v. Illinois C. R. R. Co., 299 U. S. 334, 57 S. Ct. 277, 81 L. Ed. 270.

In 11 Am. Jur., Commerce, § 10, p. 12, it is said: "It has repeatedly been held by the courts that where a subject is national in its character and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state to another, Congress alone can provide the needed regulations. In such a case the Federal power is exclusive, and the states may not act even though Congress has not exerted its legislative authority, the silence of Congress being equivalent to a declaration that the particular commerce shall be free from regulation." See, also, United Air Lines, Inc. v. Nebraska State Railway Commission, 172 Neb. 784, 112 N. W. 2d 414.

As to regulation of agencies which are engaged in and affect both interstate and intrastate commerce the rules appear in 11 Am. Jur., Commerce, § 14, p. 16, as follows: "The power of Congress does not extend to the purely internal or intraterritorial commerce of the states. * * * However, the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. On the contrary, wherever interstate and intrastate transactions are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the state, and not the nation, would be supreme within

the national field. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." See, also, United States v. Walsh, 331 U. S. 432, 67 S. Ct. 1283, 91 L. Ed. 1585; Colorado v. United States, 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878; United States v. Darby, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609, 132 A. L. R. 1430.

The power of Congress over interstate commerce extends to those intrastate activities which so affect interstate commerce or the exercise of the power of Congress over it as to make appropriate the attainment of a legitimate end of Congress. United States v. Darby, *supra.*

While Congress cannot delegate power to regulate foreign or interstate commerce to a state or municipal corporation, it may leave certain matters or details to officers, departments, or commissions without violating the rule. 15 C. J. S., Commerce, § 8, p. 265.

With these general rules before us it is now necessary to discuss the statutes which Congress has enacted with respect to aviation. The present act regulating aviation was enacted by Congress on August 23, 1958. It is set out in 49 U. S. C. A., § 1301 et seq. It is there designated as "Federal Aviation Program [New]." It replaced a former act regulating aviation enacted in 1938. Both applicant and protestants agree that so far as this litigation is concerned there is little difference in the application of the two acts. The act is long and detailed and our opinion will discuss only certain sections which we believe are decisive of this appeal. They will be taken from 49 U. S. C. A., but only the section number will be given. Section 1301 gives the definitions used throughout the act. It includes the following subsections: "(3) 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly

or by a lease or any other arrangement, to engage in air transportation; * * * (4) 'Air Commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which many endanger safety in, interstate, overseas, or foreign air commerce. * * * (10) 'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

Subsection (20) gives the definition of "Interstate Commerce." It is long and will not be quoted but its substance as applicable to this litigation means commerce from a place in one state to a place in any other state.

Section 1321 et seq., create the Civil Aeronautics Board, herein referred to as the Federal Board and in said act called "the board," and provides for its organization, operation, and powers.

Section 1302 is as follows: "In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity: (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense: (b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers, * * *."

Among the powers and duties of the Federal Board are those provided in the following sections. Section 1324(a) provides: "The Board is empowered to perform such acts, to conduct such investigations, to issue and amend

such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this chapter, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under this chapter."

Section 1371, subsection (a), provides: "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

Subsection (b) provides for the application for the certificate; and subsection (c) provides for the notice to be given before hearing, the setting of it for public hearing, and the disposal of the matter thereat.

Subsection (d) (1) provides as follows: "The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

Subsection (e) provides in part that: "Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require."

Subsection (g), in part, is as follows: "The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may

revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this subchapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: * * * Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate."

Subsection (j) is as follows: "No air carrier shall abandon any route, or port thereof, for which a certificate has been issued by the Board, unless, upon the application of such air carrier, after notice and hearing, the Board shall find such abandonment to be in the public interest. Any interested person may file with the Board a protest or memorandum of opposition to or in support of any such abandonment. The Board may, by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest."

Section 1374 is as follows: "(a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; * * *."

Subsection (b) prohibits preferences to particular persons, ports, or localities.

Section 1375 provides for postal rules and regulations of each air carrier and the filing of the rates and schedules with the board and gives the Postmaster General certain powers to be exercised in the first instance and further provides: "No order of the Postmaster General under this subsection shall become effective until ten days

after its issuance. Any person who would be aggrieved by any such order of the Postmaster General under this subsection may, before the expiration of such ten-day period, apply to the Board, under such regulations as it may prescribe, for a review of such order. The Board may review, and, if the public convenience and necessity so require, amend, revise, suspend, or cancel such order; * * *. No air carrier shall transport mail in accordance with any schedule other than a schedule designated or ordered to be established under this subsection for the transportation of mail."

Section 1376 provides for establishing rates for the transportation of mail certain portions of which providing for the rate-making elements having been hitherto set out herein.

Section 1482 provides, in part, as follows: "(b) The Administrator or Board, with respect to matters within their respective jurisdictions, is empowered at any time to institute an investigation, on their own initiative, in any case and as to any matter or thing within their respective jurisdictions, concerning which complaint is authorized to be made to or before the Administrator or Board by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. The administrator or the Board shall have the same power to proceed with any investigation instituted on their own motion as though it had been appealed to by complaint."

Section 1486 provides for judicial review from the rulings of the board to the courts of the United States therein named.

The Acts of Congress of 1958 and 1938 regulating air commerce are comparatively new and no cases are cited to us which directly decide the question before us as to the right of the states to require one engaged in air transportation to continue operations on a portion of its route after the Federal Board has suspended or de-

leted service thereon. There are some decisions however that have been decided under those acts which throw light upon the question. Also there are decisions concerning those engaged in interstate commerce in different fields which appear in principle to be controlling herein.

Northwestern Airlines, Inc. v. Minnesota, 322 U. S. 292, 64 S. Ct. 950, 88 L. Ed. 1283, 153 A. L. R. 245, was a suit where the State of Minnesota recovered judgment against the Northwestern Airlines, Inc., for delinquent personal taxes on its personal property, including its airplanes situated in the state of its domicile. The United States Supreme Court upheld the power of the state to so tax the company's property and planes. The concurring opinion of Judge Jackson states: "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.

"Congress has not extended its protection and control to the field of taxation, although I take it no one denies that constitutionally it may do so. It may exact a single uniform federal tax on the property or the business to the exclusion of taxation by the states. It may subject the vehicles or other incidents to any type of state and local taxation, or it may declare them tax-free altogether. Our function is to determine what

rule governs in the absence of such legislative enactment."

The case of Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment, 347 U. S. 590, 74 S. Ct. 757, 98 L. Ed. 967, was another case involving taxation in which Nebraska was permitted to tax the instrumentalities of Braniff used in interstate commerce on the apportionment basis in accordance with their use in the taxing state. The court in the cited case however clearly held that the federal statutes governing air commerce enacted under the commerce power did not preclude the challenged tax.

In United States v. United Aircraft Corp., 80 F. Supp. 52, a replevin suit was brought by the United States to recover possession of two aeroplane engines under a chattel mortgage recorded with the Department of Commerce, Civil Aeronautics Administration, against one to whom the engines had been delivered for repair after removal from the planes and who claimed an artificer's lien thereon. In that case the court held: "Congress, by the Civil Aeronautics Act of 1938, has pre-empted the field of conveyancing of interests in aircraft and portions thereof, to facilitate the control and promotion of air commerce. Civil Aeronautics Act of 1938, sections 1 et seq., 503(b), 49 U. S. C. A., sections 401 et seq., 523(b)."

"The pre-emption of the field of conveyancing of interests in aircraft and portions thereof to facilitate the control and promotion of air commerce is within the congressional power. Civil Aeronautics Act of 1938, §§ 1 et seq., 503(b), 49 U. S. C. A., §§ 401 et seq., 523(b)."

It is clear from these cases that in those matters in the field of aviation in which Congress has asserted jurisdiction, its acts are controlling and, in those particulars which its legislation does not cover, the states have certain residuary powers of legislation which do not contravene the Acts of Congress. This has hitherto been the rule in other fields of interstate commerce.

Colorado v. United States, 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878, was a case brought by the State of Colorado against the United States to enjoin the enforcement of an order of the Interstate Commerce Commission. The commission had authorized abandonment of a line of railroad in Colorado doing business therein. The narrow gage line was not physically connected with other portions of the lines of the company owning it but it was operated in both intrastate and interstate commerce. The opinion states: "This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole. * * * Because the same instrumentality serves both, Congress has power to assume not only some control but paramount control insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make that determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission. * * * The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce." United States Feldspar Corp. v. United States, 38 F. 2d 91, involved a petition to review an Interstate Commerce Commission's order permitting the abandonment of a part of a railway which

engaged in both interstate and intrastate commerce though its physical system was located entirely within one state. In the cited case, Judge Hand's opinion contained the following remarks: "In such a case it can indeed make no difference whether it keeps on in intrastate commerce, if it has abandoned interstate commerce over all its right of way. Its losses or gains, in general its economic fate, cannot thereafter affect national transportation, however broadly viewed; it may be left to the authority of the state whose interest alone it can then affect. Such cases are rare. If, however, it remains an interstate carrier over any part of its right of way, its general economic integrity is of interest to the nation, and is for that reason within its protection. Such is the distinction between the two cases cited, as stated in the opinion of Mr. Justice Brandeis in Colorado v. United States. 'In the case at bar, the railway continued upon the remainder of its line to carry on interstate commerce. * * * It was therefore within the jurisdiction of the Commission to determine whether a part of the tracks should be abandoned not only for interstate, but for intrastate commerce; it need not leave it a parasite upon the national system of transportation, * * *.' "

Other cases apply the same rules with respect to regulations by the United States in other fields of interstate commerce. Illinois Gas Co. v. Public Service Co., 314 U. S. 498, 62 S. Ct. 384, 86 L. Ed. 371, so construes the powers of the Federal Power Commission with respect to pipelines under the Natural Gas Act of June 21, 1938. In State v. Western Union Tel. Co. (Ohio), 86 N. E. 2d 479, and in Western Union Telegraph Co. v. State, 207 Ga. 675, 63 S. E. 2d 878, the same holdings are made interpreting the Federal Communications Act of 1934.

The protestants rely greatly on the case of People v. Western Air Lines, Inc., 42 Cal. 2d 621, 268 P. 2d 723, a case where the Supreme Court of California held that the Congress had not assumed economic control

over air carriers to the extent of excluding all state regulation as to intrastate rates. The question of intrastate rates is not before this court but if the decision in that case was correct it does not necessarily follow that the states have jurisdiction to prevent such a carrier from eliminating its service over a route segment which has been ordered deleted from the carrier's federal certificate. The court in the cited case states: "No question is here presented or determined as to the effect of this provision upon state certification; and the requirement of federal certification does not necessarily preclude state control of intrastate rates."

This question of the effect of federal and state certification however is the precise one before this court in the present case and not the question of existence nor the extent of the power that may yet reside in the state authorities as to intrastate rates for air carriers.

The protestants cite many cases, some dealing with freight rates, or passenger fares in railroad cases, or the curtailment of local trains in intrastate service. They have little application to the case before us and will not be separately discussed. The federal statutes, 49 U. S. C. A., section 1, subsection (2), by its express terms, provides that the provisions of the Interstate Commerce Act governing railroads and pipeline carriers shall not apply "to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this chapter; * * *."

Other cases are cited with respect to regulations with regard to the use of local highways and vehicles thereon. The states retain quite broad police powers in such cases. They and others cited have no application to the case before us.

In consideration of the federal statutes discussed herein, it appears Congress has given the Federal Board

power to issue or withhold certificates of public convenience and necessity to air carriers engaged in air transportation, which is there defined as interstate commerce. 49 U. S. C. A., § 1371. It has provided by the same section that no air carrier shall engage in any air transportation unless such a certificate is in force. The certificate must specify the terminal and intermediate points which the air carrier is authorized to serve. The board has been given authority to alter, amend, modify, or suspend any such certificate in whole or in part upon petition, complaint, or on its own initiative, or to revoke the same. No air carrier shall abandon any route or part thereof except on application to this board to do so. The board may by regulations or otherwise authorize temporary suspension of the service.

The Congress has set out its general policy in 49 U. S. C. A., section 1302, and declared it to be the encouragement and development of foreign and domestic commerce, the postal service, and the national defense, all as therein set out. By other sections it has provided for an extensive mail subsidy that its purposes may be accomplished.

That Congress has adopted a general plan to regulate aviation in interstate commerce is apparent. If the Nebraska State Railway Commission under the guise of regulating intrastate commerce can require service to be continued on routes or segments of routes suspended or deleted by the Federal Board created by the Act of Congress to regulate such service every other state may do the same. Under those circumstances the general plan of regulation adopted by Congress would be wholly nullified. The subject is obviously national in character and uniformity of regulation throughout the nation is required. Congress has provided that uniformity and its will cannot be thus thwarted.

"The execution by Congress of its power to regulate interstate commerce is not limited by the fact that intra-

state transactions may have become so interwoven therewith that the effective control of interstate commerce by the Federal Congress incidentally controls intrastate commerce." Western Union Tel. Co. v. State, *supra,* citing many cases under this proposition.

It appears that Congress has pre-empted the field of interstate air transportation in regard to the routes and points to be served by interstate air carriers to the exclusion of conflicting regulation by the states. 49 U. S. C. A., §§ 1301(10), 1301(21), and 1371(a); Northwestern Airlines, Inc. v. Minnesota, *supra;* Colorado v. United States, *supra;* United Air Lines, Inc. v. Nebraska State Railway Commission, *supra;* In re Veterans Air Express, Inc., 76 F. Supp. 684.

It follows that the Nebraska State Railway Commission lacks authority to compel a carrier licensed by the Civil Aeronautics Board to continue operations over a segment which that board has authorized to be discontinued, since the federal authority is paramount in this area and the conflicting directive of the state's agency interferes with the national policy.

The commission had no authority in the matter and should have disclaimed jurisdiction.

Because thereof the order of the commission is reversed.

REVERSED.

RAY CLAIR SPERRY, APPELLANT, V. WILLIAM C. GREINER ET AL., APPELLEES.

122 N. W. 2d 463

Filed July 5, 1963. No. 35361.

1. **Master and Servant.** To sustain a recovery under the doctrine of respondeat superior, the relation of master and servant must be shown to exist at the time of the injury and with respect to the particular transaction resulting in the alleged tort, and the

servant must be shown to be acting within the scope of his employment.

2. **Larceny.** Every person who shall break and enter, or enter without breaking, at any time, any motor vehicle, with the intent to commit the crime of larceny, shall be deemed guilty of a felony.
3. **Sheriffs and Constables.** Every sheriff, deputy sheriff, or police officer shall arrest and detain any person found violating any law of this state until a legal warrant can be obtained.
4. ———. Under the facts of this case there was sufficient evidence from which a jury could find the officer had probable cause to believe plaintiff had committed a felony.
5. **Appeal and Error.** In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which objection is urged.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

John R. Doyle and Herbert J. Friedman, for appellant.

Beynon, Hecht & Fahrnbruch, Paul L. Douglas, and William D. Blue, for appellees.

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

SPENCER, J.

This is an action to recover damages for personal injuries which plaintiff and appellant, Ray Clair Sperry, hereinafter referred to as plaintiff, claims he sustained by gunshot wounds. Appellees and defendants are William C. Greiner, a deputy sheriff of Lancaster County, hereinafter referred to as Greiner; Merle C. Karnopp, the sheriff of Lancaster County, hereinafter referred to as Karnopp; and Universal Surety Company, Greiner's bondsman. A jury returned a verdict for the defendants. Plaintiff perfected an appeal to this court from the judgment rendered therein.

On the evening of July 29, 1960, plaintiff, who admitted he had only 13 cents in his pocket, and a friend, after visiting two taverns, went to the Royal Grove, a dance

hall and tavern in the village of West Lincoln, where they drank beer and plaintiff danced. About 11:30 p. m., the friend went home when he was unable to locate plaintiff after searching all of the rooms at the Royal Grove, including the restroom. Plaintiff testified he had not left the Royal Grove, and that after it closed he waited around for the friend to come back. The friend testified that no such arrangement had been made. Plaintiff testified that after waiting around for sometime, he got into a car which was parked at the west end of the parking lot and went to sleep; that something awakened him and he jumped out of the car and started running; and that while running he was struck twice by bullets and sustained the injuries for which this action is brought.

Greiner and another deputy sheriff were on regular night patrol in the area of the tavern where there had been 18 break-ins or attempts at break-ins during the preceding 3 months. Greiner was driving the car, which was a white patrol car with a red dome light on the top and a highway patrol red light on the right front fender. As the car approached the tavern grounds, Greiner's companion flashed a spotlight in the rear of the parked car, and they noticed a figure look directly at the patrol car and then duck down. Greiner stopped the patrol car at the right rear of the parked car, and as Greiner was leaving the driver's seat, the plaintiff, carrying something in his hand resembling a gun but which Greiner subsequently learned was a flashlight, darted at full speed from the parked car, across the graveled road, and into a plowed field. Greiner started to give chase and hollered twice for plaintiff to halt. When plaintiff failed to heed the command, Greiner fired a warning shot into the ground behind plaintiff, who was pursuing a zigzag course. Plaintiff fell but got up and continued running, and Greiner fired a second warning shot in a downward position into the ground behind the plaintiff. Plaintiff continued to run

and then fell. Greiner came upon him, and then learned that the object in his hand was a flashlight and that he had been shot in the neck and the left buttock. Plaintiff's medical witness testified the course of the bullet in the neck was upward. A firearms expert testified that both wounds had been caused by bullets ricocheting from the plowed ground.

The owner of the parked automobile testified that he had parked it earlier in the evening and left with a friend. He did not return for it until sometime after the shooting. He testified that the flashlight in plaintiff's possession belonged to him and had been in the glove compartment of his car; that he was not acquainted with plaintiff; and that the plaintiff had no authority to be in his car. He also testified to the loss of certain drawing instruments, but they were not accounted for in the testimony.

Plaintiff in his petition alleged that Greiner was an employee of Karnopp; and that Karnopp was negligent and careless in failing to instruct him in the use and control of firearms. The evidence is undisputed that the gun, uniform, and automobile are the property of Lancaster County, and were furnished to Greiner for his use as a deputy sheriff.

It is evident that the jury accepted the defendants' theory of the case that the plaintiff was injured by two ricocheting bullets fired as warning shots into the plowed ground behind the plaintiff after he had failed to heed the command to halt; and that the plaintiff was fleeing in an attempt to escape arrest after having committed a felony.

Plaintiff alleges nine assignments of error. They are as follows: "1. The District Court erred in failing to instruct the jury on the plaintiff's theory of the case.

"2. The District Court erred in giving instruction number 5 wherein it places the burden on the plaintiff of proving an intentional tort against the defendant

Greiner in order to recover against said defendant, or the defendant Karnopp.

"3. The District Court erred in giving instruction number 5 wherein it states that if the evidence is equally balanced in favor of the defendants Greiner and Universal Surety Company then the plaintiff cannot recover against all the defendants, including the defendant Karnopp.

"4. The District Court erred in giving instruction number 10 when there was no evidence from which the jury could find the defendant Greiner had probable cause to believe that the plaintiff had committed a felony.

"5. The District Court erred in giving instruction number 10 to the jury wherein it states the deputy sheriff must act wantonly or maliciously in order to be liable for excessive force.

"6. The District Court erred in giving instruction number 16 to the jury wherein it places the burden of proof on the plaintiff to prove he did not commit a felony.

"7. The District Court erred in permitting the defendants to introduce evidence of opinion and conclusion which invaded the province of the jury and for which there was no basis in fact, in relation to the gun and the felony.

"8. The District Court erred in not permitting the jury, by any instruction, to find against the defendants jointly or severally when independent acts of negligence had been alleged and proved against defendant Greiner and defendant Karnopp.

"9. The District Court erred in failing to instruct the jury on the definition of negligence when it had become an issue as to defendant Greiner and defendant Karnopp at the time of the trial." We will discuss the assignments of error by number.

Under the first, second, third, and eighth assignments, it seems to be plaintiff's contention that he could recover from Karnopp for negligence even though he might not recover against Greiner. Plaintiff cites no

authority for this position, which is obviously fallacious. The cases he does cite are on another point and have no application here. Even if Karnopp were negligent, which the record does not support, that negligence is immaterial unless it contributed to the proximate cause of plaintiff's injuries. If plaintiff could not recover from Greiner, then certainly any negligence of Karnopp's could not have been any part of the proximate cause. Any recovery against Karnopp must be based upon the doctrine of respondeat superior. The relation of master and servant must be shown to exist at the time of the injury and with respect to the particular transaction resulting in the alleged tort, and the servant must be shown to be acting within the scope of his employment. Rich v. Dugan, 135 Neb. 63, 280 N. W. 225.

With reference to the first assignment, without going into a detailed discussion, the trial court fully instructed the jury upon the plaintiff's theory of the case as disclosed by the pleadings and the evidence.

With specific reference to the second assignment, instruction No. 5 correctly and accurately covers plaintiff's pleadings and the evidence. There is no merit to plaintiff's assignment.

Plaintiff's fourth assignment refers to the trial court's instruction No. 10, which defined the duty of an officer in attempting to make an arrest if he has probable cause to believe a felony had been committed and the person sought to be arrested attempts to escape.

Did Greiner have probable cause to believe plaintiff had committed a felony? There had been several recent attempts at breaking and entering in the vicinity of the tavern. It was an early morning hour and the Royal Grove had been closed for sometime and no one was around. When Greiner's partner flashed the patrol car spotlight on the parked car, the plaintiff raised up and then ducked down. When the patrol car stopped, plaintiff jumped from the parked car and started running, and at that time had an object in his hand which had

the appearance of a gun. He was running fast and failed to stop on the command to "halt or I will shoot" and continued to run after one warning shot was fired.

Section 28-531.02, R. R. S. 1943, provides as follows: "Every person who shall break and enter, or enter without breaking, at any time, any motor vehicle, with intent to commit the crime of larceny, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary for not less than one year nor more than two years."

Section 29-401, R. R. S. 1943, provides as follows: "Every sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman or police officer shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained."

Surely the facts were such that a reasonable man might believe that he had come upon the plaintiff in the act of committing a felony. The patrol car was lighted and well marked. Plaintiff could not help but know that it was a patrol car and the men were officers. The command to halt was loud enough for the plaintiff to hear, yet he saw fit to continue to flee. Unless Greiner had a right to believe a felony had been committed, it would be difficult to imagine a situation where an arrest could be made where an officer came upon what appeared to be the commission of a crime. There was ample evidence from which a jury could find Greiner had probable cause to believe plaintiff had committed a felony. There is no merit to plaintiff's fourth assignment.

Plaintiff in his fifth assignment picks out an isolated part of one sentence in instruction No. 10. The entire sentence reads: "However, if a deputy sheriff uses more force than is reasonably necessary to prevent the escape *or* acts wantonly or maliciously, he commits an assault and battery, and is liable therefor in damages for excessive force." (Italics supplied.) This does not

give the connotation plaintiff attempts to suggest.

With reference to the sixth assignment, instruction No. 16 reads as follows: "If you find by a preponderance of the evidence that the defendant, William C. Greiner, had reasonable grounds to believe and did believe that the plaintiff committed a felony and was attempting to escape arrest; and that the defendant, William C. Greiner, used only that force that was reasonably necessary to prevent the plaintiff from fleeing from arrest, then your verdict shall be for the defendants.

"If, however, you find from a preponderance of the evidence that the plaintiff had not committed a felony and that the defendant, William C. Greiner did not have probably (sic) cause to believe that the plaintiff had committed a felony, then the defendant, William C. Greiner, was without authority to inflict force against the plaintiff and your verdict should be for the plaintiff." Read in conjunction with the other instructions, instruction No. 16 clearly put the burden on Greiner and not on the plaintiff to prove that plaintiff had committed a felony and that Greiner had probable cause to so believe.

Plaintiff in his seventh assignment has made no reference to, or pointed out, specific admitted evidence against which this objection is urged. We said in Springer v. Henthorn, 169 Neb. 578, 100 N. W. 2d 521: "In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which objection is urged." We assume, however, it is directed to the fact that Greiner was permitted to testify that plaintiff had an object in his hand which appeared to be a gun. There is no dispute plaintiff did have an object in his right hand. It was the flashlight identified as being from the glove compartment of the car. In the excitement of the moment it could have resembled a gun. We see no error in the admission of this evidence.

Plaintiff's ninth assignment is equally without substance. While the trial court did submit the issue of negligence as to both Greiner and Karnopp, plaintiff's own evidence completely negatives any of the alleged negligence on the part of Karnopp. As to Greiner, plaintiff's original petition was framed on the basis of an intentional tort. Just before trial, plaintiff was permitted to add the word "negligently" to his petition. The trial court adequately instructed on the duties of the officer, and specifically in instruction No. 11 told the jury: "The officer, however, is required not to use any more force than that which would appear to an ordinarily prudent person, under all the existing circumstances, to be reasonably necessary to effectuate an arrest."

In instruction No. 12, the jury was told: "In order for you to determine whether the conduct of the officer in making the arrest was wrongful you are advised that the officer need not have acted according to the standards of a cool, calm and collected man, or have measured the amount of force necessary to make the arrest with deliberation or absolute precision. * * * The standard to be used in measuring his conduct is that he must conduct himself as an ordinarily prudent man would have done under the circumstances as shown by the evidence."

The plaintiff tendered no instructions. The trial court gave 21 instructions, which, considered as a whole, more than adequately presented plaintiff's theory of the case.

Our attention has not been directed to any error prejudicial to the rights of the plaintiff. We find no reason to disturb the judgment entered by the trial court on the verdict of the jury. We therefore affirm the judgment herein.

AFFIRMED.

WHITE, C. J., not participating.

STATE OF NEBRASKA, APPELLEE, V. RICHARD DODD, APPELLANT.

122 N. W. 2d 518

Filed July 5, 1963. No. 35418.

1. **Extradition.** A fugitive from justice surrendered by one state upon the demand of another may be prosecuted by the latter for any offense committed within its borders without first having had an opportunity to return to the state by which he was surrendered.
2. **Criminal Law: Evidence.** Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

James E. Abboud, Jr., and Leon J. Garcia, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

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

CARTER, J.

The defendant was convicted in the district court for Douglas County of the offense of obtaining money under false pretenses and representations from John H. McLaughlin in an amount in excess of $35 with intent to cheat and defraud, contrary to the provisions of section 28-1207, R. R. S. 1943. Defendant seeks a review of his conviction in this court.

The defendant was engaged in the business of repairing automobiles. The evidence shows that on or about February 14, 1961, defendant undertook to repair a truck belonging to McLaughlin. He demanded and obtained $275 from McLaughlin. He took the truck into his possession for the purpose of repairing it. Two or three days later McLaughlin found the defendant's place of busi-

ness locked. The truck was inside the place of business, torn down and not repaired. The defendant could not be found. He left no forwarding address. He gave no notice of the closing of the repair shop. He did not contact McLaughlin, nor return the $275. There is evidence in the record by other witnesses who were similarly treated. The defendant was extradited from the State of Ohio and tried for the offense hereinbefore stated. No contention is made that the evidence was insufficient to sustain a conviction.

Defendant contends that he was improperly convicted in that he was not tried for the offense for which he was extradited. While there is some question as to whether or not this matter was properly raised by the record, the applicable rules are clear that his contention is not meritorious.

The Uniform Criminal Extradition Act, adopted in Nebraska, provides: "After a person has been brought back to this state upon extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here, as well as that specified in the requisition for his extradition." § 29-726, R. R. S. 1943. The foregoing statute has long been the rule in this state. State ex rel. Petry v. Leidigh, 47 Neb. 126, 66 N. W. 308; Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, 165 A. L. R. 932. See, also, Lascelles v. State of Georgia, 148 U. S. 537, 13 S. Ct. 687, 37 L. Ed. 549; Pettibone v. Nichols, 203 U. S. 192, 27 S. Ct. 111, 51 L. Ed. 148.

Defendant assigns as error the admission of evidence of other offenses of the same nature occurring at approximately the same time. The admission of the evidence was limited by the trial court to the question of the intent of the accused in committing the acts charged. The evidence was properly admitted under our holding in State v. Easter, 174 Neb. 412, 118 N. W. 2d 515, wherein this court said: "Evidence of other crimes, similar to that charged, is relevant and admissible when it tends

to prove a particular criminal intent which is necessary to constitute the crime charged."

Defendant assigns as error the giving of instruction No. 9. The instruction stated: "You are instructed that evidence that the defendant may have been a party to another similar transaction or transactions, was admitted for the sole and only purpose of tending to prove that the defendant had a motive and the intent to commit the alleged crime for which he is here tried, and such evidence shall be considered by the jury for that purpose only." This instruction is consistent with the holdings of this court for advising the jury when evidence is admitted for a limited purpose. The instruction was in all respects a proper one.

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

AFFIRMED.

EARL FOSLER, A MINOR, BY CHESTER FOSLER, HIS FATHER, NATURAL GUARDIAN, AND NEXT FRIEND, APPELLANT, V. ARTHUR ADEN ET AL., APPELLEES.

122 N. W. 2d 494

Filed July 5, 1963. No. 35452.

1. **Master and Servant.** Section 48-409, R. R. S. 1943, provides in part: "Every person operating a plant where machinery is used, shall provide such guards * * * or other appliances as will protect employees against injury."
2. ———. The language appearing in section 48-409, R. R. S. 1943, "every person operating a plant" is interpreted to mean the owner-operator of a business, whether it be an individual person, partnership, or corporation.
3. ———. The term "every person" includes all persons, both natural and artificial.
4. ———. "Manager" is defined as a person chosen or appointed to manage, direct, or administer the affairs of another person or of a corporation or company.

Appeal from the district court for Seward County: H. EMERSON KOKJER, Judge. Affirmed.

Ivan A. Blevens, for appellant.

John E. Dougherty, for appellees.

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

MESSMORE, J.

This is an action at law brought by Earl Fosler, a minor, by Chester Fosler, his father, natural guardian, and next friend, against Arthur Aden and the Farmers Union Cooperative Association, a corporation, defendants, to recover damages under section 48-422, R. R. S. 1943, resulting from loss of a foot which was amputated by a grain auger alleged to have been improperly protected by guards in violation of section 48-409, R. R. S. 1943. The employer of the minor plaintiff, Farmers Union Cooperative Association, a corporation, hereinafter called corporation, was joined as defendant for the purpose of subrogation under the Nebraska Workmen's Compensation Act. The trial court rendered judgment in favor of the defendant Aden and against the plaintiff Earl Fosler, in that such plaintiff had no cause of action against the defendant Aden. The plaintiff filed a motion for new trial which was overruled. The plaintiff perfected appeal to this court.

The plaintiff's petition alleged in substance that Earl Fosler was a minor, 18 years of age, and brought this action against Arthur Aden as operator of an elevator or plant; that Arthur Aden willfully, deliberately, and intentionally installed and operated therein a machine shafting with grain auger blades affixed thereto, without providing guards, boxing, screens, or other appliances as would protect employees against injury therefrom, in violation of the provisions of section 48-409, R. R. S. 1943; that on July 26, 1961, Earl Fosler was employed by the corporation in the plant operated by Arthur Aden, on which date he was ordered and directed by Arthur Aden to enter the grain pit where the

auger shafting was turning and being operated in violation of the Nebraska Safety Code, which auger shafting was located in a depression in the floor of the pit on which it was necessary for employees to walk; that while Earl Fosler was executing the directions given by Arthur Aden his foot slipped in the shafting and his right leg was amputated and cut off between the knee and the ankle; and that as a direct and proximate result of the injury he suffered pain, was required to employ surgeons, was hospitalized, was permanently disabled, and has been damaged, for which he prayed judgment.

The defendants' answer, as far as necessary to consider, admitted the identity of the corporation with its principal place of business in Milford, and denied all other allegations of the plaintiff's petition. The answer alleged that Arthur Aden and Earl Fosler were coemployees of the corporation and were covered under the Nebraska Workmen's Compensation Act; and prayed that the plaintiff's petition be dismissed.

For convenience we will refer to Earl Fosler as the plaintiff, to Arthur Aden as the defendant, and to other witnesses by their names.

Chester Fosler testified that he was the plaintiff's father; that the plaintiff was living with the family on July 26, 1961; that the plaintiff had spent 1 year at the University of Nebraska taking a pre-engineering course; and that the plaintiff obtained employment at the corporation's elevator in Milford in July 1961. This witness was the secretary of the board of directors of the corporation, hereafter referred to as the board, at the time of the accident. The plaintiff's employment was considered by the board and he was employed, to be paid $1.25 an hour. His hours of work were varied. This witness further testified that he had been a stockholder in the corporation for a number of years; that the corporation had a general manager at its elevator who received a regular salary as manager and a commission based on the earnings of the corporation; that the de-

fendant had been the manager of the elevator for 16 or 17 years; that the board met once a month and at times had special meetings; that there were seven members of the board; that the meetings were usually held in the evening and the manager was generally present to make a report to the board which consisted of the total dollar business, cash business, accounts receivable, and cash value of all grain sold; that the manager had charge of the elevator and hired the employees but they had to be approved by the board, at least for full-time help; that the board fixed the salaries; that there are three other employees at the elevator; and that any of the employees, not otherwise busy, wait on trade. The elevator is organized as a co-operative association. This witness further testified that prior to the occasion of the plaintiff losing his foot, this witness had never been in the grain pit. He entered the pit after the accident. and described the pit as a long, narrow passageway with an auger in the bottom of it and doors on each side of it which open to different grain bins. These are sliding doors, perhaps 3 or 4 feet above the floor.

On cross-examination this witness testified that before the plaintiff went to work at the elevator the matter was discussed by the board, and this witness was present at the time. The board discussed the matter because extra help was needed and the plaintiff was looking for work. The plaintiff made application for work, and the application was approved by the board. This witness further testified that the defendant is not a stockholder of the corporation; that the auger is located in the annex which is built on the east end of the elevator; that the annex is 25 or 30 feet long; that the auger is run by electricity which is turned on and off in the main part of the elevator; and that the auger and the grate covering it are visible when a person goes into that part of the annex.

The plaintiff testified that at the time of the trial he was 19 years old; that he obtained summer employ-

ment with the corporation and started to work the fore part of July at $1.25 an hour; that this was his first experience working in a grain elevator; that the part of the elevator referred to as the annex is to the east, and contains grain bins; that at the bottom there is a hallway referred to as the pit into which all the grain bins have openings that terminate about 3 feet above the floor; and that running through this pit is an auger. He further testified that to load a railroad car a person would first turn on the auger, then go down and open one of the sliding doors, and let the grain fall into the auger. He would then go upstairs to watch a counter on the wall until the car was almost filled. There is a scale upstairs that measures out ten bushels, and each time there are ten bushels it trips a number so that the person can figure how many bushels are in the car. When there are about three dumps left, and the person wants to stop the process, it is necessary to go down to the pit and shut the grain bin door, go back up and let the auger and leg empty out, and then shut it off. When the door is shut the auger is still running, if not, the grain would pile on top of the auger and stop it or plug it up. This witness was watching the counter gauge toward the end of the process and saw it reach the shut-off point. He said that he would go down and shut the bin door. Kenneth Troyer, another employee, said he would pull the spout out of the car. This witness further testified that he went to the east side of the annex building, then north down some stairs, then west into the pit where he went down three steps and stepped over a grain chute; and that he entered the pit door, walked down the steps toward the door to close it, forgot to pick up some paper to stick in the bin door, and turned to the left to pick up the paper off the floor. He remembered his foot slipping and something pulling on it, and the next thing he knew he did not have a leg. The auger was running when he entered the pit. He believed his foot slipped on some

wheat. He hopped out of the pit and up the stairs. Kenneth Troyer came to take care of him. His foot slipped into the auger near the door he was closing. The auger was covered with a grate. He did not know where the opening was that his foot slipped into, and testified that after his foot slipped into the auger a portion of the cover came loose.

On cross-examination the plaintiff testified that he had been down in the pit several times before the accident occurred; that he was there at times when the auger was rolling; that he was familiar with the auger, its size, the manner in which it revolved, and the speed at which it revolved when it was running empty; that he knew about what speed the auger was going when it was pulling grain up into the higher elevations; that there were electric lights in the area which were on at the time of the accident; that he was wearing regular work shoes approximately 3 or 4 inches wide; that the defendant was not the only person who gave him instructions; and that one of the employees who did so was Wilton Stauffer who was the assistant manager of the elevator. The plaintiff further testified that he had helped load 10 cars of grain; that he did not know for sure how he got his foot caught in the auger, whether his foot slipped, or what happened; and that he was not paying any particular attention as to where he was stepping with reference to the location of the auger or the grate. The plaintiff further testified that the insurance carrier for the corporation paid all of his hospital bills and his workmen's compensation of $37 a week up to the time of the trial.

On redirect examination the plaintiff testified that it was dusty in the pit on the day the accident occurred. On recross-examination he testified that he was born and raised on a farm until he went to work at the elevator; that during the time he was on the farm he had experience with revolving farm machinery and had operated tractors, combines, and elevators and that some

of that machinery included augers; that there was dust in the pit, and he knew that the dust was there before he started into the pit; that he knew the auger was running; and that he did not shut the auger off before he went down into the pit to close the door.

The defendant, Arthur Aden, testified that he had lived in Milford for 18 years and had been in the employ of the corporation since that time; that during that time he had been the manager of the elevator; that he was in the office part of the building when the accident occurred; that he does the general managing of the elevator, and Wilton Stauffer is the assistant manager who takes care of most of the outside work at the elevator and around the feed shed; that he, Aden, has very little to do other than office work; and that he makes all the managerial decisions and makes a definite report to the board once each month. He described the loading process by stating that when the grain is loaded from the annex the first thing to do is to push a button to turn on the elevator leg which takes the grain up to the top where it is distributed into the cars, then to push another button to get the auger coming toward the leg, then to go down into the hallway or pit where the auger is located and turning and open one of the gates that lets the grain pour into the auger. The grain is carried west in the auger, dumped into the belt cups, taken to the top, and dropped in the scale which measures out ten bushels each time it trips itself. This scale is automatic, and there is a register down below on the work floor that tallies each time the scale dumps the grain. The plaintiff was doing that type of work at the time of the accident. This witness further testified that when they are three dumps of grain away from the amount that the person wants in the car, you have to start shutting the grain off before you get the total capacity of the car. If the plaintiff was watching the indicator and he wanted three or four more dumps in that car, he would know it was just about full, then

he would go down, shut the gate, and shut the grain off. This must be done while the auger is continuing to run because it has to be empty before it is stopped. When the job is completed there is a bushel or so of grain on the floor to be swept in. When the machinery is in operation, dust is generated in this room and the employees normally wear dust masks. This witness further testified that after the plaintiff was taken to the hospital this witness went down and looked at the scene. The auger had been shut off and the grate over the auger was in place. He did not observe any blood on the grate. There was no clothing or anything of that kind in the room or in the auger. The severed foot ended up in the automatic scale.

On cross-examination the defendant testified that he was strictly on a salary basis, and was not a stockholder of the corporation; that he was originally employed by the board; that the board employed the plaintiff; that he gave no instructions with reference to work to the plaintiff on the date of the accident; and that the plaintiff's directions with reference to the work were to come from the assistant manager.

Kenneth Troyer testified that he heard the plaintiff call, and saw him crawling up the steps. He laid the plaintiff down, told Aden to call the rescue squad, and took off his own shirt and applied a tourniquet. He stayed with the plaintiff until plaintiff was taken to the hospital. He checked to see if the grain was shut off, and the wheat was still dribbling a little out of the hole. He went down into the pit and noticed that the grate was pushed to the west farther than it usually was. He made this observation right on the west side of the first bearing, and the bin door was just on the east side of the bearing. At that time the grate was to the west at least 6 inches. No part of the grate was raised above the floor. There was an opening above the auger at least 6 inches wide which he had not observed before. On other occasions the width of the opening at that

point was approximately 3 or 4 inches. On cross-examination this witness testified that the steel bars that go across the grate are half an inch wide; and that he did not measure them, but they run the full length of the grate.

LeRoy Ficke testified that he was the chairman of the board; that the defendant actually took care of the entire business as the manager, had control of the employees, and made the decisions relating to the shipping and selling of grain; that all of the members of the board are farmers, are not engaged in the grain business, nor do they conduct the business of the corporation; that he was notified of the accident and went to the elevator immediately, and into the pit; that the auger was shut off; that one of the bars in the grate was bent; that there was a boxing every 10 feet on the auger; and that this bent bar was about a foot or less from the boxing or bearing.

At the conclusion of the plaintiff's evidence the defendant made a motion for directed verdict. The trial court sustained the defendant's motion for directed verdict, and stated that he determined that a question of fact was not involved where the facts are not in dispute; that the evidence delineated the duties of each of the people who were working at the plant; that he concluded that the court was to construe the statute; and that he reached the conclusion that the term "operator" means the one who runs the business, that is, in this case, the corporation. The trial court entered judgment on behalf of the defendant.

The plaintiff contends that the trial court erred in ruling as a matter of law that the defendant Arthur Aden was not the operator of a plant under section 48-409, R. R. S. 1943; and that the trial court erred in failing to submit to the jury under appropriate instructions the issue of whether or not Arthur Aden was the operator of a plant under section 48-409, R. R. S. 1943.

Section 48-409, R. R. S. 1943, provides: "Every per-

son operating a plant where machinery is used, shall provide such guards, boxing, screens or other appliances as will protect employees against injury from belting, shafting, gearing, elevators, drums, saws, cogs, electric currents, molten metal or hot liquid. He shall also furnish and supply belt shifters which can be operated from the floor. All exposed cogs or gears shall be enclosed in metal casings or woven wire screens. Protruding set screws in collars and couplings or shafting or other revolving machinery shall be countersunk or covered with metal boxing. Pulleys, belts and projections of or from ends of shafting shall be protected by boxing or enclosing with metal or with other suitable material. Belts shall not rest on shafting in motion, but rest hooks shall be provided to hold belting free therefrom. Roll guards shall be placed on roll feed machines fed by hand at the point where the material is fed, and a device for instantly stopping the machine by the hand or foot shall also be provided within reach of the operator when operating the machine."

The plaintiff cites the case of Quist v. Duda, 159 Neb. 393, 67 N. W. 2d 481. This was an action in which the plaintiff, an employee of a tenant, sought to recover from the landlord damages in tort for injuries received in a man-lift in a garage, contending that the landlord violated the safety code of this state. The landlord defendants moved for directed verdict which was sustained. This court said: "The word operator generally relates to the person actively and directly engaged in an operation. Deep Vein Coal Co. v. Rainey, 62 Ind. App. 608, 112 N. E. 392; Flynn v. Pan American Hotel Co. (Tex. Civ. App.), 179 S. W. 2d 849, and same case 143 Tex. 219, 183 S. W. 2d 446." The last two cited cases interpreted the definition in the same manner as Quist v. Duda, *supra*.

The plaintiff asserts that every person operating a plant where machinery is used in violation of section 48-409, R. R. S. 1943, should be liable in damages to

any person injured, as provided by section 48-422, R. R. S. 1943, which provides in part: "Every person operating a plant where machinery is used who shall violate any of the provisions of sections 48-401 to 48-424 shall be liable in damages to any person injured, as a result thereof, * * *." The applicability of this act is related to operation. Quist v. Duda, *supra.*

The plaintiff also cites the case of Baer v. Schaap, 168 Neb. 578, 97 N. W. 2d 207, wherein the court was dealing specifically with section 48-425, R. R. S. 1943, which had to do with scaffolds or staging, safety rails, hoists, cranes, stays, ladders, supports, or other mechanical contrivances used in the erection, repairing, alteration, removal, or painting of any house, building, bridge, viaduct or other structure. This court held that where a scaffold was supplied on bailment, bailor was liable if the scaffold did not meet requirements of the statute. A rehearing was granted in the above-cited case. In Baer v. Schaap, 171 Neb. 347, 106 N. W. 2d 468, this court held the former opinion to be in error in holding that the evidence was sufficient to submit the case to the jury, and the decision in the former case was set aside. In Baer v. Schaap, 172 Neb. 414, 109 N. W. 2d 724, a reargument was ordered by this court with reference to the opinion in Baer v. Schaap, 171 Neb. 347, 106 N. W. 2d 468. During the pendency of time for reargument, the parties filed a stipulation in this court for dismissal of the action, which was allowed, and the appeal was dismissed. In any event, the above-cited cases bear no relevancy to the instant case.

The plaintiff cites Waite v. State, 169 Neb. 113, 98 N. W. 2d 688, wherein this court said: "The word operate as used in section 39-727, R. S. Supp., 1957, relates to the actual physical handling of the controls of the vehicle by a person while under the influence of intoxicating liquor." To like effect is Rose v. Gisi, 139 Neb. 593, 298 N. W. 333, which deals with a different

statute than the one being considered in the instant case and bears no relevancy to the instant case.

Other cases cited by the plaintiff do not meet the situation presented in the instant case under the facts adduced therein.

In considering section 48-409, R. R. S. 1943, which uses the words "operating a plant," this would include the corporation.

The term "every person" includes all persons, both natural and artificial. See § 49-801 (18), R. R. S. 1943.

In 35 Am. Jur., Master and Servant, § 193, p. 621, it is stated: "The purpose of statutes requiring that guards or other safety devices be provided for certain kinds of machinery used in industries is to remove all unnecessary danger to persons who are employed upon or about such machinery and are subject to dangers inherent in its operation, * * *."

In 35 Am. Jur., Master and Servant, § 360, p. 784, it is stated: "The obligation of the employer to furnish to his employee, for the performance of the work required of him, safe and suitable tools, machinery, and appliances such as a reasonable and prudent person would ordinarily use, and also to see that the same are kept in proper repair, * * *."

In 35 Am. Jur., Master and Servant, § 175, p. 604, it is stated: "The employer's obligation to care extends, as a general rule, to all tools, machinery, and appliances that may be furnished for the use of the employee in the discharge of his duties; and, for any neglect of this duty, the employee may hold the employer liable in damages." Several states adhere to this rule. See, Poos v. Fred Krug Brewing Co., 101 Neb. 491, 163 N. W. 840, L. R. A. 1918D 515; Westlake v. Murphy, 85 Neb. 45, 122 N. W. 684, 19 Ann. Cas. 149.

In the instant case the corporation is the employer of the plaintiff. Arthur Aden, defendant, is the manager of the corporation. "Manager" is defined as: "A person chosen or appointed to manage, direct, or administer

the affairs of another person or of a corporation or company." Black's Law Dictionary (3d ed.), p. 1151.

The evidence in the instant case clearly discloses that the defendant was the manager of the corporation and not the employer of the plaintiff.

Our research discloses many types of statutes relating to safety codes and decisions of foreign jurisdictions. Because of the different types of statutes and the facts in each case relating thereto, these decisions are not helpful in a determination of this appeal.

This court has not passed on the precise question now presented.

This case does not present a question of fact. The facts are not in substantial dispute. The trial court was obligated to construe section 48-409, R. R. S. 1943, and determine the meaning of the word "operator" as used in such section of the statute. The trial court interpreted the word "operator" to mean the owner-operator of a business, which is the corporation, and not the defendant Aden, the manager of the corporation. We conclude that the trial court properly interpreted the statute as applied to the instant case.

We further conclude that the trial court did not err in sustaining the defendant Aden's motion for directed verdict.

We affirm the judgment of the trial court.

AFFIRMED.

HAL LIGHTHILL ET AL., APPELLEES, V. KEITH MCCURRY, DOING BUSINESS AS MCCURRY CONSTRUCTION COMPANY, ET AL., APPELLANTS.

122 N. W. 2d 468

Filed July 5, 1963. No. 35483.

1. **Workmen's Compensation.** Questions of dependency of parents on a deceased minor son, in whole or in part, under the provisions of the Nebraska Workmen's Compensation Act, section

48-124, R. R. S. 1943, shall be determined in accordance with the fact as the fact may be at the time of the injury to the deceased employee son.

2. ———. Parents are not presumed to be dependents of minor children but, on the facts, may be found to be dependent.
3. ———. Where a claim is made under the Nebraska Workmen's Compensation Act on account of dependency, actual as distinguished from mere legal dependency must be shown.
4. ———. The determination of the fact of partial dependency under the Nebraska Workmen's Compensation Act must be based first upon contributions made by the employee for the purpose of support of the claimed dependent.
5. ———. It is not money contributed but money contributed for the purpose of support of the claimant that must be the basis of any claim of partial dependency under the Nebraska Workmen's Compensation Act.
6. ———. "Dependency" and "support" under the Nebraska Workmen's Compensation Act are terms that are not capable of certain definition.
7. ———. If a contribution is made to the ordinary comforts and conveniences which are reasonably appropriate to parties in their station in life, it should be considered as support and the recipient regarded as a dependent.

APPEAL from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Luebs, Elson, Tracy & Huebner and Irwin G. Manley, for appellants.

Paulick, Buechler & Huber, for appellees.

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

WHITE, C. J.

This is a partial dependency case under the Workmen's Compensation Act, sections 48-122 and 48-124, R. R. S. 1943. The question involved is whether or not the plaintiffs, the parents of the deceased, were partially dependent upon their deceased 20-year-old son on the date of his death within the meaning of the act.

The parents were found by the Nebraska Workmen's Compensation Court to be partially dependent on the

deceased employee of the defendants on the date of his death, September 26, 1961, and an award in their favor was entered. The defendants appealed directly to the district court where the case was tried de novo on the merits. On appeal, at the commencement of the trial, the parties stipulated "that the sole issue is whether or not there is dependency under the laws of Nebraska." After trial on this issue, the district court also found for the plaintiffs, found that the plaintiffs were partially dependent upon their deceased son, Laverne Lighthill, and affirmed the award of the compensation court. The defendants appeal.

The facts in this case are almost without dispute. The decedent, Laverne Lighthill, son of the plaintiffs, was killed on September 26, 1961, while acting within the scope and course of his employment for the defendant employer, Keith McCurry, doing business as McCurry Construction Company. The decedent was 20 years of age, single, and lived at home with his parents. At the time of his death, the decedent was earning $1.70 per hour for a 40-hour week. The plaintiff father was employed by Sherman County, working on the county roads for a monthly salary of $245 with a net take-home pay after deductions of $213 per month. During all of the period referred to herein, the decedent lived with his parents in the family home. His mother did not work or have any income, and the decedent was the recipient of the normal incidents of living in the home, part of his board, his laundry, room, and enjoyment of the home. The decedent's employment with the defendant McCurry started in April 1961.

As shown by answers to interrogatories requested and offered by the defendants and received without objection, contributions by the decedent to his parents for a period beginning June 17, 1961, and ending on the date of the death of their son may be summarized monthly as follows:

A.	June 1961.	
	6-17-61 - Cash by check to mother	$10.00
	6-19-61 - Overall purchase for father	$ 8.94
	6-27-61 - Cash from wages	$15.00
	6-30-61 - Payment of father's gas bill	$12.55
B.	July 1961.	
	7- 3-61 - Payment on Chevrolet car for parents	$150.00
	7- 5-61 - Cash to mother	$15.00
C.	August 1961.	
	Cash to mother on different dates	$20.90
	Payment by check of father's gas bill	$ 4.35
D.	September 1, 1961, to September 22, 1961, inclusive.	
	Purchase of boots for father	$14.50
	Cash to mother on four different dates	$16.00
		$10.00
		$10.00
		$10.86

The mother's uncontradicted testimony on many of these items was supported by documentary evidence, mostly checks signed by the deceased. The car belonged to the parents and was used by the father, Hal Lighthill, in his work, and the son used it some for social purposes in the evening. Gasoline was purchased separately by the son at different times, and he would use the car when it was his turn to drive to his own work. The family lived in Litchfield, and the son went down town in the evening. The monthly family expenses were $279.75 consisting of the usual expenses of a family owning and living in a home.

The Workmen's Compensation Act, section 48-122 (3), R. R. S. 1943, provides that in order to sustain a claim of partial dependency, the plaintiff must show an average amount regularly contributed by the deceased for a reasonable time immediately prior to the accident. The parents are not presumed to be dependents of minor

children but, on the facts, may be found to be dependent. They fall within the class contemplated by the following which is part of section 48-124, R. R. S. 1943: "In all other cases, questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury * * *."

The defendants contend that the decedent made no regular contributions toward the support of his parents, that there is no evidence that the parents were actually dependent for support upon any money given them by the decedent, and that the money given them by the decedent was not for their support. The defendants rely mainly on the case of Pieters v. Drake-Williams-Mount Co., 142 Neb. 315, 6 N. W. 2d 69, and say it is "on all fours" with this case.

We feel that this case is very similar to and controlled by McKelvey v. Barton Mills, Inc., 152 Neb. 120, 40 N. W. 2d 407, a later case. In that case, a young boy, 16 years of age, quit school and began working away from home at various jobs. He had worked for the employer defendant only 6½ weeks prior to his death, but during that period, he had made minor contributions in varying amounts, generally from $5 to $10 per week, to his parents. The parents were operating a 200-acre farm with a gross income of about $4,100 per year, and the boy made contributions to his father for a tire and tube on the family car.

The same contentions were made by the defendant in the above case as in the present case. This court had before it at that time the Pieters case, *supra,* and cited its holding as supporting the award to the plaintiff therein. The court said: *"It reasonably appears that appellees could have gotten along without the assistance given by the deceased but that these contributions provided nothing beyond what may be regarded as ordinary necessities and relieved only against self-denial. It further reasonably appears that the deceased made the contributions in recognition of a duty in this respect which*

it pleased him to assume. * * * This court said in Kral v. Lincoln Steel Works, 136 Neb. 31, 284 N. W. 761: 'Where the evidence shows that parents, with limited means, actually received contributions for their support from the wages of a son now deceased, such fact constitutes evidence strongly tending to establish dependency, and the question of dependency or partial dependency must be determined from the facts in each case.' * * * In Pieters v. Drake-Williams-Mount Co., 142 Neb. 315, 6 N. W. 2d 69, it was said: 'Dependency in fact under * * * the workmen's compensation act is not created by contributions made for purposes other than the partial support of the alleged dependent. * * * The determination of the fact of partial dependency under * * * the workmen's compensation act must be based first upon contributions made by the employee for the purpose of support of the claimed dependent. * * * It is not money contributed, but money contributed for the purpose of support of the claimant that must be the basis of any claim of partial dependency under said act.' * * * This court has held that where a claim is made under the workmen's compensation law on account of dependency actual as distinguished from mere legal dependency must be shown. Palmer v. Hamer, 133 Neb. 362, 275 N. W. 322; Meyer v. Nielsen Chevrolet Co., 137 Neb. 6, 287 N. W. 849. * * * 'Dependency' and 'support' under the workmen's compensation law are not capable of certain definition. The definition and application of these words should not be too severely restricted. *If a contribution is made to the ordinary comforts and conveniences which are reasonably appropriate to parties in their station in life, it should be considered as support and the recipient regarded as a dependent.* * * * In Federal Underwriters Exchange v. Hinkle, (Tex. Civ. App.) 187 S. W. 2d 122, is found a statement appropriate to such a situation: 'Support is a very flexible term and includes something more than the bare necessities of life. It includes also the ordinary comforts and con-

veniences which are reasonably appropriate to the parties' station in life—such as were actually being enjoyed by them at the time of and prior to their son's death.' " (Emphasis supplied.)

Without reciting the exact connections between these pronouncements and the separated elements of the evidence, it is apparent here, as in the McKelvey case, *supra*, that the parents had ample funds for their own support, and that the contributions may have "relieved only against self-denial." It further reasonably appears that the contributions undisputedly were used to procure and pay for the things commonly regarded as of the essence of the necessities of life or were, at a minimum, "made to the ordinary comforts and conveniences which are reasonably appropriate to parties in their station in life." The defendants, in effect, would have us apply a test that would require a showing that the parents were either indigent or incapable of supporting themselves and that the contributions were over and above what the decedent would normally have to pay for his own support. Our cases do not support such a rigidity of construction. The definitions and application of these words should not be so severely restricted. McKelvey v. Barton Mills, Inc., *supra*.

The defendants do not discuss or attempt to distinguish the McKelvey case by way of argument but rely on the Pieters case, cited *supra*, which was urged, considered, and quoted from in the McKelvey case, *supra*. The two cases are clearly distinguishable. In the Pieters case, *supra*, the plaintiff was a 27-year-old married man with a family, and the decedent was a 59-year-old father "indigent and in need" who came to Omaha to live with the son who said, "that any time he wanted to come and stay with me," he could do so. The court found: "Here the record sustains only the conclusion that the plaintiff assumed the burden of caring for his father, that while unemployed the burden of caring for his father was entirely upon the plaintiff, and that when the father

was employed the burden was in part, at least, carried by the father. The record does not support a finding that the father at any time undertook to or did contribute to the plaintiff for the purpose of aiding in the support of the son or his family."

We adhere to the applicable rules announced in McKelvey v. Barton Mills, Inc., *supra,* and the significance with relation thereto given substantially comparable facts in that case. We find that the plaintiffs were partial dependents of the decedent and entitled to compensation under the workmen's compensation law.

The defendants complain of errors in the admission of evidence as to exhibits 1 to 9, claiming insufficient foundation. Assuming, but not deciding, that there was such lack of foundation, the identical evidence as well as additional evidence was received by way of answers to interrogatories proposed by the defendants, answered by the plaintiffs, offered by the defendants themselves, and received without objection. The defendants complain that they were not allowed large enough scope on cross-examination to explore the financial assets and property of the plaintiffs which were available to them for their own support. We have examined the record and at no point can we find where the trial court abused its discretion in this matter.

The matter of the computation or amount of the award is not discussed or argued in the parties' briefs. The plaintiffs ask that the award be increased but do not separately cross-appeal or argue the question. Consequently, we may not consider it here.

The judgment of the district court was correct and is affirmed. An attorney's fee of $250 for services in this court is allowed in favor of plaintiffs to be taxed as costs against the defendants.

AFFIRMED.

JOSE CAMPOS, APPELLEE, V. SAM TOMOI ET AL., APPELLANTS.

122 N. W. 2d 473

Filed July 5, 1963. No. 35488.

1. **Workmen's Compensation.** The fact that an employer or employers are engaged in farming does not remove from the coverage of the Nebraska Workmen's Compensation Act other businesses or occupations carried on by the employer or employers which are otherwise in the coverage of the statute.
2. ———. A workman is not a farm laborer within the meaning of the Nebraska Workmen's Compensation Act simply because at the moment he is doing work on a farm; nor because the task on which he is engaged happens to be what is ordinarily considered farm labor. Neither the pending task nor the place where it is performed is controlling. The whole character of the employment must be looked to to determine whether an employee is a farm laborer within the meaning of the Nebraska Workmen's Compensation Act.
3. ———. A group of farmers operating a commercial hay grinding business on a partnership basis may not, during the course of the operation of said separate business, be deemed employers of farm laborers within the meaning of the Nebraska Workmen's Compensation Act.

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

Herman & Wood, for appellants.

Frank Glebe, for appellee.

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

WHITE, C. J.

This is a workmen's compensation case and the appeal presents the question of whether or not the defendants, under a partnership agreement in the operation of a feed grinder, were employers of a farm laborer within the provisions of section 48-106, R. R. S. 1943, and thereby exempt from liability under the provisions of the Nebraska Workmen's Compensation Act.

Section 48-106, R. R. S. 1943, provides in part as fol-

lows: "The following are declared not to be hazardous occupations and not within the provisions of the act: * * * employers of farm or ranch laborers * * *."

A single judge of the compensation court, the three-member court on appeal, and the district court found that the plaintiff was not a farm laborer within the meaning of the above act, awarded compensation, and the defendants appeal.

The plaintiff was hired by the three defendants, Sam Tomoi, Ed Tomoi, and Kay Yamada, to assist in the operation of a large commercial type hay grinder during the winter months and then afterwards continue to work on their farms. His pay was at an hourly rate of $1.25. The grinder and the equipment accessory thereto were worth approximately $20,000. The hay grinder was of a large type with only two like it in the general area of operations around Scottsbluff. The plaintiff did not live on a farm and was hired to work on the grinder. The plaintiff was injured 6 days after commencing work when his left arm was caught in a shaft while putting a canvas on it, while the defendants were grinding hay under contract for a farmer on a neighboring farm.

The defendants, operating as a partnership, ground hay for large commercial cattle feeders in the area and ground hay for numerous other farmers while the plaintiff was working for them.

They charged $5 a ton and the earnings received by the partnership were placed in a separate bank account from which expenses were deducted. The defendants admitted they grossed over $10,000 a year for grinding. They used the grinder more for hire than for their own work. The defendants farmed about 440 acres of land and engaged in an extensive partnership in a buying, feeding, and selling operation as to lambs and cattle. They used the grinder to grind all of their own hay, and they had to purchase some extra hay for their feeding operations. The net profit from the separate grinding operation was $4,000 to $5,000 annually.

The defendants contend that hay grinding is a farm labor operation from the character of the job, that as employers they were all individual farmers, and that the grinder was used as an integral part of their own farming operation. They contend that the fact that the plaintiff was employed to work with the grinder itself is immaterial, that the employment was essentially farm labor, and that, therefore, the defendants were employers of "farm laborers" and are exempt from the provisions of the act.

There is considerable confusion and diversity of opinion in the cases construing factual situations arising under the applicable provisions of the Workmen's Compensation Act and the principles applicable thereto. See, Keefover v. Vasey, 112 Neb. 424, 199 N. W. 799, 35 A. L. R. 191; 99 C. J. S., Workmen's Compensation, § 33b, p. 195. The place where the work is being performed, the nature of the task the employee is performing at the time, the purposes for which he was hired, and the nature of the employer's occupation have been deemed controlling in different cases. The fact that the employer or employers are engaged in farming does not remove from the coverage of the statute other businesses or occupations carried on by the employer which are otherwise in the coverage of the statute. 99 C. J. S., Workmen's Compensation, § 33, p. 193; Campos v. Garden City Co., 166 Kan. 352, 201 P. 2d 1017; Tucker v. Newman, 217 Minn. 473, 14 N. W. 2d 767; Butterfield v. Brown, 287 N. Y. 623, 39 N. E. 2d 264.

Our latest case where this problem was before us is Oliver v. Ernst, 148 Neb. 465, 27 N. W. 2d 622. The plaintiff was injured while operating a bulldozer on a farm while constructing a water conservation dam. His employer had contracted for the work. The plaintiff did not live on a farm. The district court found that the work was farm work and that the employer was exempt. Our court, on appeal, in reversing this finding, said: "The record in this case shows that the

plaintiff was employed to operate a bulldozer and perform whatever work defendant contracted for in the way of moving dirt. Although part of the work he was required to do was in fact farm work, that fact alone would not make him a farm laborer within the meaning of the compensation law; nor would the fact that the work being done at the time happened to be on a farm and in the nature of what is ordinarily considered farm labor necessarily change this relation. Taking into consideration the entire relationship of the parties we find that plaintiff was employed to operate a bulldozer and perform whatever work defendant contracted for in the way of moving dirt and not as a farm laborer within the meaning of the compensation law."

This court in Oliver v. Ernst, *supra,* approved our holding in Guse v. Wessels, 132 Neb. 41, 270 N. W. 665, wherein we followed and approved the holding in Peterson v. Farmers State Bank, 180 Minn. 40, 230 N. W. 124, wherein it is said: "A workman is not a farm laborer simply because at the moment he is doing work on a farm; nor because the task on which he is engaged happens to be what is ordinarily considered farm labor. The employee of an implement dealer does not become a farm laborer while engaged in correcting the behavior of a self-binder in the grain field of the owner, a farmer and customer of the dealer. * * * Neither the pending task nor the place where it is being performed is the test. *The whole character of the employment must be looked to to determine whether he is a farm laborer.*" (Emphasis supplied.)

When we analyze the whole character of the employment here, it appears clear that the plaintiff was not a farm laborer within the meaning of the act. The partnership operation of the defendants was designed and set up, both mechanically and financially, not only to do their own feed grinding, but to commercially operate for profit generally. They characterized and impressed this operation with the stamp of a separate business by

keeping separate accounts, by the volume of business acquired and contracted for, and by the way they dealt with it themselves. The plaintiff was hired at an hourly rate and was working on the grinding machine itself at the time of the accident, the job itself was contracted commercially for profit, and further contract operations were to last over a 10-month period. The fact that the work being done happened on the farm, or the characterization of the work itself as farm labor if that may be done, is not controlling. Oliver v. Ernst, *supra*. Taking into consideration the entire relationship of the parties, we find the plaintiff was employed to assist in the operation of a hay grinder and perform whatever work the defendants contracted for in the operation of their separate business, and was not employed as a farm laborer within the meaning of the compensation law.

The defendant urges Keefover v. Vasey, *supra*, as controlling in this case. The same contention was made in Oliver v. Ernst, *supra*, and the same basic distinction pointed out in Oliver v. Ernst, *supra*, applies to this case. In Keefover v. Vasey, *supra*, five farmers operated a threshing machine primarily for their own use using the smallest type available. The plaintiff was injured while on a threshing job performed for one of the original partners as a part of the purchase price for his interest in the cooperative enterprise. The partners did not set up, design, or operate their enterprise for general threshing or commercial purposes. The threshing season is comparatively short, and the threshing they did for others was on an exchange labor basis or entirely casual and incidental in purpose as compared to the only primary object of their cooperative effort which was performance of their own threshing on their own farms.

In Oliver v. Ernst, *supra*, we followed Guse v. Wessels, *supra*, adopting the holding in the Minnesota case of Peterson v. Farmers State Bank, *supra*. The Minnesota Supreme Court in a later (1947) case passed upon

the precise question involved here. In Skreen v. Rauk, 224 Minn. 96, 27 N. W. 2d 869, it held: "An employe of a farmer engaged in threshing as a business, and not in doing his own threshing or in threshing for others casually or upon an exchange-work basis, is covered by the workmen's compensation act, § 176.01, subd. 13. Walker v. Wading, 180 Minn. 49, 230 N. W. 274; Charpentier v. Cumming, 178 Minn. 519, 227 N. W. 663."

There are other factual distinctions between the Keefover case and the case at bar that are apparent from a review of the facts therein stated, but it is unnecessary to review them herein. The judgment of the district court is correct and is affirmed. An attorney's fee of $250 for services in this court is allowed in favor of plaintiff to be taxed as costs against the defendants.

AFFIRMED.

ESTHER SCHWARCK, APPELLANT AND CROSS-APPELLEE, V. JAMES SCHWARCK, APPELLEE AND CROSS-APPELLANT.
122 N. W. 2d 489

Filed July 12, 1963. No. 35331.

1. **Divorce.** Corroboration relied upon in a suit for divorce must be competent evidence of the acts or conduct asserted as grounds for divorce.
2. ———. Section 42-335, R. R. S. 1943, means that corroborative evidence other than the declarations, confessions, or admissions of the parties is required of the acts or conduct asserted as grounds for a divorce.
3. ———. Ordinarily, condonation is complete if there is a resumption of marital relations after the alleged breach of marital duty.
4. ———. 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 the marriage and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed;

the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto, and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just.

5. ———. This rule provides no mathematical formula by which an alimony award can be exactly determined. Generally speaking, awards of this court in cases of this kind vary from one-third to one-half of the value of the property, depending on the facts and circumstances of the particular case.

Appeal from the district court for Lancaster County: JOHN L. POLK, Judge. Affirmed in part, and in part reversed and remanded with directions.

Schrempp, Lathrop & Rosenthal, for appellant.

Merril R. Reller and John McArthur, for appellee.

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

YEAGER, J.

In this action Esther Schwarck, plaintiff, filed a petition for divorce from James Schwarck, defendant. In the action the defendant filed an answer and a cross-petition. By the cross-petition the defendant sought a divorce from the plaintiff. The ground for divorce alleged by the plaintiff was cruelty on the part of the defendant. The grounds alleged by the defendant were cruelty and adultery on the part of plaintiff. A trial was had at the conclusion of which a decree of divorce was awarded to plaintiff and she was awarded custody of three minor children of the parties and an allowance for their support, alimony for herself, attorney's fees, and costs. The cross-petition of the defendant was denied. Both parties filed motions for new trial which were overruled.

From the decree the plaintiff appealed on the grounds

that the award of alimony and amount allowed for child support were insufficient. The defendant presented a cross-appeal. By his cross-appeal he urges that the custody of the minor children should have been awarded to him, that no award of alimony should have been made to the plaintiff, and that no allowance for the support of the children should have been made in her favor.

It must be said that the question of whether or not on the evidence either of the parties is entitled to a decree of divorce is the one which requires first consideration.

As has already been made clear the plaintiff seeks to sustain her right to retain her decree of divorce on the ground that the record discloses that the defendant has been guilty of cruelty. By her evidence and the evidence of the defendant there can be little doubt this has been shown, and if by her own acts and conduct she has not forfeited her right, she is entitled to a divorce from the defendant.

Without going into great detail the record discloses with sufficient corroboration that during about 5 years before the trial the defendant on occasion struck the plaintiff and he used abusive language to her which included profanity and repeated accusations of and terms indicating her unchastity.

On the part of the defendant little stress has been placed on the alleged cruelty of plaintiff toward the defendant except in the area of alleged infidelity and adultery. As to this question of adultery it will be said that each alleged incident of which the defendant has adduced evidence is denied by the plaintiff, and also that each incident is without corroboration. It may be said further that if any such incident has been proved, it was condoned by the defendant.

The latest expression of this court on the question of corroboration is in the case of Ross v. Ross, 174 Neb. 795, 119 N. W. 2d 495, as follows: "Corroboration relied upon in a suit for divorce must be competent evidence of the

acts and conduct asserted as a ground for divorce."

On the question of condonation, in the same case, it is said: "Ordinarily, condonation is complete if there is a resumption of marital relations after the alleged breach of marital duty."

Definitive of what is meant by corroboration, this court said in Birth v. Birth, 165 Neb. 11, 84 N. W. 2d 204: "Section 42-335, R. R. S. 1943, means that corroborative evidence other than the declarations, confessions, or admissions of the parties is required of the acts or conduct asserted as grounds for a divorce."

The action here was commenced May 16, 1961. The final separation of the parties took place in April or May of 1961. They were married July 18, 1939. The defendant in his effort to sustain his charges of adultery adduced evidence of alleged incidents of conduct of the plaintiff as far back as 1942 bearing on the question. As to most of these there was no testimony of overt significance on the question of adultery. In most instances there was not anything from which even a suspicion of adultery could flow. Whatever was disclosed by this evidence was well known to the defendant long before the parties separated and if anything was amiss it was condoned.

The defendant gave testimony of an alleged incident when he observed and interrupted an act of adultery. This was several years, probably about 3½ to 4 years, before the trial here. This the plaintiff denied. There was no corroboration and the parties continued to live together thereafter.

The other incident of significance has to do with one Kenneth Sheldon. The plaintiff and Sheldon took an automobile trip together covering a period of 2 to 3 weeks. The defendant effectually insists that on this trip and after their return the two engaged in an adulterous relationship. There can be no doubt that there was opportunity but there is no evidence of overt significance that this was true. There is evidence which

might be said to have been of a corroborative character had there been evidence of or from which a legal inference could reasonably flow that there had been an adulterous act or acts, but there was no such evidence.

It ought to be said here, in order to avoid inferences unjust to the plaintiff, that the plaintiff was not the author of the design to make the trip. The defendant was the author of the design. It is true that she wanted to take a vacation but the plan to have her travel with Sheldon was made by the defendant. He furnished the automobile and the money for that purpose.

The reason given was, stated briefly, that he thought Sheldon was a psychiatrist and that this trip with him would be of value to the mental and emotional state of the plaintiff.

There are many other details in the evidence but none of greater potence than those referred to herein relating to the claim of the right of the defendant to a divorce from the plaintiff on the ground of adultery or of cruelty.

On the record, therefore, the conclusion is reached that the portion of the decree granting a divorce to the plaintiff on the ground of cruelty was proper and should be affirmed.

The record discloses that four children were born of the marriage. Three of them are minors. One is married. By the decree the plaintiff was awarded custody of the three who are minors, subject to the right of defendant to reasonable visitation. The defendant was by the decree required to pay to the plaintiff for support and maintenance of the three $200 a month until they shall become of age or self-supporting, or until the further order of the court, and to pay the living expenses of the son of the parties who was in school in Colorado while he was attending such school. The plaintiff was awarded permanent alimony of $20,000, payable $5,000 in December 1962, and $1,500 each January thereafter until fully paid.

The plaintiff on this appeal contends that this allow-

ance is not sufficient and against this, the defendant contends that the plaintiff, on account of unfitness, should be deprived of the custody of the children, and that they should be awarded to him or to some other suitable person, and that no award of alimony should have been made to the plaintiff.

The defendant has made no showing the effect of which is to show that the plaintiff has created an environmental condition or atmosphere which would reflect adversely on the propriety of committing the care and custody of these children of the parties to her. Without further ado, it will be said that the prayer of the defendant in this respect is denied.

The questions of the amount of child support and alimony for the plaintiff are so interrelated that they will be considered together.

The defendant from about the year 1949 was engaged in what may be generally described as excavating and quarrying. The operations were carried on under the names of James D. Schwarck Excavating Company, Inc., and Schwarck Quarries, Inc. At the start the parties had nothing. The plaintiff and defendant worked together to build up the business and the operations. Everything indicates, as the record discloses without dispute, that the business grew which growth flowed from the joint work of these parties. The growth of the business over the years was substantial. The measure of this growth however is not ascertainable from the record in this case. There is nothing in the record which with any degree of authenticity shows the financial condition of the operations carried on or the total value of the property involved in the operations or the property and estate of the parties to this action. The plaintiff introduced in evidence instruments denominated audit reports, but on their face they carry a declaration of lack of sufficiency as reports of complete and authentic audit. The defendant presented no evidence from which a reasonably accurate conclusion as to values can be reached.

The plaintiff, though having been offered the opportunity to examine the books and records of the defendant, has furnished nothing from which a reasonably conclusive estimate of values could be reached.

In this light the district court was and this court is confronted with only widely varying estimates. In the evidence of the plaintiff there are estimates of net value of all properties as high as $157,345.55. On behalf of the defendant there is an estimate of the assets of the business above liabilities of $70,000 to $80,000. In addition there is evidence of ownership of property which is not a part of the business, which includes a house of about the value of $3,500 to $4,500, a lot of the probable value of $1,000 to $1,500, and another lot the minimum estimate of the value of which was $4,000 and the maximum $10,000. There is nothing in the record on which to base a fair estimate of the profits obtainable from the business, but only that they were quite substantial.

Since the separation of the parties the plaintiff has not occupied a home belonging to the parties but has been required to occupy for herself and the children of the parties rental accommodations. The rental cost is not disclosed as is also true of the cost of maintenance of herself and the children. These costs of course will continue into the future. The standard of living of the parties during the years before the separation has not been disclosed, but there is nothing to indicate that it departed from ordinary and customary concepts.

In the light of this it appears that the award of the decree for child support is insufficient and that it should be increased to $300 a month, otherwise to remain the same.

As to the award of permanent alimony for a wife in the situation such as the plaintiff is in here, this court, in Kramer v. Kramer, 171 Neb. 128, 105 N. W. 2d 741, stated the following, which is a repetition of what had been said theretofore: "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, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired and the contributions each has made thereto, and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just."

In the case here everything the parties had at the time of separation, as has already been indicated, was accumulated by the joint efforts of the parties. The plaintiff's contribution was not alone the raising of a family and the care of the home and children, but the record discloses that she actively and diligently participated in the performance of the operations and conduct of the business.

As has been pointed out the record will not permit of anything more than a guess as to the true value of the property which had been accumulated. There is sufficient to indicate the existence of what had been profitable enterprises and that property had been accumulated, as shown by the evidence of the defendant, which was of the net value of from $80,000 to $90,000. This does not include value for a going concern, good will, or anything else in the realm of intangible value.

In Kramer v. Kramer, *supra*, with reference to what has already been quoted therefrom herein, it was said: "We point out that this rule provides no mathematical formula by which an alimony award can be exactly determined. Generally speaking, awards of this court

in cases of this kind vary from one-third to one-half of the value of the property, depending on the facts and circumstances of the particular case."

In the light of this pronouncement and what has been disclosed by the record it must be said that the award of permanent alimony made by the district court is inadequate. That portion of the decree is ordered vacated and set aside with directions to award alimony to the plaintiff in the amount of $35,000, payable as follows: A payment of $5,000 becoming due on the entry of the decree, and a payment of $3,000 becoming due annually thereafter. The other provisions with regard to division and distribution of property and the award of attorney's fees are affirmed. An award of fees for the attorneys for plaintiff for services in this court in the amount of $1,500 is made.

To the extent indicated herein the judgment of the district court is reversed, and to the extent indicated it is affirmed. The cause is remanded to the district court with directions to render decree and judgment in conformity with the conclusions and determinations made herein.

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

HOWARD E. CRANE ET AL., APPELLANTS, V. BOARD OF COUNTY COMMISSIONERS OF SARPY COUNTY, NEBRASKA, APPELLEE, WILLIAM L. BURKE ET AL., INTERVENERS-APPELLEES.

122 N. W. 2d 520

Filed July 12, 1963. No. 35347.

1. **Zoning: Appeal and Error.** A decision of a board of adjustment will not be disturbed unless it is illegal, is not supported by the evidence, is arbitrary and unreasonable, or is clearly wrong.
2. **Zoning.** Under zoning regulations, an applicant is not entitled to a special permit to operate a trailer court as a matter of

right upon a showing of compliance with applicable health and sanitation regulations.

3. **Zoning: Trial.** In the absence of a special requirement, a board of adjustment is not required to include findings of fact or a statement of the reasons for its decision in the order entered upon an application made to the board.
4. ———: ———. Evidence that previous applications for special permits to operate trailer courts have been refused does not establish that the refusal to grant a subsequent application for such a permit is arbitrary and capricious.
5. **Zoning.** The exercise of the zoning power may not be denied on the ground that individual property rights may be adversely affected thereby.
6. ———. Zoning regulations must give reasonable consideration to the character of the district and should conserve the value of buildings and encourage the most appropriate use of the land.
7. **Zoning: Municipal Corporations.** What is the public good as it relates to zoning ordinances affecting the use of property is primarily a matter lying within the discretion and determination of the municipal body to which the power and function is committed; and unless an abuse of discretion has been clearly shown, it is not the province of the court to interfere.
8. **Zoning: Statutes.** Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment is controlling.
9. **Zoning.** Nonconforming uses are not favored.

Appeal from the district court for Sarpy County: JOHN M. DIERKS, Judge. Affirmed.

Richard G. Stehno, for appellants.

Dixon G. Adams, for appellee.

Swenson, Erickson & Westering, for interveners-appellees.

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

BOSLAUGH, J.

Howard E. Crane and Amelia A. Crane, the plaintiffs and appellants, applied to the building inspector of Sarpy County, Nebraska, for a special permit to construct and operate a trailer court upon the north 125 feet of Lot 8-C in Clinton's Subdivision in Sarpy County,

Nebraska. The board of adjustment denied the application and the plaintiffs appealed to the district court.

William L. Burke and Verna L. Burke, who own property to the east of the plaintiffs' land, intervened in the district court on behalf of themselves and a number of other property owners who are similarly situated and opposed the application.

The district court found generally against the plaintiffs and dismissed the action. The plaintiffs' motion for new trial was overruled and they have appealed. The county board of Sarpy County, Nebraska, which is the board of adjustment, is the defendant and appellee.

Counties in Nebraska are empowered to adopt a comprehensive zoning plan by resolution. § 23-114, R. R. S. 1943. This authority includes the right to regulate and restrict the use of house trailers. § 23-161, R. R. S. 1943. Pursuant to this authority, the county board of Sarpy County, Nebraska, has adopted such a resolution.

The zoning regulations divide Sarpy County into districts and regulate and restrict the use of the land in each district. The regulations provide that in addition to any building permit that may be required, a special permit shall be obtained before establishing or extending the use of a house trailer or house trailer camp or park in any district. The regulations also provide that an application for such a permit shall be made to the building inspector and that the zoning board of adjustment shall hold a public hearing on the application after notice of the hearing has been published.

The statute provides that any person aggrieved by the decision of the board of adjustment may present to the district court a petition alleging that the decision is illegal and specifying the grounds of illegality. The statute prescribes the procedure to be followed in the district court and authorizes the district court to take evidence if it shall appear that testimony is necessary for the proper disposition of the matter. § 23-168, R. R. S. 1943.

The general rule is that a decision of a board of adjustment will not be disturbed unless it is illegal, is not supported by the evidence, is arbitrary and unreasonable, or is clearly wrong. Frank v. Russell, 160 Neb. 354, 70 N. W. 2d 306.

The petition filed in the district court alleged that the plaintiffs were entitled to the permit as a matter of right; that the decision of the board of adjustment was illegal because the board failed to make any findings of fact or give any reasons for its decision; and that the decision of the board of adjustment was contrary to the evidence and was arbitrary and capricious. The plaintiffs' brief contains 15 assignments of error which, in substance, reassert the principal allegations of the petition.

The plaintiffs own and operate a motel and trailer court in Sarpy County, Nebraska. This property is located approximately 3 miles north of Offutt Air Force Base on Fort Crook Road, which is also U. S. Highway No. 73-75. The plaintiffs built their trailer court in April 1959, upon parts of Lots 7-A-1, 7-B, and 8-A. Lot 7-A-1 is a rectangular tract which extends east from the highway for a distance of approximately 686 feet. Lot 7-B is a triangular tract that lies east of Lot 7-A-1 and adjoins an old interurban railroad right-of-way.

Lot 8-C is an irregular tract which extends south approximately 204 feet from Lot 7-B to Childs Road. The west boundary of Lot 8-C is an extension of the line between Lot 7-A-1 and Lot 7-B. The east boundary of Lot 8-C is the old interurban right-of-way.

Chandler Road is one-half mile north of Childs Road. The area between Childs Road and Chandler Road generally is zoned "B-2" for a distance of 300 feet east from the highway. B-2 is a general business or commercial district in which hotels and motels are permitted uses.

Bellevue Boulevard is approximately one-third of a mile east of the highway. The area between Childs Road and Chandler Road, and between the highway and

Bellevue Boulevard and which is more than 300 feet east of the highway, generally is zoned "R-2." R-2 is a single-family residence district with a minimum lot area of 20,000 square feet. The area immediately east of the highway has developed into commercial uses generally. The area lying farther to the east has developed into residential uses generally. Thus, the zoning plan which the county adopted is consistent with the general trend of development.

Zoning regulations which were adopted by Sarpy County on or before 1955 were held invalid by this court in February 1959. Board of Commissioners v. McNally, 168 Neb. 23, 95 N. W. 2d 153. New zoning regulations adopted by Sarpy County became effective April 17, 1959. The plaintiffs have never obtained a special permit to operate their trailer court. To that extent, the operation of the trailer court constitutes a nonconforming use. Board of Commissioners v. Petsch, 172 Neb. 263, 109 N. W. 2d 388.

The west 300 feet of Lot 7-A-1 is zoned "B-2." Lot 7-A-1, except the west 300 feet, and Lots 7-B and 8-C are zoned "R-2." The plaintiffs purchased Lot 8-C in November 1960. At that time the plaintiffs knew that the land was zoned R-2 and that a trailer court could not be established upon the property without a special permit.

The zoning regulations provide that a house trailer park "shall be permitted in any District, but only after obtaining a Special Permit therefor after notice and hearing as provided in this Resolution, and only after a showing of compliance with all local and State health and sanitation regulations." The plaintiffs contend that an applicant must be granted a special permit upon a showing of compliance with all local and state health and sanitation regulations. This contention ignores the purpose and design of zoning regulations which are more than health and sanitation regulations.

County zoning regulations are intended to promote

the health, safety, and general welfare of the community by regulating and restricting the use of the land within the area zoned. § 23-161, R. R. S. 1943. The regulations must be made in accordance with a comprehensive plan designed to lessen congestion in the streets and highways, to prevent the overcrowding of lands and the undue concentration of population, and to encourage the most appropriate use of land. § 23-163, R. R. S. 1943. These same considerations apply to an application for a special permit to construct and operate a trailer court. Consequently, an applicant is not entitled to a special permit to operate a trailer court as a matter of right upon a showing of compliance with applicable health and sanitation regulations.

The plaintiffs complain that the decision of the board of adjustment was illegal because the board failed to make findings of fact or give any reason for its decision. The plaintiffs cite no authority which supports this contention. In the absence of a special requirement, the board of adjustment is not required to include findings of fact or a statement of the reasons for its decision in the order entered upon an application made to the board. See 101 C. J. S., Zoning, § 308, p. 1092.

The principal issue in this case is whether the action of the board was illegal because it was arbitrary and capricious. The plaintiffs produced evidence which tended to show that the board of adjustment has never granted any application for a special permit to operate a trailer court in Sarpy County. The record does not show the number of house trailers which are occupied or the number of trailer courts which are operating in Sarpy County. However, it is apparent from the record that the use of house trailers is not prohibited in Sarpy County. Under these circumstances, evidence that other applications for special permits have been denied does not establish that the refusal to grant a special permit to construct and operate a trailer court at the particular location involved in this case was arbitrary and capricious.

The evidence is in conflict as to whether adjacent property would be depreciated in value if the permit were granted and the north 125 feet of Lot 8-C was used as a trailer court. This factor alone is not controlling but it is a circumstance which the board of adjustment could consider. Although the exercise of the zoning power may not be denied on the ground that individual property rights may be adversely affected thereby, zoning regulations must give reasonable consideration to the character of the district and should conserve the value of buildings and encourage the most appropriate use of the land. § 23-163, R. R. S. 1943.

What is the public good as it relates to zoning ordinances affecting the use of property is primarily a matter lying within the discretion and determination of the municipal body to which the power and function is committed; and unless an abuse of discretion has been clearly shown, it is not the province of the court to interfere. Bucholz v. City of Omaha, 174 Neb. 862, 120 N. W. 2d 270.

It is not the duty of the court to determine what use should be made of Lot 8-C. That discretion rests with the zoning authority. It is the duty of the court to determine whether the board of adjustment had a right to refuse to issue the special permit. The issue is whether there was an abuse of discretion. Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment is controlling. Bucholz v. City of Omaha, *supra.*

The plaintiffs argue that the grade or fill on the right-of-way to the east of Lot 8-C and the grading which has been done to raise the elevation of the south 79 feet of Lot 8-C, together with the other facts and circumstances, make the property peculiarly suitable for use as a trailer court and should compel the granting of the permit. It is true that the grade or fill on the right-of-way is somewhat of a barrier between Lot 8-C and the property lying to the east but there is a conflict in

the evidence as to its effectiveness. The plaintiffs do not own or control the right-of-way and there is no assurance that it will remain in its present condition. Perhaps the grading which has been done on Lot 8-C would make its use as a trailer court less objectionable but the grading does not remove the basic objections to the use.

The evidence establishes that trailer courts in general are not consistent with residential development. A trailer court is a relatively concentrated use of land. There is more activity and congestion on the land than is ordinarily incident to residential use. Many of the occupants may be transients who are not as interested in creating a desirable neighborhood influence as those persons who intend to live in the area for a long time.

In reality, the plaintiffs' application is in the nature of a request to extend a nonconforming use. Nonconforming uses are not favored. See Annotation, 18 A. L. R. 2d 725. The statute provides that the zoning regulations may provide for the gradual elimination of nonconforming uses. § 23-161, R. R. S. 1963. The zoning regulations provide generally that nonconforming uses shall not be extended and that a nonconforming use which is discontinued for 1 year or more shall not be resumed.

It is true that the zoning regulations provide that trailer courts may be operated in any district if a special permit is obtained. If the special permit were granted, then the use of the north 125 feet of Lot 8-C would not be a nonconforming use. But the trailer court which the plaintiffs now operate is a nonconforming use because they have never obtained the permit required by the zoning regulations. The use now extends from a B-2 district into an R-2 district. The purpose of the application is to extend the use onto additional land in the R-2 district. The board of adjustment could have found that this would be contrary to the purpose and design of the zoning plan.

The evidence does not sustain the plaintiffs' conten-

tion that the denial of the special permit deprives them of any practical economical use of their property.

From our examination of the record we have concluded that the evidence fails to show an abuse of discretion by the board of adjustment.

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

AFFIRMED.

YEAGER, J., participating on briefs.

GRACE E. KNAPP, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

122 N. W. 2d 513

Filed July 12, 1963. No. 35417.

1. **Judgments.** It is a fundamental principle of jurisprudence that material facts or questions which were an issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action.
2. ———. A cause of action, once finally determined between the parties on the merits, cannot afterwards, so long as such judgment remains in force, be litigated by new proceedings, either before the same or any other tribunal.
3. ———. The foregoing rule applies, not only to judgments which are the result of a trial of issues of fact, but also to judgments on demurrer, where such judgments go to the merits of the case; but a judgment on a demurrer, which is based on a technical defect of pleading, a lack of jurisdiction, or the like, does not involve the merits of the controversy, and will not support the plea of res judicata.
4. ———. 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.
5. **Judgments: Pleading.** A judgment of dismissal after sustaining a demurrer based on the failure to state a cause of action is a judgment on the merits even though by amendments a good cause of action might be stated.
6. **Courts: Evidence.** A general rule is that, while a court will

take judicial notice of its own records, it will not in one case take judicial notice of the record in another case.

7. ———: ———. However, where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.

8. **Courts: Pleading.** Matters so judicially noticed are properly considered when determining the questions presented by a demurrer.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Affirmed.

O'Sullivan & O'Sullivan and Donald S. Bergquist, Jr., for appellant.

Herbert M. Fitle, Bernard E. Vinardi, Frederick A. Brown, Edward M. Stein, Sebastian J. Todero, Walter J. Matejka, and Frederick S. Geihs, for appellees.

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

BROWER, J.

This is an action brought in the district court for Douglas County for personal injuries alleged to have been sustained by the appellant when, on July 15, 1957, she fell, injuring her back. The injury occurred at the intersection of Sixteenth and Dodge Streets in Omaha, Nebraska, and the action is predicated upon an alleged negligent construction of a curb at that intersection.

The defendants were the city of Omaha and its mayor and council members.

The defendants interposed what is denominated a special appearance "for the reason that the court is without jurisdiction of the subject matter."

On January 29, 1962, the trial court entered an order sustaining the special appearance and dismissing the action. This order recites that the district court for Douglas County had jurisdiction of the parties and the

subject matter in a prior action. Continuing, the recitation states that the previous case had been dismissed upon the plaintiff declining to plead further; that after the dismissal the plaintiff appealed to the Supreme Court from the ruling on the demurrer and order of dismissal where the decisions of the trial court were sustained; and that the cause of action had therefore been fully adjudicated.

The plaintiff filed a motion for rehearing on the order sustaining the special appearance. The motion being overruled on September 13, 1962, the plaintiff has brought the matter to this court on appeal.

The defendants filed a motion herein to dismiss the appeal because it was not taken in time, contending that where no trial of matters of fact had occurred the time for appeal should run from the order of dismissal and not from the time of overruling the motion for rehearing. This court previously overruled this motion because of its rulings in McGerr v. Marsh, 148 Neb. 50, 26 N. W. 2d 374, and Brasier v. Cribbett, 166 Neb. 145, 88 N. W. 2d 235.

Plaintiff contends the trial court erred in sustaining the special appearance and dismissing the action.

The cause before us quite patently turns on the effect of the prior action and its disposition by the trial court and this court.

It also involves questions concerning the propriety of the trial court in taking judicial notice of the previous cause and in considering the same on its ruling sustaining the special appearance and dismissing the action.

The opinion of this court in the first case is found in Knapp v. City of Omaha, 172 Neb. 78, 108 N. W. 2d 419. The substance of the allegations of the plaintiff's petition is there outlined in greater detail than herein. A comparison of the petitions shows they are the same except in two respects. In the former case the date of the filing of the statutory notice, required by section 14-801, R. R. S. 1943, was left blank, viz: "—— day of July,

1957." In the present case the notice is alleged to have been filed on the "23rd day of July, 1957" and a copy of the notice is attached. Also in the present petition the mayor and councilmen who are joined with the city as defendants are different than in the former case, apparently because of a change in the officers.

"It is a fundamental principle of jurisprudence that material facts or questions which were an issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action." Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551. See, also, Glissmann v. Orchard, 152 Neb. 500, 41 N. W. 2d 756.

" 'A cause of action, once finally determined between the parties on the merits, cannot afterwards, so long as such judgment remains in force, be litigated by new proceedings, either before the same or any other tribunal. * * * The foregoing rule applies, not only to judgments which are the result of a trial of issues of fact, but also to judgments on demurrer, where such judgments go to the merits of the case; but a judgment on a demurrer, which is based on a technical defect of pleading, a lack of jurisdiction, or the like, does not involve the merits of the controversy, and will not support the plea of res judicata.' " Trainor v. Maverick Loan & Trust Co., 92 Neb. 821, 139 N. W. 666, citing Yates v. Jones Nat. Bank, 74 Neb. 734, 105 N. W. 287.

In Fuchs v. Parsons Constr. Co., 172 Neb. 719, 111 N. W. 2d 727, it is stated: " '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.' "

In the case presented in our prior decision, Knapp v. City of Omaha, *supra,* the trial court had sustained a general demurrer on the plaintiff's original petition on the ground it did not state a cause of action. Under

our statute, section 25-854, R. R. S. 1943, the plaintiff would doubtless have been given the right to amend her petition in the trial court. This the plaintiff failed to do but elected to stand on her petition and the action was dismissed. She appealed from this dismissal and this court sustained the trial court in its order of dismissal. In the cited case this court stated the defendants suggested nine reasons why the demurrer should have been sustained, but it was only necessary to consider one of them. The defect in plaintiff's petition which was decisive in the prior determination was that the necessary notice of the injury had not been filed within the time prescribed by section 14-801, R. R. S. 1943. The plaintiff contends that her failure to insert the date when the notice was filed was but a technical defect under the rule cited from Trainor v. Maverick Loan & Trust Co., *supra,* and that a dismissal of the cause for that reason would not bar a subsequent action. Yet it is obvious that unless that date were supplied no cause of action whatever was stated. The want of an allegation as to the timely filing of the notice was fatal. That a petition could be amended without great difficulty or even with slight effort to state a cause of action does not make its failure to do so in the first instance a "technical defect." The defect is so substantial that it defeats the action entirely. If this court should hold a cause of action stated in a petition as to which a general demurrer was interposed and sustained and the cause dismissed could be reasserted in a subsequent action by adding one or more essential averments not previously pleaded, litigation would have no finality. Finality would then turn not on what cause had been attempted to be stated but what by amendment might have been stated. In such cases the conclusiveness of decisions would be seriously impaired. A party should not be vexed with successive actions on the same cause of action. A judgment of dismissal after sustaining a demurrer based on the failure to state a cause of action is

a judgment on the merits even though by amendments a good cause of action might be stated.

There are of course other defects in pleadings which are subject to demurrer such as misjoinder of causes, defect of parties, or lack of jurisdiction, and judgments of dismissal may follow because thereof. Where such a dismissal is not on the merits the rule of res judicata does not apply.

The plaintiff cites the case of Fuchs v. Parsons Constr. Co., *supra,* and contends that because the dismissal after the sustaining of the demurrer in the first decision did not there bar the subsequent action, another suit is not precluded here. The cited case has no application. The demurrer was sustained on the grounds of misjoinder. The court in that case clearly distinguishes between the two situations.

The case of Yates v. Jones National Bank, 74 Neb. 734, 105 N. W. 287, is also cited by the plaintiff as authority for her position that the second action now before us could be maintained under the present circumstances and that the previous dismissal was no adjudication. The cited case is quite involved and the opinion decides several consolidated cases. In some of them the causes had been removed to the federal circuit court and there dismissed on demurrers or otherwise. On appeal to the Circuit Court of Appeals, the circuit court was reversed and the causes remanded to the state courts for want of federal jurisdiction. Jones v. Mosher, 107 Fed. 561. In most of them the plaintiffs themselves in the end entered voluntary dismissals and no adjudication was involved. In one however in which Bailey was plaintiff the Circuit Court of Appeals had sustained a general demurrer and dismissed the case. Bailey v. Mosher, 63 Fed. 488. In the cited case, Yates v. Jones National Bank, *supra,* the state court held that Bailey's petition stated a new, separate, and independent cause of action. On appeal to the Supreme Court of the United States, that court held likewise though it reversed the judg-

ment and remanded the cause for further proceedings on other grounds. Yates v. Utica Bank, 206 U. S. 181, 27 S. Ct. 647, 51 L. Ed. 1015. Both this court and the Supreme Court of the United States made it clear in their opinions, however, that the dismissal after sustaining the general demurrer would have been a complete adjudication if the same cause of action had been stated.

We will now turn to the question involving the trial court's taking judicial notice of its own records with respect to the prior adjudication.

The rules concerning courts taking judicial notice of their own records have been repeatedly stated by this court. In Witzenburg v. State, 140 Neb. 171, 299 N. W. 533, it is held: "The general rule is that, while a court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case.

"However, where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.

"Matters so judicially noticed are properly considered when determining the questions presented by a demurrer." See, also, Marsh-Burke Co. v. Yost, 102 Neb. 814, 170 N. W. 172; Loup County v. Rumbaugh, 151 Neb. 563, 38 N. W. 2d 745.

The cause before us was the same as that previously before the trial court and before this court. They are interrelated and the causes of action in fact appear identical. Knapp v. City of Omaha, *supra*.

It follows that the trial court properly took judicial notice of its prior adjudication.

The pleading of the defendants in the case now under consideration as hitherto alluded to was termed a special

appearance. However, its substance was "that the court is without jurisdiction of the subject matter." Objection to the jurisdiction of the court over the subject matter is not a special appearance. By section 25-806, R. R. S. 1943, however, it is one of the grounds for demurring specially. As a general rule no fixed and inflexible form is necessary for a demurrer, and a motion which in substance and effect challenges the sufficiency of a pleading on demurrable grounds will be treated as a demurrer. 71 C. J. S., Pleading, § 248, p. 479.

We conclude the cause of action in the plaintiff's petition had been previously adjudicated and that the court properly took judicial notice of its prior decision on the consideration of the defendants' motion.

It follows that the judgment of the trial court should be and is affirmed.

AFFIRMED.

DON WALKENHORST, APPELLEE, V. THEODORE A. (JIM) APOLIUS ET AL., APPELLEES, IMPLEADED WITH A. H. ADAMS, FIRST AND REAL NAME UNKNOWN, APPELLANT.

122 N. W. 2d 875

Filed July 12, 1963. No. 35423.

1. **Fraudulent Conveyances.** The question of fraudulent intent in all cases pertaining to fraudulent conveyances under the laws of Nebraska shall be deemed a question of fact, and not of law.
2. **Chattel Mortgages.** To warrant reformation of a chattel mortgage where there is a misdescription of land upon which a crop of wheat is growing, the proof must be clear, convincing, and satisfactory.

Appeal from the district court for Keith County: JOHN H. KUNS, Judge. Affirmed.

Hastings & Wanek, for appellant.

Frank B. Svoboda and W. C. Conover, for appellee Theodore A. (Jim) Apolius.

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

MESSMORE, J.

This is the second appearance of this case in this court. Walkenhorst v. Apolius, 172 Neb. 830, 112 N. W. 2d 31. The case was instituted as an action in equity by Don Walkenhorst to foreclose a thresherman's lien on wheat grown by Theodore A. (Jim) Apolius, hereinafter referred to as Jim Apolius or Jim, 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, owned by John C. Riedel. Named as parties defendant were Jim Apolius; his father, Theodore E. Apolius, hereinafter called Ted Apolius or Ted; Security State Bank of Madrid, Nebraska; A. H. Adams; William Merrell; Farmers Cooperative Association; Cliff Hull, doing business as the Hull Grain Company; John C. Riedel; and 5,482.20 bushels of 1960 wheat in storage at the Farmers Cooperative Association and with Hull.

The defendants Jim Apolius, Security State Bank of Madrid, Nebraska, and the two elevators heretofore mentioned did not appear, and their defaults were entered.

The plaintiff Walkenhorst was paid by Jim Apolius; the landlord, John C. Riedel, has been paid; and the claims of each have been satisfied.

By order of the trial court, the wheat was sold and the proceeds of the sale deposited with the clerk of the district court for Keith County.

Any cause of action insofar as the present case is concerned has been dismissed by Ted Apolius as to William and Doris Merrell.

The trial court, in the first case, found that the chattel mortgage of the defendant A. H. Adams should be reformed and decreed to be a lien on the wheat grown on the east half of Section 6, Township 12 North, Range 37 West of the 6th P. M., in Keith County, the same

being the wheat sold and the proceeds thereof deposited in the registry of the district court, and as reformed the defendant and cross-petitioner, A. H. Adams, was entitled to a foreclosure of the chattel mortgage referred to in the petition and a sale of the mortgaged property; that there was due upon the notes and chattel mortgage as reformed the sum of $3,120, with interest from the date of the decree at the rate of 6 percent; and that said amount was a second lien on the wheat described in the reformed mortgage and subject only to the first lien in favor of the defendants Merrell. The court adjudged and decreed that A. H. Adams have and recover on his note and mortgage $3,120, with interest at the rate of 6 percent; that the mortgage be reformed and decreed to be a second lien on the wheat subject to the first mortgage in favor of the defendants Merrell; and that the clerk of the district court for Keith County pay from the funds in his possession, the same being the proceeds of the sale of the wheat, to the landlord his share, to William and Doris Merrell the amount due on their mortgage, and to A. H. Adams $3,120, the balance of the funds to be held by the clerk of the court until further order of the court. This court, in Walkenhorst v. Apolius, *supra,* reversed the judgment of the trial court and remanded the cause for trial. Ted Apolius perfected appeal to this court.

The trial court in the instant case rendered judgment in favor of the defendant Ted Apolius, decreeing that this defendant have a first lien in the amount of $6,180 on the proceeds of the sale of the wheat; that the clerk of the district court for Keith County pay the balance on hand in the amount of $59.73 to Ted Apolius; that Ted Apolius have judgment against the defendant and cross-petitioner A. H. Adams in the amount of $3,120, plus interest from February 1, 1961; and that the cross-petition of A. H. Adams be dismissed. The trial court found that the evidence relating to the alleged mistake in A. H. Adams' cross-petition was not sufficiently

clear, convincing, and satisfactory to allow a reformation of his mortgage; that Ted Apolius, by virtue of his bill of sale, had a first lien on the proceeds of the sale of the wheat to secure indebtedness of $6,180; and that A. H. Adams had recovered the sum of $3,120 from the proceeds of the sale of the wheat. The defendant A. H. Adams filed a motion for new trial. From the order overruling the motion for new trial the defendant A. H. Adams perfected appeal to this court.

The pleadings of Ted Apolius and A. H. Adams, the only parties to this litigation, are with reference to their respective claims of priority, that is Ted Apolius' bill of sale, or the chattel mortgage given by Jim Apolius to A. H. Adams, as to the wheat grown on the east half of Section 6, Township 12 North, Range 37 West of the 6th P. M., in Keith County.

Ted testified that he lived at Roscoe, Nebraska; that his wife's name was Anna Lane Apolius; and that he had a son Jim Apolius. He gave his occupation as farming, selling irrigation equipment, and dealing in real estate. He testified that he loaned Jim $2,200, evidenced by a note dated March 22, 1954, due March 22, 1955, which Ted paid to the Haggard Drilling Company for a pump that was installed on Jim's place; that Jim made payment on this note on July 8, 1958, in the amount of $500, by check; that Jim was in a position where he had to have $2,000 to pay the installment on a pump that he had purchased; and that Jim owed the Haggard Drilling Company $2,000 and Ted helped Jim out. Ted further testified that Jim owed him $4,214 for the balance due on the purchase of a farm which Jim bought from him. This is evidenced by a note dated July 17, 1953, in the amount of $4,214, due July 17, 1954. This was a continuation of the payment on the farm that Ted sold to Jim in 1952, and Jim still owed this amount when the deed to the farm was delivered to him. The deed was delivered to enable Jim to get a larger loan on the farm. Jim made a payment of $600

on July 24, 1953, and $1,182.75 on November 14, 1957. Ted further testified that he received a bill of sale from Jim for 160 acres of wheat in Keith County on April 6, 1960; and that in the spring of 1960 Jim decided to sell the farm, and at that time Ted wanted Jim to settle with him for the amounts that Jim owed him. Ted had a conversation with Jim about the obligations owing to him in March and about the time Jim was to convey the farm to the Most brothers. Ted had a half interest in the oil and mineral rights on the farm, and he asked Jim to give him a bill of sale on the wheat crop that he had left on the east half of Section 6 heretofore described. Ted gave a quitclaim deed to Jim on March 9, 1960, which was recorded March 18, 1960. This quitclaim deed conveyed to Jim one-half of all the oil, gas, and mineral rights in the northeast quarter and southwest quarter of Section 8, Township 12 North, Range 37 West of the 6th P. M., in Keith County, Nebraska. When Ted received a bill of sale from Jim on April 6, 1960, he took it to the Security State Bank of Madrid, Nebraska, and succeeded in obtaining a loan. He gave the bank a note for $3,000 on May 16, 1960. This note was due August 16, 1960. Ted also gave the bank a chattel mortgage on the 160 acres of wheat of the 1960 harvest, on the east half of Section 6 before described. This mortgage was filed of record on July 11, 1960. The bill of sale discloses a consideration of one dollar, and that Jim sold, transferred, and delivered to Ted all growing wheat located on the east half of Section 6 before described, consisting of approximately 160 acres, to be harvested in 1960. The bill of sale was recorded in the office of the county clerk of Keith County on July 15, 1960.

Ted further testified that he talked to Don Walkenhorst about cutting the wheat. Walkenhorst asked Ted if he knew that two other persons had mortgages on this wheat. Ted told Walkenhorst that he was unaware of such fact. During the time Ted had the bill

of sale, he checked to see how the wheat was progressing. He testified that he could observe this from the road, and he did not drive into the field.

On cross-examination Ted testified that he gave a $2,000 check to Jim which was made out to the Haggard Drilling Company; that he believed he gave the warranty deed to the home place to Jim in 1953; that the consideration of the deed was $16,000; that he did not take a mortgage back on the farm for the reason that Jim was getting a larger loan; that he took Jim's note for the balance, and this note was for $4,214; that this did not represent all of the indebtedness that Jim owed him, only the balance due on the farm; that Jim owed him indebtedness other than that shown by two notes, in the amount of about $6,500 for money that Jim took out of the irrigation business when Jim worked for Ted as a salesman; that in his capacity as a salesman Jim collected money for Ted and worked as a salesman from 1953 until 1958; and that in 1954, Haggard contacted him about Jim's bill, and Ted undertook to lend Jim the money to pay the bill; and that in 1960, Jim decided to sell the home place to the Most brothers, and at that time Ted delivered to Jim the quitclaim deed on the oil and gas rights. He then decided to square accounts with Jim as near as he could, and he was going to realize this from the proceeds from the sale of the wheat. He had a conversation with Jim about the bill of sale when he gave Jim the quitclaim deed for the oil and mineral rights. He asked Jim what he could do about paying him what he owed him. Jim told him all he had was the wheat, and that he would give Ted a bill of sale for this wheat. Ted testified that after he got the bill of sale, he would have sold his two-thirds interest in the wheat, deposited the money, and given Jim credit for whatever it brought on Jim's note; that he knew nothing about Jim's indebtedness, except what Jim owed him; that Jim did have a bill with Thompson Pipe and Steel Company at one time in the amount of $9,000,

and it could have been $3,000 on April 6, 1960; that he also recalled an obligation to Alf Elander of North Platte in the amount of $8,000, and Jim's obligation to Bill Merrell; that he did not know of Jim's obligation to A. H. Adams or to George Hastings; and that he did remember a suit pending in the district court brought by one Hull against Jim for a fertilizer bill of over $1,000. April 6, 1960, was just prior to the time Jim was holding his machinery sale. Ted had no information that Jim's machinery was encumbered. He knew that A. H. Adams was living on the east half of Section 6 heretofore described and that Jim was farming it. Ted further testified that he had to raise some money because of his account with the Thompson Pipe and Steel Company in the amount of $4,500; and that Jim gave him a check for $1,900 in payment for the pipe that Ted had sold to Jim. At the time Jim made the $1,900 payment to the Thompson Pipe and Steel Company, he needed the pipe to complete his deal with the Most brothers.

Wendell Haggard testified that he was engaged in the business of well drilling and that in either 1953 or 1954, he installed a deep-well irrigation pump for Jim for which Jim had owed him for quite a while. The complete balance owing was paid by check after Jim had sold his farm in 1960. This check was made out by Ted, Jim's father, and $2,000 was paid by Jim's father. In this connection he was referring to the payment made in 1954 or 1955. On redirect examination he testified that the balance paid in 1960 was between $500 and $600.

The cashier of the Security State Bank of Madrid testified that Ted applied for a loan. Ted said he had a bill of sale on some wheat on the east half of Section 6 heretofore described. Ted gave this witness the bill of sale, and a loan was made to Ted in the amount of $3,000. A policy of hail insurance was written to cover the wheat shown in the bill of sale. Ted also gave the bank a note

and a chattel mortgage as security for the loan. The chattel mortgage was filed July 11, 1960.

A. H. Adams testified that he lived on the east half of Section 6, heretofore described, in 1960, and lived there from November 1958 to January 1961; that Jim came to his place to induce him to work for Jim which he did on occasions; that Jim had a farm sale in the spring of 1960; that in April 1960, Jim owned only the wheat on the east half of Section 6 heretofore described; and that on April 16, 1960, he had a conversation with Jim in Hastings' office at Grant, Nebraska. Jim gave a note to G. B. Hastings in the amount of $500, dated April 16, 1960, due July 1, 1960, and a note to this witness in the amount of $2,500 dated April 16, 1960, due July 1, 1960. At the same time he gave this witness a chattel mortgage on 150 acres of growing wheat located on the west half of Section 6 heretofore described, subject to a first mortgage in favor of William Merrell in the amount of $3,000. This mortgage was filed of record at 8 a. m. on April 21, 1960. He further testified that Jim did not have any wheat on the west half of Section 6, Township 12 North, Range 37 West of the 6th P. M., in Keith County; and that Don Most farmed that land and was doing so on April 16, 1960. This witness further testified that he had two notes on the 1959 crop of wheat raised by Jim, and that the chattel mortgage given by Jim on April 16, 1960, was security for those two notes. A. H. Adams further testified that he intended to take a mortgage on the wheat on the east half of Section 6 heretofore described; and that he placed the letter "E" on the chattel mortgage after he found out the description on the mortgage was wrong. He corrected the chattel mortgage before the harvest. The chattel mortgage should read "east" half of Section 6 heretofore described. This witness further testified that he did not have any conversation with Jim on April 6, 1960, the date the bill of sale was given by Jim to Ted, and never discussed the bill of sale with either Jim or Ted; that the

first he heard of the bill of sale was when he hauled part of the wheat to Roscoe; and that Don Walkenhorst was cutting the wheat and asked this witness to haul it.

Don Walkenhorst testified that he knew Ted and Jim; that in 1960, he cut the wheat for Jim; that he had had a conversation with reference to harvesting the wheat when Jim moved to Colorado in the spring of 1960; that Jim told him to wait until the wheat was ripe and then cut it, which he did; and that he called Ted on the telephone a week or 10 days before he cut the wheat and Ted said that he owned the wheat. This witness further testified that he had a conversation with A. H. Adams the day before he cut the wheat and Adams told him that he, Adams, had a mortgage on the wheat and that this witness might just as well cut it; and that A. H. Adams drove a truck and hauled the wheat.

A. H. Adams was recalled and testified that from April 1, 1960, until the wheat was harvested he did not have any conversation with Ted about the ownership of the wheat; that he did not remember seeing Ted during the period of time from April to July 1960; that he learned about the bill of sale after he hauled wheat to Roscoe; that he saw Ted one time after he commenced harvesting the wheat when Ted came out to the field and said to him: "Well, I see they got you a working"; and that nothing was said about Ted claiming ownership of the wheat. He further testified that there was an agreement between this witness and Jim which provided in substance that in consideration of the extension of Jim's indebtedness to A. H. Adams in the amount of $2,500 and to G. B. Hastings in the amount of $500, Jim executed a chattel mortgage in the name of A. H. Adams in the amount of $3,000, and executed a note to A. H. Adams in the amount of $2,500 and a note to G. B. Hastings in the amount of $500, to be paid July 1, 1960. To secure the notes Jim gave a chattel mortgage in the amount of $3,000 payable to A. H. Adams for the indebtedness that Jim owed A. H. Adams. This agree-

ment provided further that if Jim failed to harvest the wheat described in the chattel mortgage on the west half of Section 6, Township 12 North, Range 37 West of the 6th P. M., in Keith County, at the time the same was ready for harvest, Jim would authorize and empower A. H. Adams to enter upon the land and have the wheat harvested at the time of its maturity; and that the proceeds of the sale of the wheat should be used first to pay for the cutting and harvesting of the wheat, second to pay the amount of $3,000 with accrued interest to William Merrell who held a first mortgage on the wheat, then to pay A. H. Adams and G. B. Hastings in the aggregate amount of $3,000 and accrued interest, and the balance to be paid to Jim. A. H. Adams further testified that he did not know exactly when he did alter the description in the chattel mortgage; and that he changed it after Jim had signed it. On redirect examination A. H. Adams testified that Hastings assigned his note to this witness.

The defendant Adams assigns as error that the trial court erred in decreeing that Adams had no right to reformation of the chattel mortgage executed and delivered to him by Jim Apolius; that the trial court erred in holding the bill of sale given to Ted Apolius by Jim Apolius constituted a valid lien upon the proceeds of the wheat and that the same was superior to the chattel mortgage held by A. H. Adams; that the trial court erred in failing to find that the bill of sale was fraudulent as to Adams; and that the trial court erred in rendering judgment in favor of Ted Apolius when there was not sufficient evidence to sustain the judgment and when the judgment was contrary to the law.

While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue,

consider the fact that the trial court observed the witnesses and their manner of testifying. See Smith v. Hornkohl, 166 Neb. 702, 90 N. W. 2d 347.

The defendant A. H. Adams cites section 36-204, R. R. S. 1943, which provides in part: "Every sale made by a vendor of goods and chattels in his possession or under his control, * * * unless the same be accompanied by the immediate delivery, and be followed by an actual and continued change of possession of the things sold, * * * shall be presumed to be fraudulent and void as against the creditors of the vendor, * * * and shall be conclusive evidence of fraud unless it shall be made to appear on the part of the persons claiming under such sale * * * that the same was made in good faith, and without any intent to defraud such creditors or purchasers."

Section 36-301, R. R. S. 1943, provides in part: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against a creditor or creditors of the mortgagor, * * * unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagor resides, * * *."

Section 36-401, R. R. S. 1943, is cited. It provides in part: "Every conveyance or assignment, in writing or otherwise, of any estate or interest in * * * goods * * * made with the intent to hinder, delay or defraud creditors or persons, of their lawful rights, damages, forfeitures, debts or demands, * * * shall be void."

The defendant A. H. Adams asserts that Ted and Jim conspired and set up a scheme and a device to defraud him.

As we view the record it shows that Jim was indebted to his father, Ted, for a considerable amount of money, as well as to other creditors. The only creditor making

a claim in this case was the defendant A. H. Adams. Ted wanted to perfect a settlement with his son. This resulted in the son giving the father a bill of sale to the wheat crop heretofore mentioned. From all of the evidence, the trial court could conclude that Jim did owe his father a considerable amount of money, and thereafter Jim executed a chattel mortgage to William Merrell and defendant A. H. Adams covering the same property that was shown in the bill of sale.

In Carlson v. Kirchman, 131 Neb. 229, 267 N. W. 452, it was held that the question of fraudulent intent in all cases pertaining to fraudulent conveyances under the laws of Nebraska shall be deemed a question of fact, and not of law.

In Sweley v. Fox, 135 Neb. 780, 284 N. W. 318, this court held: "To warrant reformation of a mortgage for mutual mistake, the proof must be clear, convincing, and satisfactory." See, also, Wheeler v. Brady, 126 Neb. 297, 253 N. W. 338, to the same effect. The same applies to a chattel mortgage.

To warrant reformation of a chattel mortgage where there is a misdescription of land upon which a crop of wheat is growing, the proof must be clear, convincing, and satisfactory.

In 76 C. J. S., Reformation of Instruments, § 84, p. 454, the general rule is stated as follows: "It is generally held that in order to establish a cause of action for reformation of an instrument a mere preponderance of the evidence is insufficient, and the evidence must be clear and convincing and satisfactory."

The evidence in the instant case fails to show that Ted Apolius entered into a conspiracy with his son Jim to defraud the defendant A. H. Adams. The evidence shows that Ted took the bill of sale from Jim Apolius in good faith to apply on the indebtedness that Jim owed him. There is no competent evidence that Ted Apolius knew anything about the transactions between Jim Apolius and A. H. Adams.

Applying the rules heretofore set out, we conclude that the trial court did not err in finding that the evidence was insufficient to warrant A. H. Adams to reform the chattel mortgage. Ted Apolius was a third party, and without notice of the existence of the chattel mortgage cannot be held responsible for the mistakes made by Jim Apolius or A. H. Adams with reference thereto.

As to whether or not A. H. Adams took possession of the wheat, the evidence is in conflict. The record shows that Don Walkenhorst was hired by both Ted and Jim to cut and harvest the wheat and was paid by Jim. Adams did testify that he hauled the wheat to town under the direction of Don Walkenhorst who harvested it. He picked up the tickets at the elevator, which is a common practice and insufficient to disclose possession or control of the wheat. A. H. Adams also testified that he took possession of the wheat under an agreement with Jim authorizing him to do so. The trial court resolved this conflicting testimony to the effect that A. H. Adams did not take possession of the wheat at any time.

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

AFFIRMED.

DAVID O. STILLWELL, APPELLEE, V. DENNIS SCHMOKER ET AL., APPELLANTS.

122 N. W. 2d 538

Filed July 12, 1963. No. 35428.

1. **Witnesses: Evidence.** Testimony of witnesses must be confined to concrete facts perceived by the use of their senses as distinguished from opinions and conclusions deducible from evidentiary facts.
2. ———: ———. While an expert will be permitted to express his opinion, or even his belief, he cannot give his opinion upon the precise or ultimate fact in issue before the jury, which must be determined by it.

3. ———: ———. A witness may describe the marks that he observed near the place of the accident. The inference to be drawn from the testimony is solely the province of the jury.
4. **Automobiles: Trial.** An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications to enable a jury to observe and understand the duty of drivers at the time and place in question.
5. ———: ———. Although the evidence may be entirely circumstantial as to the rate of speed at which a motor vehicle was operated, it may be sufficient to support a reasonable conclusion reached by the jury on the issue of negligence.
6. **Automobiles: Evidence.** Circumstances connected with an accident may be sufficient to overcome direct evidence as to the speed of a motor vehicle.
7. **Trial.** It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence, and a failure to do so is prejudicial.
8. **Automobiles.** The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.
9. **Negligence.** Negligence is a question of fact and may be proved by circumstantial evidence and physical facts.
10. **Automobiles: Negligence.** This is true as to the specifications of speed as well as to any other specifications of negligence claimed.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded with directions.

Tye, Worlock, Knapp & Tye, for appellants.

Mitchell, Taylor & Beatty, for appellee.

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

SPENCER, J.

Plaintiff brought this action to recover for personal injuries and property damage sustained in a collision

at the intersection of U. S. Highway No. 30 and Avenue E in Kearney, Nebraska. Judgment was rendered for plaintiff, and, upon the overruling of their motion for a new trial, defendants perfected their appeal to this court.

David O. Stillwell, the plaintiff and appellee, will be hereinafter referred to as plaintiff. Defendants and appellants are Dennis Schmoker, a minor, and his father, Donald Schmoker. At the time of the collision Dennis was driving the vehicle which was owned by his father, and any recovery against the father is dependent upon recovery against Dennis. We will hereinafter refer to Dennis Schmoker as defendant, and to both Schmokers as defendants.

The collision occurred shortly after 5 p. m., on December 2, 1961. U. S. Highway No. 30 is 60 feet 9 inches wide, runs east and west, and is divided between intersections by an 8 foot 9 inch concrete median strip, with two lanes of traffic both east and west. Each lane is 13 feet wide and they are divided by a white stripe. The median strip on the west at this intersection is 16 feet 4 inches east of the west curb of Avenue E. Plaintiff was driving west on U. S. Highway No. 30. Defendant had come from the west on U. S. Highway No. 30, and had either made or was in the process of making a left-hand turn when the collision occurred. The posted speed limit for the area is 35 miles per hour.

An officer who investigated the collision testified that when he arrived at the scene, the two cars had the westbound traffic lanes blocked. Plaintiff's car, a 1961 Valiant, was across the south lane of the westbound traffic headed north, and defendant's car, a 1953 Ford, was on an angle against the curb in the north lane, but the record does not disclose the direction in which it was headed. The concentration of debris was 23 feet south of the north curb and 22 feet 9 inches east of the west curb, or in the northwest quadrant of the intersection. There were no brake or skid marks visible. It was the officer's

testimony that both drivers told him they did not see the other car. Plaintiff testified he might have told the officer he did not see the defendant. Defendant testified he did not remember telling the officer he had not seen the plaintiff. From the exhibits it is evident that the front bumper of the plaintiff's car came in contact with the right front fender of the defendant's car, directly above the right front wheel.

Defendants set out 18 assignments of error. We comment on only four of them, Nos. 2, 3, 5, and 11, and will set out only enough of the testimony to understand the points involved. We do not pass on the merits or sufficiency of any of the other assignments.

Plaintiff testified he saw the defendant's car first when he was three houses back from the intersection. Defendant's car was then three car lengths from the intersection. He saw it a second time just before entering the intersection and the defendant had cut the corner and was turning and pulling into the intersection. "He had made his turn and he was just coming into the intersection." The collision then occurred. Plaintiff testified he had been driving 25 to 35 miles an hour before going into the intersection. He did not apply his brakes and did not have time to do anything before the impact.

Defendant testified that he was driving between 15 and 20 miles an hour approaching Avenue E; that when he started into the intersection he first observed the plaintiff's car a block away; that he braked his car before going into the intersection and cut his speed down to 10 miles an hour. On cross-examination he testified he was at the edge of the island to the west, ready to make his turn when he first observed the plaintiff's car a block away. He did not look again until he was in the intersection and was crossing the white line dividing the two lanes of westbound traffic. At that time, his car "had fairly well straightened out, going pretty much north." He testified plaintiff then had his face turned away and it was pointing down toward the floor board

of the car. On the speed of the plaintiff's car, the following testimony of defendant was offered by the plaintiff from defendant's deposition as admissions against interest: "Q So you couldn't tell from that either, could you, as to his rate of speed? A Oh, somewhat you could. It seemed that he was moving at a faster rate of speed than he should have at that place. Q Well, Dennis, you are not saying that you saw him more than just a few feet before he hit you? A No, I'm not saying that, but he approached me too fast. I don't know, maybe it happens quick, but it seems to me that he hit me at a rather fast speed."

Defendants' second assignment relates to permitting the investigating officer to testify over objection as to the location of the point of impact. The question asked was as follows: "Q From your observation of the debris, the positions of the vehicles, and your examination of the scene of the accident, and from your examination of hundreds of accidents in the past, do you have an opinion as to which lane of traffic—the north or south lane of westbound traffic the collision occurred in? Mr. Knapp: Objected to, no proper and sufficient foundation laid, and calling for the conclusion of the witness. The Court: He may answer. A I would say that it happened in the south lane of the westbound traffic." The trial court had earlier sustained an objection to a question seeking an opinion of this witness as to the actual point of impact. This question is tarred with the same vice. The physical facts from which the question was to be answered were all presented to the jury. The issue did not call for the opinion of an expert. It was an ultimate fact for the determination of the jury, and the objection should have been sustained.

As we said in Danner v. Walters, 154 Neb. 506, 48 N. W. 2d 635: "One of the objections most frequently raised against the admission of expert opinion testimony is that the opinion offered invades the province of the jury. This objection is indeed the basis of the general

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

"A witness may describe the marks that he has observed near the place of an accident. The inference to be drawn from the testimony regarding such tire marks, skid marks, or scratches is solely the province of the jury."

Defendants' third assignment is directed at the following portion of instruction No. 1 given by the trial court: "The evidence in this case estiblishes (sic) that on December 2nd, 1961, at about 5:30 P. M., a collision occured (sic) between an automobile driven by David Stillwell westerly on U. S. Highway 30 in the City of Kearney, and an automobile driven by Dennis Schmoker *in an easterly direction and turning left* in the intersection of Highway 30 and Avenue 'E'." (Italics supplied.)

It is defendants' contention that the evidence indicates that defendant had made his turn and his car was headed nearly straight north, and that the statement he was driving easterly, turning left, was prejudicial when read in conjunction with certain factors respecting left-hand turns emphasized in the instructions. We do not believe the jury could have been misled by this statement when considered with the other instructions, but as phrased it does not give the defendants the full

benefit of the plaintiff's admission that the defendant's car had made its turn.

Defendants' assignments Nos. 5 and 11 are directed at the issue of speed and will be considered together. Assignment No. 5 complains about instruction No. 8 given by the trial court. Assignment No. 11 complains about the failure to give defendants' tendered instruction No. 4 which embraced defendants' theory on the relevancy of speed. The trial court's instruction No. 8 on speed is as follows: "You are instructed that the maximum speed limit under the ordinances of the City of Kearney on East 25th Street, being U. S. Highway Number 30, between Avenue D and Avenue G is 35 miles per hour. Under the ordinances of the City of Kearney there is a further provision that at intersections the speed should be 15 miles per hour. However, between Avenue D and Avenue G on 25th Street the streets are posted with 35 miles per hour signs only, and the court as a matter of law rules that the 35 miles per hour speed limit was the maximum legal speed at the place of the accident here in question.

"There is no evidence in this case that the maximum speed laws have been violated by either party in this case, and this instruction is given only to remove any confusion from the jurors' minds as to what the legal speed was at this location, this confusion may having (sic) arisen from various claims and testimony given during the course of the trial."

Defendants' tendered instruction No. 4 was as follows: "You are instructed that the section of the traffic ordinances of the City of Kearney, Nebraska, in full force and effect at the time of this accident and applicable to this case provide as follows:

" 'Sec. 19.16 Speed Limitation. No person shall drive any vehicle on any street within the city at a rate of speed greater than is reasonable and proper having regard for the traffic and conditions of the street, and in any event at a rate of speed not greater

than 15 miles per hour within the congested district, or at a rate of speed not greater than 25 miles per hour outside the congested district, except for certain city streets that are presently designated as part of Federal Highway No. 30, and for such streets the rate of speed shall be . . . from Twenty-fifth Street and 'D' Avenue to Twenty-fifth Street and 'N' Avenue at a rate of speed not greater than 35 miles per hour; and when traversing intersections bridges, or sharp curves the person driving such motor vehicle shall not drive at a rate of speed greater than 15 miles per hour and shall have such vehicle under complete control; . . . '

"You are instructed that the Statutes of the State of Nebraska so far as they are applicable to this case, provide as follows:

" '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 was (sic) given a plaintly (sic) visible signal of intention to turn. The driver of any vehicle traveling at an unlawful rate of speed shall forfeit any right-of-way he might otherwise have hereunder.'

" 'No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.'

" 'No person shall drive a vehicle in any residence district within any city or village at a speed greater than 25 miles per hour unless, by the ordinance of such city of (sic) village, a greater rate of speed is specifically permitted.'

" 'The fact that the speed of a vehicle is lower than the prima facie limit shall not relieve the driver from the duty to decrease when approaching and crossing an intersection, . . . or when special hazards exist with respect to other traffic or highway conditions, and speed shall be decreased as may be necessary to avoid collid-

ing with any vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.'

"You are instructed that if you find from the evidence that either the plaintiff or the defendant violated any of the provisions of the above ordinances of the city or statutes of the State of Nebraska referred to in this instruction, the violation thereof would not be, in and of itself, negligence on the part of the violator, but would be evidence of negligence to be considered by you, together with all other evidence, facts and circumstances of the case, to determine whether or not such violator was guilty of negligence."

Defendants in their answer and cross-petition pleaded several specific acts of negligence, including the following: "5. In that the plaintiff, at the time and place in question, was driving and operating a vehicle at a rate of speed greater than that which was reasonable and proper under the circumstances and conditions of traffic then existing upon the highways, contrary to the laws of the State of Nebraska, Sec. 39-7,108, R. R. S. and the ordinances of the City of Kearney, Chapter 19, Art. I, Sec. 19.15 and Chapter 19, Art. II, Sec. 19.16.

"6. In that the plaintiff, at the time and place in question, failed to slow his automobile upon approaching and entering an intersection, contrary to the laws of the State of Nebraska and the ordinances of the City of Kearney."

The only instruction involving speed given by the trial court is instruction No. 8, set out above. This instruction undertook to give the maximum speed for vehicles at the place of the accident. However, it did not include material applicable limitations and qualifications, and is prejudicially erroneous. As we said in Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333: "An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all the material applicable statu-

tory limitations and qualifications to enable a jury to observe and understand the duty of drivers at the time and place in question." The instructions tendered by the defendants set out certain proper qualifications in both the applicable ordinances and the statute. The applicable ordinance provided: "No person shall drive any vehicle on any street within the city at a rate of speed greater than is reasonable and proper having regard for the traffic and conditions of the street, * * *."

Section 39-7,108, R. S. Supp., 1961, provides in part: "The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, * * * or when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care; * * *."

Defendants specifically pleaded that the plaintiff at the time and place in question was operating his vehicle at a rate of speed greater than was reasonable and proper under the circumstances, and that he failed to slow his automobile on entering the intersection. This was a part of their defense. The trial court omitted these allegations from the instruction delineating the allegations of the parties, and by instruction No. 8 eliminated any question of speed in any form from the case. In effect, instruction No. 8 directed for the plaintiff on that phase of the defendants' defense.

Does the record reveal evidence from which the jury might find excessive speed? If it were to believe the defendant's statement that when he was turning into the intersection plaintiff was 300 feet east of the intersection, it is evident it would be necessary to find that plaintiff was driving in excess of 35 miles per hour. There are other inferences in the record from which a

jury might have questioned plaintiff's speed which it is not necessary to discuss, because this testimony was sufficient to require the court to cover this phase of the defendants' defense.

This case is controlled by Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758, in which we held: "Although the evidence may be entirely circumstantial as to the rate of speed at which a motor vehicle was operated, it may be sufficient to support a reasonable conclusion reached by the jury on the issue of negligence. Circumstances connected with an accident may be sufficient to overcome direct evidence as to the speed of a motor vehicle." At page 599 of that case, we said: "Appellant alleged in her petition that appellee operated his truck at a greater rate of speed than was reasonable and proper, having regard for the condition of the highway, and the traffic thereon. She now contends the trial court prejudicially erred in failing to submit this issue to the jury in view of the evidence adduced.

"In this regard, 'It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleadings and evidence, and a failure to do so is prejudicial.' Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571."

In Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112, we held: "The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing."

In Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701, we held: "Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. All that the law requires is that the facts and circumstances proved, together with the inferences that may be properly drawn therefrom, shall

indicate with reasonable certainty the negligent act charged." This is true as to the specifications of speed, as well as to any other specifications of negligence claimed. Coyle v. Stopak, *supra*.

We have come to the conclusion that the defendants are entitled to a new trial and that the judgment of the trial court overruling their motion was in error. We therefore reverse the judgment of the trial court denying defendants a new trial, and remand the cause with directions that defendants' motion for a new trial be sustained, and that they be granted a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD FRANK UPAH, JR., APPELLANT, V. JOSEPHINE MARIE ANCONA UPAH, APPELLEE.

122 N. W. 2d 507

Filed July 12, 1963. No. 35434.

1. **Divorce.** While a divorce proceeding is pending, the parties must live separate and apart. Such a separation is not wrongful, and ordinarily a charge of abandonment or desertion cannot be based thereon.
2. **Divorce: Appeal and Error.** A divorce case is tried de novo on the record in this court, and this court is required to reach independent conclusions of fact without reference to findings made by the trial court.
3. **Divorce.** Although no violence is threatened, yet harping and nagging, continued for years by either a husband or wife, concerning conduct above reproach, may be so unreasonable as to utterly destroy the peace of mind, seriously impair health, and ruin all legitimate ends and objects of matrimony, and constitute extreme cruelty.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Reversed and remanded with directions.

Marchetti & Samson, for appellant.

McCormack & McCormack and Webb, Kelley, Green & Byam, for appellee.

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

WHITE, C. J.

This is a divorce action. The plaintiff sued for an absolute divorce on the ground of extreme cruelty. The defendant cross-petitioned for a limited divorce from bed and board on the ground of abandonment, for allowances for child support, for alimony in the nature of separate maintenance, and for a division of the real and personal property of the parties. The trial court dismissed the plaintiff's petition, granted the defendant a divorce from bed and board, and awarded allowances and a division of property hereinafter discussed in detail.

The plaintiff appeals assigning numerous errors. They may be grouped into three questions:

1. Was the defendant entitled to a divorce from bed and board on the ground of abandonment?

2. Is the plaintiff entitled to a divorce from the defendant on the ground of extreme cruelty?

3. What is the proper disposition of the questions of allowances for child support, alimony, and division of property?

In order to decide the first question presented, a review of the court history of this litigation is necessary. On October 11, 1957, very shortly after the parties separated, the plaintiff filed his petition for divorce on the ground of extreme cruelty. Three days later, on October 14, 1957, the defendant wife filed a motion for allowances. Hearing was had on October 18, 1957, and the court by subsequent order judicially fixed the terms and conditions of their separation, fixed the amount of temporary support, declared custody of the children in the defendant, and fixed in detail the times and requirements as to visitation of the two children of the parties. For over 4½ years, and until the time of trial of this case in August 1962, this order stands undisturbed as

the measure of the obligation of their judicially declared terms of separation. Subsequent to this order, the parties jointly moved, and were granted release of the child support and lien on their real estate. The record discloses that in the fall of 1958 the plaintiff bought a new home for the wife and children in which they are now living. It also appears that a motion of the defendant attacking the sufficiency of the petition was filed November 15, 1957. Hearing was had on defendant's motion and an order was entered October 27, 1961, overruling it and giving her 3 weeks to answer. On November 17, 1961, responsive to this order, the defendant filed an answer and cross-petition for a limited divorce from bed and board only, alleging as her sole grounds willful abandonment by the plaintiff for more than 2 years. Section 42-302, R. R. S. 1943, authorizes a divorce from bed and board "for utter desertion of either party for a term of two years." The trial court in granting the limited divorce for desertion computed the time by using the period of separation after the filing of the divorce and the entry of the court's separation and allowance order of January 28, 1958. This was error. Time elapsing during the pendency of a divorce case may not be added to or counted in the period required to establish a claim of "utter desertion" under the statute. The parties have a right as a matter of public policy to assert their claims in court, and even though judicially found to be groundless, should not bear the risk of having their right to be heard defeated by the danger of the length of the period of time elapsing during the pendency of the litigation. The correct rule is stated in Ellis v. Ellis, 115 Neb. 685, 214 N. W. 300: "It is elementary that while a divorce proceeding is pending the parties must live separate and apart. Such a separation is not wrongful, hence a charge of abandonment cannot be based thereon. * * * We therefore conclude that such tacking of time cannot be had, and that the trial court erred in holding to the contrary. The

decree of the court granting the defendant a divorce on the ground of abandonment must be, and is, set aside." To require cohabitation, with the implication of intercourse and forgiveness during the pendency of a divorce case in order to defeat a subsequent possible claim of desertion, would be against public policy and contrary to our subsequent holdings, including the Wright v. Wright, 153 Neb. 18, 43 N. W. 2d 424, holding that parties must live apart during a divorce proceeding, wherein we followed and cited the Ellis holding, *supra,* and Dunn v. Dunn, 26 Neb. 136, 42 N. W. 279. This is the general rule. See, 27A, C. J. S., Divorce, § 56 (4), p. 181; 17 Am. Jur., Divorce and Separation, § 103, p. 322.

The decree of the district court granting a limited divorce from bed and board to the defendant must be reversed.

We turn now to the question of whether the plaintiff is entitled to a divorce on the ground of extreme cruelty. We are required to try factual questions de novo on the record and reach independent conclusions without reference to the findings made by the trial court. § 25-1925, R. R. S. 1943; Scholz v. Scholz, 172 Neb. 184, 109 N. W. 2d 156. The trial court, in light of the result reached as to desertion, made no findings on the issue of extreme cruelty.

Both parties were about 35 years of age, were married in 1950 at the age of 22, have two children, a boy and a girl, ages 9 and 6. They were married while the plaintiff was in college. They had no financial resources whatsoever, and the plaintiff drove a taxicab and operated a cleaning service to help pay expenses. He was graduated from Creighton University in 1951. The defendant was employed as a secretary at the time of the marriage and later on helped for a short period of time when the plaintiff was setting up a retail unpainted furniture business which is his present occupation. During their marriage they lived in a one-room attic apartment rented at $35 per month, a prefabricated house

rented at $85 per month, and before their separation in 1957, rented a more comfortable house for $125 per month and bought new furniture and appliances. Throughout the marriage, the defendant suffered intermittently from multiple sclerosis, requiring hospitalization at times, a condition known to the plaintiff at the time of the marriage. The defendant introduced no medical evidence in this respect, and it appears that her suffering from this condition and periods of hospitalization are not as frequent since their separation in 1957 as before. The record is undisputed that the plaintiff is very industrious, worked late at night building up his furniture business in downtown Omaha, and also worked in a partnership in two other enterprises which eventually failed financially. It appears that both parties were extremely close to their respective parents and families, that neither drank nor smoked, that both had the same religious affiliation, that several attempts to reconcile and settle their differences were made by members of the families, religious counselors, and friends, which were partially successful and unsuccessful. Brevity forbids a further detailing of the general background of this marriage.

We shall not burden the record with the details of the evidence with respect to cruelty. The defendant claims no cruelty against the plaintiff, admits continual "arguments" with the plaintiff, and in her very brief direct testimony, she fails to deny in any substantial sense the detailed explicit recitals of events related by the plaintiff. The record shows this couple to be almost completely incompatible from the beginning in 1951. The defendant came from a family of some means and is a graduate of Duchesne College. Their troubles centered around money and maintaining a certain social position and demanded standard of living. The record shows arguments, harping, and nagging about demands for a checking account, charge accounts, household appliances, the poverty of their living conditions, the fact

that her family and friends had better houses than theirs, and many other subjects. The improvement in their homes, the buying of new appliances, and other changes did not diminish this continual course of conduct on her part. These arguments took place in front of the children and despite the plaintiff's protestations, she continued them. These arguments affected the children. General incompatibility ripened into cruelty and abuse of the plaintiff. She referred to the plaintiff as a "bum," that she should never have married him in the first place, that he was from South Omaha, and that he was nothing and would amount to nothing. When they moved to their third house, newly carpeted and furnished with new furniture, she complained bitterly about living in South Omaha. There is much other testimony in the record as to the extremely violent language used by the defendant with reference to the plaintiff's parents and on other matters. Except as to one or two of these statements and incidents, the defendant's testimony is bereft of denial, she conceding that they had many arguments. There is, for example, undisputed evidence that during the time of their final period of trouble in 1957, the defendant accompanied one of her marriage counselors to several different bars and places of entertainment and that he was present in the home in casual dress on many occasions. On being questioned about this, her undenied answer was, "Why don't you get yourself a nun?"

The evidence shows that as a culmination of the long hours of work, the trouble at home, and the death of the plaintiff's father, the plaintiff became ill and was hospitalized in January 1957.

The plaintiff's testimony in this case was corroborated in many pertinent details by Dr. Gurnett, the physician who had treated both parties, by the nextdoor neighbor, by a business acquaintance, and by a mutual social and personal friend, Joan Weiss, in whose home the parties had visited constantly for many years and who helped

effect a reconciliation at one time between the parties. Joan Weiss confirmed the continual arguing, bickering, and nagging of the plaintiff as to money, checking account, household appliances, and also the defendant's admissions as to continual nagging, promises to quit, and that the defendant's own brother had interceded with her to quit nagging and change her course of conduct.

The defendant's testimony is very brief, very general in nature, and lacking in denial of many, if not almost all, of the pertinent and detailed testimony as to cruelty by both the plaintiff and his corroborating witnesses. The defendant alone testified in her own behalf and produced no corroborating testimony.

Here pertinent is the following from DeWaal v. DeWaal, 148 Neb. 756, 29 N. W. 2d 371: "Although no violence is threatened, yet harping and nagging, continued for years by either a husband or wife, concerning conduct above reproach, may be so unreasonable as to utterly destroy the peace of mind, seriously impair health, and ruin all legitimate ends and objects of matrimony, and constitute extreme cruelty 'by other means,' as defined in section 42-302, R. S. 1943. See Brown v. Brown, 130 Neb. 487, 265 N. W. 556; Faris v. Faris, 107 Neb. 214, 185 N. W. 347; Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447; Hartshorn v. Hartshorn, 104 Neb. 561, 178 N. W. 186."

The above holding was followed in Sell v. Sell, 148 Neb. 859, 29 N. W. 2d 877, and follows the general rule. See 27A C. J. S., Divorce, § 28 (1), p. 75.

It further appears clear from the whole record in this case that the best interests of the parties themselves, their children, and society would be best served by the granting of an absolute divorce. We have said many times that ordinarily an absolute divorce is to be preferred to a limited divorce from bed and board where the pleadings and evidence sustain such findings. We hold that an absolute divorce should be granted to the plaintiff in this case.

The remaining and difficult problem is the question of allowances for child support, alimony, and division of the property of the parties. The rule to be applied by the court in reaching a determination of this issue is well settled, and we will not repeat it here. See, Jablonski v. Jablonski, 173 Neb. 544, 114 N. W. 2d 1; Malone v. Malone, 163 Neb. 517, 80 N. W. 2d 294; Pasko v. Trela, 153 Neb. 759, 46 N. W. 2d 139.

The district court awarded the defendant $65 per month for each child during minority, or until further order of the court, and their medical and dental expenses; awarded the defendant the exclusive use of the home bought by the plaintiff in 1958 together with the household goods, furniture, and furnishings; and required the plaintiff to pay the mortgage, insurance, and tax payments on the home and to pay all necessary repairs. The plaintiff was ordered to pay $225 per month separate maintenance with no time limitation specified and, in addition thereto, all defendant's medical and dental bills.

The parties own a home at 4916 Walnut Street, Omaha, Nebraska, purchased by the plaintiff in 1958 as a home for the defendant and the children. It has a market value of $15,000 and an unpaid balance due on the mortgage against it of $11,474.59. The household goods and furnishings are worth about $800 with a replacement cost of about $2,000. This is the total accumulated property of the parties outside of the plaintiff's furniture business. The plaintiff operates a retail used furniture business on rented premises in Omaha. No evidence appears as to any accumulated capital assets of this business except the listing of office equipment and vehicles, and their depreciated value, in the plaintiff's income tax returns. These would indicate a value of around $5,000.

The evidence shows that the plaintiff had $100 in his personal bank account and $7,500 in his business account with accounts payable of $6,000, leaving a business bal-

ance of about $1,500. The evidence is in dispute as to his net income, his 1961 income tax return showing a net income of about $9,900, about $9,600 for 1960, and about $12,000 for 1959. The dispute centers around the significance of payments made by the plaintiff to his mother of about $2,500 per year. Considering these payments as part of his income for the purposes of fixing allowances, we come to the conclusion that the plaintiff's annual net income before taxes for the past 3 years runs between $11,000 and $13,000. We observe that it is necessary to preserve the plaintiff's ability to operate his business and its capital structure. We also note the highly competitive nature of this enterprise and the long-time period it has taken through hard work to build it up to its present level. We also take into consideration the fact that the defendant has multiple sclerosis and will require periodic medical attention. There is no medical testimony in the record enabling the court to explore this situation precisely. It appears she has been hospitalized for varying periods about 15 times since their marriage and most of them prior to the time of separation. It does not appear clear that she has been hospitalized more than three times since the separation in September 1957. The defendant is not muscularly crippled in any way and, except for the periods of hospitalization, her own testimony does not sustain a finding that she has not led an almost normal life outside the range of the acute attacks. The frequency of the attacks, the length of the remissions, and the degree and range of their progressiveness vary in individual cases of this disease and are not ascertainable from the record as to this defendant. It is true that the plaintiff knew of her condition in this respect at the time of their marriage in 1950. It appears that the parties have received help with the expenses of her hospitalization periods through the insurance program of the business of the defendant's father, Ancona Brothers Wholesale Grocery Company, on the basis

of part-time typing work. The defendant appears to be a good mother, and there is no dispute as to the custody of the children. The parties have had virtually no difficulties as to visitation privileges.

We have considered all of the evidence as it bears on all of the factors we are required to consider under the applicable rule as to alimony and property division in a divorce case. As in most divorce cases involving children, the family relationship may not be severed without working hardship on both parties and the children. Many efforts were made to save this home and marriage but to no avail. It is not so important to rectify past wrongs or deviations as it is to try to accomplish a solution that will measure up to the future best interests of these young people and their children.

One conclusion is inescapable from all points of view, and that is they should be divorced and certainty given their status and future rights and obligations. The troubles developing in the almost 6 years of the pendency of this action between this couple demonstrate the wisdom of resolving their rights with certainty and finality.

We hold, therefore, as follows:

1. That plaintiff is granted a decree of absolute divorce from the defendant and the judgment awarding the defendant a limited divorce is reversed and her cross-petition dismissed.

2. That defendant is awarded the custody of the two minor children subject to reasonable visitation rights of the father, and defendant is awarded the sum of $65 per month for the support of each child during their minority or until further order of the court.

3. The defendant is awarded the fee simple title absolute to the property at 4916 Walnut Street, Omaha, Nebraska, being Lot 21, Block 27, West Side Addition, together with all furniture, furnishings, and household goods.

4. The defendant is awarded permanent alimony in the sum of $27,000, payable at the rate of $225 per month

for a period of 10 years from the date of the entry of decree on mandate of this court payable to the clerk of the district court.

5. The plaintiff is awarded title to all property except that specifically granted to the defendant herein.

6. The plaintiff is to pay all costs, including attorney's fees, awarded herein.

The plaintiff complains of the trial court's award of $1,000 attorney's fees to defendant's attorney claiming excessiveness. Although this amount appears to be ample considering that the trial lasted 3 days and the defendant's sole testimony was her own, all of the facts in connection with counsel's services do not appear of record and we cannot say the district court abused its discretion and, consequently, we will not disturb it. We allow an additional fee to counsel for defendant for services in this court of $100.

The judgment of the district court is reversed and the cause remanded with directions to enter a decree in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

INA A. MITCHELL, APPELLANT, V. OTTO H. BEERMANN ET AL., APPELLEES.

122 N. W. 2d 525

Filed July 12, 1963. No. 35444.

1. **Waters: Quieting Title.** A party who seeks to have title to real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence.
2. **Adverse Possession: Limitations of Actions.** 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 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. **Adverse Possession.** In order to establish title by adverse possession it is not necessary that a party shall prove complete enclosure nor that he remained continuously on the land for the statutory period, but only that the land was used continuously for the purposes to which it was by its nature adapted.
4. **Adverse Possession: Limitations of Actions.** The statutory period for the establishment of title to real estate by adverse possession is 10 years.

Appeal from the district court for Dakota County: JOHN E. NEWTON, Judge. Reversed and remanded with directions.

Leamer & Graham, for appellant.

Mark J. Ryan and Stewart & Hatfield, for appellees.

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

YEAGER, J.

This is an action instituted by Ina A. Mitchell, plaintiff and appellant, against Otto H. Beermann and Marie Beermann, husband and wife, defendants and appellees, the purpose of which is to have title quieted in her to certain lands described as Lot 1, Section 35, Township 29 North, Range 9 East of the 6th P.M., in Dakota County, Nebraska, or otherwise described as the northwest quarter of the northwest quarter of Section 35, Township 29 North, Range 9 East of the 6th P.M., in Dakota County, Nebraska, and all accretion thereto, the north line of the accretion being an extension to the Missouri River of the north line of Section 35, and the south line being a line beginning at a point on the west line of Section 35, 1155 feet south of the northwest corner of Section 35, thence north 118 degrees, 26 minutes, east to the Missouri River. Others were made parties to the action but for the purposes of this opinion further reference to them is not required.

The defendants Beermann were the owners of Lot 1 and the northwest quarter of the northeast quarter, also described as the north half of the northeast quarter of

Section 34, Township 29, Range 9, Dakota County, Nebraska. The land described was located directly west of the west line of Section 35 and of the land claimed by the plaintiff. These defendants claimed as their own all of the land eastward from the line between Sections 34 and 35 which was claimed by the plaintiff and to which she seeks in this action to have title quieted. They seek to have title quieted in them on the ground that this is all accretion to their land in Section 34, and on the further ground that they are the owners of and entitled to it by adverse possession. By appropriate pleadings the defendants have asserted their claimed rights.

The case was tried to the court and judgment was rendered quieting title in the defendants. Motion for new trial was filed by the plaintiff and was overruled. From the order overruling the motion for new trial and the judgment the plaintiff has appealed.

In order to make clear what is involved herein and to limit the necessity for discussion it is pointed out that the portion of Section 35 involved here is bounded on the east by the Missouri River and on the west by the north and south line between Sections 34 and 35. The portion of Section 34 involved adjoins Section 35 on the west side of Section 35. A line running east and west along the north side of the land in Section 34 extended eastward to the river is also the north line of the land in Section 35. A line running east and west along the south line of the land involved in Section 34 extended southeastward to the river is also the south line of the land included in Section 35. The controversy here concerns the land which lies between the north and south lines of the land in Section 35.

The plaintiff without question had record title to this land by an uninterrupted chain commencing in April 1931. There is nothing in the record the purport or effect of which is to show abandonment of the land or

surrender of title thereto since the date of original acquisition.

On this basis and because of alleged acts of the defendants the effect of which, if successful, would deprive plaintiff of her property and title thereto, she has instituted this action to quiet title.

In 1942 the defendants purchased the land which is owned by them in Section 34. The description was of land in Section 34 "and accretions thereto, if any."

In the action here the defendants by cross-petition seek to have title quieted in them to the land east of the north and south line between Sections 34 and 35 to which the plaintiff has record title. They base their claim of right first, on a theory of accretion, and second, on adverse possession.

By their theory of accretion, as interpreted, their contention is that although the area claimed by plaintiff was originally in an existing Section 35 it became nonexistent and disappeared by the removal of the west bank of the Missouri River westward beyond the line between the two sections, thus obliterating the line, after which by accretion all of the land to the east of this new line was accretion to the land in Section 34 and was property of the defendants, title to which they were entitled to have quieted in them.

This contention finds no support in the evidence. There is no evidence that the river had ever receded westward to or beyond the line between the lands involved in Sections 34 and 35. There is evidence which without contradiction shows that at least as far back as 1928 there was land continuously extending eastward from the line between Sections 34 and 35. The existence of this condition was known by the defendants at the time of their purchase in 1942.

The only suggestion that the river had ever receded westward of this line at any time was that there was evidence of high banks across Section 34 west of this line.

In order to have title to this real estate quieted in them on the ground that it is accretion to land to which they had title, the burden was on the defendants of proving the accretion by a preponderance of the evidence. See Jones v. Schmidt, 170 Neb. 351, 102 N. W. 2d 640. The defendants have failed to sustain this burden.

The defendants, as pointed out, also claimed title to this real estate by adverse possession. In order to establish title to this real estate by the operation of the statute of limitations, or in other words by adverse possession, the defendants must prove by a preponderance of the evidence that they were in actual, continuous, notorious, and adverse possession of the property under claim of ownership during the full period required by the statute. See Jones v. Schmidt, *supra.*

Proof of possession is sufficient if the land is used continuously for the purpose to which it may in its nature be adapted. See, James v. McNair, 164 Neb. 1, 81 N. W. 2d 813; Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384.

"The statutory period for the establishment of title to real estate by adverse possession is 10 years." Jones v. Schmidt, *supra.*

The factual situation from which it must be ascertained whether or not the defendants have adversely possessed this land for 10 years or more is in substance the following: The defendant Otto H. Beermann was acquainted with the line between Sections 34 and 35. He never made use of the land itself east of the line except that he said that he extended fences east to the river so that cattle could go onto it. There is no evidence that he used the area continuously as pasture land. In 1945 and on another occasion the defendants had trees cut down and converted to lumber for use on land other than this. Nothing occurred in the nature or character of taking of possession of the land or any part of it until 1955, which was less than 10 years before the

commencement of this action. At that time the defendants had a portion cleared and planted to crops. From this time on it may well be said that the defendants took and asserted a right to the possession of the land. From this time on there was actual, continuous, notorious, and adverse possession.

Even then there was no overt assertion of ownership until after the plaintiff had taken action to resist the rights claimed by the defendants. The record discloses that the defendants never, prior to that time, asserted to anyone ownership. Otto H. Beermann discussed the matter with his wife but no one else.

The evidence adduced is insufficient upon which to base a finding that the defendants had and held in the nature to which it was adapted actual, continuous, notorious, and adverse possession under claim of ownership for 10 years the land involved in this action. The defendants were therefore not entitled to have judgment quieting title in them.

The judgment of the district court is therefore reversed and the cause remanded with directions to render judgment quieting title in the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

CHARLES R. KELLY, APPELLEE, V. PETER KIEWIT SONS COMPANY, A CORPORATION, APPELLEE, IMPLEADED WITH STATE OF NEBRASKA, APPELLANT.

122 N. W. 2d 501

Filed July 12, 1963. No. 35447.

1. **Workmen's Compensation.** In order to receive workmen's compensation from the Second Injury Fund a claimant must in fact have a permanent total disability.
2. ———. A workman who is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted, except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellant.

Joseph P. Cashen and Kennedy, Holland, DeLacy & Svoboda, for appellee Kelly.

Stoehr, Rickerson, Sodoro & Caporale, for appellee Peter Kiewit Sons Co.

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

BOSLAUGH, J.

This is a proceeding under the Workmen's Compensation Act brought by Charles R. Kelly, the plaintiff, against the defendants, Peter Kiewit Sons Company and the State of Nebraska.

The plaintiff was injured as the result of an accident arising out of and in the course of his employment on October 7, 1958, while employed as a construction laborer by Peter Kiewit Sons Company. The plaintiff claims that the disability resulting from this injury combined with a previous disability, which was caused other than by disease, has resulted in permanent total disability. The plaintiff claims that he is entitled to receive compensation from both his employer and the Second Injury Fund.

The compensation court found that the plaintiff was entitled to receive compensation from the employer for temporary total disability, medical and hospital expense, and for a 15 percent permanent partial disability of the right foot and entered an award to that effect but dismissed the action as to the State of Nebraska. The plaintiff waived rehearing before the compensation court and appealed directly to the district court.

The district court found that the plaintiff was entitled to receive compensation from the employer for tempo-

rary total disability, medical and hospital expenses, and for 15 percent permanent partial disability of the right foot, and compensation thereafter for permanent total disability from the Second Injury Fund. The motion for new trial of the State of Nebraska was overruled and it has appealed to this court.

The controversy here is between the plaintiff and the State of Nebraska. The issue is whether the plaintiff is entitled to receive compensation for permanent total disability out of the Second Injury Fund.

The Workmen's Compensation Act provides that if an employee receives an injury which of itself would cause only partial disability but which, combined with a previous disability other than one caused by disease, does in fact cause permanent total disability, the employer shall be liable only for the partial disability which would have resulted from the second injury in the absence of any preexisting disability, and for the additional disability the employee shall be compensated out of a special fund created for that purpose and known as the "Second Injury Fund." § 48-128, R. R. S. 1943. In order to receive workmen's compensation from the Second Injury Fund a claimant must in fact have a permanent total disability. Franzen v. Blakley, 155 Neb. 621, 52 N. W. 2d 833.

The plaintiff is 60 years of age. When the plaintiff was about 12 years old he injured his right knee in a noncompensable accident. In this accident a darning needle entered his right knee and the joint became infected. A fragment of the needle was removed from the plaintiff's left hip in 1928. As a result of this accident and injury and the complications which followed, the plaintiff eventually developed a stiff right knee and a stiff left hip.

The disability resulting from the stiff right knee is approximately 50 percent. The disability resulting from the stiff left hip is between 60 and 70 percent. The stiff hip results in an added strain being placed on the back.

The two injuries complement each other and together produce a greater disability than either injury would produce by itself.

At the time the accident occurred on October 7, 1958, the plaintiff was working as a laborer on a construction project. He was then able to do heavy common labor and had done similar work for many years. The construction superintendent under whose supervision the plaintiff had been working testified that the plaintiff was steady, reliable, and a good employee; that the plaintiff walked with a limp; that the superintendent was careful in assigning work to the plaintiff; and that the plaintiff worked as a mortar mixer most of the time.

The accident occurred while the plaintiff was helping to load a culvert pipe on a flat-bed truck. The pipe fell from the truck and struck the plaintiff's right leg. The plaintiff was knocked to the ground and his right leg was broken between the knee and the ankle.

The plaintiff sustained a comminuted fracture of the right tibia and fibula in about the middle third. The fracture was approximately 9½ inches below the knee and 6 inches above the ankle joint. There was also an injury to the soft tissue at the site of the fracture. A closed reduction was performed on the day following the accident and a cast applied. The fracture healed slowly. The leg was in a cast for about 9 months. On October 12, 1959, the physician who had been treating the plaintiff advised him that he could return to work.

The fracture of the tibia or shin bone healed with a posterior angulation of 4 or 5 degrees. The bone is not in perfect alignment but is bent to the rear at the point where the fracture occurred. The treating physician considered this to be the principal factor in the permanent partial disability resulting from the accident and injury on October 7, 1958. The plaintiff does not have the same ability to step off and it interferes with his balance.

There is evidence that there is an interference or

alteration in the circulation in the right leg. The plaintiff complains of a loss of sensation in the leg, a feeling of numbness or that the leg is asleep. The plaintiff testified that his leg is weak and that he is unable to stand on it for more than 10 minutes at a time. Before the accident the plaintiff was able to do heavy lifting but now he is unable to lift anything from the floor. The plaintiff has been able to do only light work around his home.

The plaintiff has about a fourth grade education. He is unfitted to perform any work other than common labor.

The evidence as a whole, including motion pictures of the plaintiff, establishes that the plaintiff is permanently totally disabled within the meaning of the Workmen's Compensation Act. A workman who is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted, except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act. Thinnes v. Kearney Packing Co., 173 Neb. 123, 112 N. W. 2d 732.

The plaintiff was able to do heavy labor before the accident on October 7, 1958. Even though the plaintiff had a stiff knee on one side and a stiff hip on the other side as a result of the noncompensable accident, he managed to do heavy work. The disability resulting from the accident of October 7, 1958, has combined with the previous disability to produce permanent total disability.

The employer is liable only for the partial disability which would have resulted from the accident of October 7, 1958, in the absence of the preexisting disability. The plaintiff is entitled to receive compensation for the additional disability from the Second Injury Fund.

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

AFFIRMED.

CITY OF GERING, A MUNICIPAL CORPORATION, APPELLANT, V. H. O. JONES ET AL., APPELLEES.

122 N. W. 2d 503

Filed July 12, 1963. No. 35482.

1. **Deeds.** In construing a deed it will be presumed that the grantor intended the deed to be a consistent whole, and if it can reasonably be done, the court will harmonize ambiguous expressions with the plain provisions of the deed to effectuate the grantor's intent.
2. ———. An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a less interest is effectively manifested.
3. **Deeds: Trusts.** Where property is conveyed directly to a municipal corporation to hold for purposes for which the corporation was created, no trust for the benefit of others arises, unless such intent can be found to be effectively manifested by apt and appropriate language creating a trust in the property.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded with directions.

Willard F. McGriff and Neighbors, Danielson & Van Steenberg, for appellant.

Wright, Simmons & Hancock, for appellee Jones.

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

WHITE, C. J.

This is an action to construe a deed from Julia Huffman to the City of Gering, Nebraska, under the provisions of section 25-21,150, R. R. S. 1943.

The sole question involved is whether or not the City of Gering, Nebraska, has the power to sell and convey a fee simple title absolute to certain lots which had theretofore been conveyed to the city, "for the use and benefit of the Citizens of the said City of Gering, Nebraska."

The provisions of the warranty deed, executed by

Julia Huffman on March 5, 1927, for a consideration of $2,500 to the city, insofar as pertinent here are set out as follows.

The granting recital is:

"* * * in hand paid do hereby grant, bargain, sell, convey and confirm unto The City of Gering of the County of Scotts Bluff and State of Nebraska the following described real estate * * *."

The description recital is:

"* * * the following described real estate situated in Gering in Scotts Bluff County and State of Nebraska to-wit: Lots 1, 2, 3, 4, 5, 6, 16, 17 and 18 of Huffmans Subdivision of Block Twenty-one (21), Gardners Addition to the City of Gering. *Said property to be used for the use and benefit of the Citizens of the said City of Gering, Nebraska.*" (Emphasis supplied.)

The habendum clause of the deed is:

"TO HAVE AND TO HOLD the premises above described, together with all the Tenements, Hereditaments and appurtenances thereunto belonging, unto the said City of Gering *forever*. And I do hereby covenant with the said Grantee that I am lawfully seized of said premises; that they are free from encumbrance that I have good right and lawful authority to sell the same; and I do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever." (Emphasis supplied.)

The trial court found that the deed conveyed the real estate to the City of Gering as trustee for the use and benefit of the citizens of said city and that the city now owns the property as a trustee of a charitable trust and is without authority to sell, alienate, or convey the fee title to the premises. The plaintiff appeals.

What is the proper interpretation of the words in the description recital, "to be used for the use and benefit of the Citizens of the said City of Gering, Nebraska."

As pointed out later in this opinion, we see no inconsistency or ambiguity in these successive clauses in the

deed. However, in construing a deed the court will presume the grantor intended the deed to be a consistent whole, and if it can reasonably be done, the court will harmonize ambiguous expressions with the plain provisions of the deed to effectuate the grantor's intent. Arthur v. Arthur, 115 Neb. 781, 215 N. W. 117; In re Estate of Hart, 137 Neb. 843, 291 N. W. 502; Marsh v. Marsh, 92 Neb. 189, 137 N. W. 1122.

Section 76-104, R. R. S. 1943, provides as follows: "An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a less interest is *effectively manifested.* No words of inheritance or other special words are necessary to transfer a fee simple." (Emphasis supplied.)

The granting clause in this deed is without limitation. The habendum clause also is without limitation, and the courts have construed the use of the word "forever" (habendum clause) in like situations to import the creation of an absolute or fee simple estate. 36A C. J. S., Forever, p. 1098; In re Estate of Lewis, 248 Iowa 227, 80 N. W. 2d 347.

Ordinarily in the event of repugnancy and inconsistency between the grant, habendum, and description clauses of the deed, the granting clause will prevail. Clark v. Continental National Bank, 88 F. Supp. 324; Annotation, 84 A. L. R. 1054 and 58 A. L. R. 2d 1374. See, also, 16 Am. Jur., Deeds, § 232, p. 566, notes 13, 16, and 17, citing A. L. R. and L. R. A. annotations.

But, these rules of construction, although sufficient to decide this case, do not reach the deeper question of whether there really is a repugnancy or ambiguity in this deed. Is there a repugnancy from the use of these words in a clause attached to the recital of description in the deed? We think not. This language did not create a charitable trust as the trial court found. We note the following factors gathered from the language of the whole instrument:

1. The property was conveyed to the City of Gering with directions that it was to be used for the very purpose for which the municipality was created, namely, for the use and benefit of the citizens of the City of Gering.

2. The deed was for a substantial consideration, $2,500.

3. There is no reverter clause, language of special limitation on the use of the property itself, or directions to a designated trustee.

We feel that the language in question here is no more than a declaration as to the powers and restrictions that already are imposed by law on the City of Gering.

The intention to transfer a lesser interest than the fee, in the light of these inferences from the language of the instrument itself, cannot be found to be effectively manifested.

In Clarke v. Sisters of Society of the Holy Child Jesus, 82 Neb. 85, 117 N. W. 107, the grant was as follows: "One of the conditions upon which this property is conveyed is that the grantee herein hereby agrees to teach the parochial school children (whose parents are known to be unable to pay) free of charge, and *if the grantee herein should fail to use the said property for convent school purposes, or refuse to teach the parochial school children as agreed above, or shall divert said property to any other use,* then the said property herein conveyed shall revert to and be the property of the grantor, if living, and, if dead, to his heirs." (Emphasis supplied.)

In construing this deed, the court found that the general purposes of the Society were for the same purposes for which the deed was conveyed and said: "The general rule appears to be that, where property is conveyed directly to a corporation to hold for purposes for which the corporation was created, no trust for the benefit of others arises. There are no apt words in the deed to create a trust, or making the grantee a trustee

of the property. On the contrary, it is evidence that the grantor intended to vest the legal title absolutely in the corporation for use in its corporate business, subject to the conditions named. * * * *The property was to be owned absolutely by the society and used for promoting the very purpose for which it was organized. We are unable to see any legal principle upon which a charitable trust in this property can be established,* and, if no trust was created by the deed of conveyance, the plaintiffs in this action have no interest to protect, and no interest which qualifies them to maintain the action." (Emphasis supplied.)

In Society of the Home for the Friendless v. State, 58 Neb. 447, 78 N. W. 726, the grant was: "The State of Nebraska for the use and benefit of the home for the friendless in the State of Nebraska." In holding that no trust was created, the court said: "We are not warranted in holding that the language quoted from the deed was intended to create a trust, * * * the purpose of the language was to describe the *use to which the property should be devoted, and not to create a trust.*" (Emphasis supplied.)

The appellees' contention is based on cases where the declaration of the grant dedicated the property for specific use, such as a park and for no other purpose, Abel v. Girard Trust Co., 365 Pa. 34, 73 A. 2d 682; or, land dedicated "for the use of schools," Special School Dist. No. 5 v. State, 139 Ark. 263, 213 S. W. 961; and other dedications of land to a municipality specifically for the creation of parks or public squares, Massey v. City of Bowling Green, 206 Ky. 692, 268 S. W. 348; Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal. App. 615, 227 P. 649. These cases are distinguishable not only because of the impact of the precise language used in the grants declaring a trust, but also because a declared use of the property itself was impressed and imposed by the charitable donor. The appellees do not discuss or distinguish Clarke v. Sisters of Society of the Holy Child Jesus,

supra, and Society of the Home for the Friendless v. State, *supra,* cited by the appellant and quoted from in this opinion.

We hold that there was no repugnancy in the different clauses of this deed, that the City of Gering received title in fee simple absolute, and that there is no impediment to alienation. The judgment of the trial court is reversed and the cause remanded with directions to enter a judgment in conformity with the opinion herein.

REVERSED AND REMANDED WITH DIRECTIONS.

GENERAL MOTORS ACCEPTANCE CORPORATION, A CORPORATION, APPELLEE, V. DONALD E. MACKRILL, APPELLANT.

122 N. W. 2d 742

Filed July 16, 1963. No. 35438.

1. **Sales: Usury.** In considering whether a transaction is a time sale made in good faith or a loan, the court will look through the form and examine its substance.
2. **Sales.** 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.
3. **Interest: Usury.** Regardless of the term used, if the result is a charge for the loan of money or for forbearance of a debt the result is interest.
4. ———: ———. Disguise it by any name we will, it is and remains interest. We are concerned not with the form but the intent of the transaction.
5. ———: ———. The permissive provisions of the Installment Loan Act will not apply to a nonlicensee, but a nonlicensee will be bound by the inhibitory provisions of the act.
6. **Sales: Usury.** The fact that a purchaser has full knowledge of and accepts the terms of a proferred sale is not a defense to a charge of usury.
7. ———: ———. The lender is the violator of the law and against him alone are its penalties enacted.
8. ———: ———. The contract herein is in violation of the Installment Loan Act and is void and uncollectible.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded with directions.

Bertrand V. Tibbels, for appellant.

Wright, Simmons & Hancock, for appellee.

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

SPENCER, J.

This is a replevin action in which General Motors Acceptance Corporation, hereinafter referred to as plaintiff, alleges it has a special interest in a 1960 Chevrolet sedan pickup Biscayne by reason of being the assignee of a conditional sale contract entered into between Kizzier Chevrolet Company, a corporation, hereinafter referred to as Kizzier, and Donald E. Mackrill, hereinafter referred to as defendant. Defendant appeals from the overruling of a motion for a new trial after a judgment for the plaintiff for possession and costs.

On December 9, 1961, defendant purchased the car in question from Kizzier and signed what is designated as a conditional sale contract, obligating himself to pay a balance of $1,573.76. The financial part of the transaction is described in the conditional sale contract as follows: "Undersigned seller hereby sells, and undersigned buyer or buyers, jointly and severally hereby purchase (s), subject to the terms and conditions set forth below and upon the reverse side hereof, the following property, delivery and acceptance of which in good order are hereby acknowledged by buyer, viz.:

New or Used	Year Model	No. Cyl.	Make Trade Name	Body Type If Truck, Give Tonnage	Model Number or Series	Manufacturer's Serial No.	Motor No.
used	1960	8	Chevrolet	sedan pickup	Biscayne	012 80S 134 161	none

For a TOTAL TIME SALE PRICE computed as follows:
1. *CASH SALE PRICE (Including the

	itemized costs designated below)	$1895.00(1)
2.	TOTAL DOWN PAYMENT under instalment sale - Consisting of $645.00 plus $ none (Net Trade-in) (Cash)	$ 645.00(2)
	DESCRIPTION OF TRADE-IN Make Chevrolet Model Bel Air Year 1956	
3.	DIFFERENCE BETWEEN ITEMS 1 AND 2	$1250.00(3)
4a.	COST OF REQUIRED CAR INSURANCE. (Include this item, if buyer has authorized seller to apply for the insurance)	$ 80.00(4a)
4b.	COST OF CREDITOR INSURANCE ON LIFE OF BUYER (Exclude this item if buyer does not authorize such insurance)	$ 9.60(4b)
4c.	————————————	$ none (4c)
5.	BASIC TIME PRICE (PRINCIPAL BALANCE) (Add items 3, 4a, 4b and 4c)	$1339.60(5)
6.	TIME PRICE DIFFERENTIAL	$ 234.16(6)
7.	TIME PRICE BALANCE (Add items 5 and 6)	$1573.76(7)
8.	TOTAL TIME SALE PRICE (Add items 2 and 7)	$2218.76(8)

The Time Price Balance is payable at the seller's office designated below or at such office of any assignee as may be hereafter designated in 24 instalments of ———————— $ as listed each commencing Jan. 10, 1962, and on the same day of each successive month thereafter, or as indicated in space below. The final instalment shall equal the amount of time price balance

remaining due. 1 @ 200.00 on Jan 10, 1962 and 23 @ 59.72."

Defendant was allowed $845 for his old car, received $200 of the amount in cash, and was given credit for $645. There is a dispute between the parties as to whether this $200 was a loan or was advanced by Kizzier on the old car for the purpose of paying off an encumbrance of some type on the car. For the purpose of a decision herein, that point is immaterial and will not be discussed.

Subsequent to December 9, 1961, the salesman for Kizzier advised defendant that he had used a wrong rate for computing the insurance premiums in the contract and that the contract would have to be changed to include an additional $9. On January 13, 1962, defendant signed a new contract which is the contract involved in this action. The contracts are on the same form and are exactly the same except for the changes in the amounts inserted in the contracts. The itemization of the description of the transaction in the January 13, 1962, contract is as follows:

"For a TOTAL TIME SALE PRICE computed as follows:

1.	*CASH SALE PRICE (Including the itemized costs designated below)	$1895.00(1)
2.	TOTAL DOWN PAYMENT under instalment sale - Consisting of $645.00 plus $ none (Net Trade-In) (Cash)	$ 645.00(2)
	DESCRIPTION OF TRADE-IN Make Chevrolet Model Bel Air Year 1956	
3.	DIFFERENCE BETWEEN ITEMS 1 AND 2	$1250.00(3)
4a.	COST OF REQUIRED CAR INSURANCE (Include this item, if buyer has authorized seller to apply for the	

	insurance)	$ 89.00(4a)
4b.	COST OF CREDITOR INSURANCE ON LIFE OF BUYER (Exclude this item if buyer does not authorize such insurance)	$ 10.47(4b)
4c.	_____	$ none (4c)
5.	BASIC TIME PRICE (PRINCIPAL BALANCE) (Add items 3, 4a, 4b and 4c)	$1349.47(5)
6.	TIME PRICE DIFFERENTIAL	$ 231.22(6)
7.	TIME PRICE BALANCE (Add items 5 and 6)	$1580.69(7)
8.	TOTAL TIME SALE PRICE (Add items 2 and 7)	$2225.69(8)

The Time Price Balance is payable at the seller's office designated below or at such office of any assignee as may be hereafter designated in 24 instalments of . . . . . $ as listed each, commencing Jan. 10 1962, and on the same day of each successive month thereafter, or as indicated in space below. The final instalment shall equal the amount of time price balance remaining due. 1 @ 200.00 on Jan. 10, 1962; and 23 @ 60.03."

Defendant sets out eight assignments of error. The pertinent ones may be summed up in the contention that the transaction evidences an installment loan at usurious rates. It is the plaintiff's contention that the transaction is a time price sale and not a loan transaction. Plaintiff contends further that, in any event, there is no time price differential which is in violation of the Installment Sales Act or the Installment Loan Act construed with the laws regulating the amount of interest which may be charged by a private person.

In Elder v. Doerr, *ante* p. 483, 122 N. W. 2d 528, we held the Nebraska Installment Sales Act to be unconstitutional. It will, therefore, not be necessary to discuss any of the provisions of that act with relation to this transaction. We are concerned with only two points.

Is the transaction a bona fide time sale? If not, is the contract usurious and void under the provisions of the Nebraska Installment Loan Act?

Is the transaction a valid time sale or what our cases have denominated as a loan in violation of the terms of the Installment Loan Act? In considering whether or not such a transaction is a time sale made in good faith or a loan, the court will look through the form and examine its substance. State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55. We have said many times 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 Wood v. Commonwealth Trailer Sales, Inc., 172 Neb. 494, 110 N. W. 2d 87.

This transaction on its face shows a cash sale price of $1,895, an allowance for the trade-in, and two additional charges for insurance. The total of $1,349.47 is shown to be the basic time price. The only apparent conclusion is that the amount of $1,349.47 is to be financed. There is then an item designated as time price differential of $231.22. Regardless of the term used, this item is a charge for the loan of money or for forbearance of a debt. Disguise it by any name or title we will, it is and remains interest. We are concerned not with the form but the intent of the transaction.

Dwayne Kizzier testified that the deal with the defendant was not accepted on the contract, but on the purchase order. To quote him, "* * * but the original deal is made on the purchase order and approved by the Sales Manager or myself."

The purchase order recites the following:

"Base price of unit	$1895.00
Tot. Credit	645.00
Sub-Total	1250.00
Insurance Mo 24 Ded 50	80.00
Life Ins.	9.60

Time Sales Charge Mo.	234.16
Total of above items	1573.76"

(Italics supplied.)

This merely emphasizes that an interest charge was made on the unpaid balance. There is no evidence in this case that the defendant was given a choice between a cash and a time sale price.

Kizzier was not licensed to make installment loans. Under our law, the permissive provisions of the Installment Loan Act will not apply to a nonlicensee, but a nonlicensee will be bound by the inhibitory provisions of the act. Curtis v. Securities Acceptance Corp., 166 Neb. 815, 91 N. W. 2d 19.

The highest legal rate which could be charged by a nonlicensee is 9 percent simple interest. The amount to be financed was $1,349.47. It was to be financed for a period of 24 months. Under the contract in this case, it was payable in installments, with the first payment of $200 due in 1 month, and with an installment payment of $60.03 due each month thereafter for 23 months, so that at the end of 24 months $1,580.69 would have been paid. This is $1,349.47 plus the time price charge of $231.22.

Is $231.22 in excess of 9 percent simple interest on this contract? If a 9 percent charge had been made on the full amount of $1,349.47 for the full period of 2 years, it would have only amounted to $242.90. The interest on the $200 payment for 23 months would be $34.50. The interest on the $60.03 installment due in February for 22 months would be $9.70, and each $60.03 installment would increase the interest rebate approximately 45 cents each month. It is readily apparent, therefore, that the charge was a usurious one, and the penalties of the Installment Loan Act are applicable. We determine that the interest charge of 9 percent simple interest on this contract, with a payment of $200 after 1 month and the balance in 23 equal installments, would be approximately

$107. This is considerably less than the $231.22 actually charged.

It is argued that the defendant had at times worked as a car salesman and fully understood the transaction. It could also be argued that the defendant was not in a position to accept a cash sale offer if one had been made, and that the very nature of the transaction indicated the sale would need to be a time price sale. The fact that a purchaser has full knowledge of and accepts the terms of the proffered sale is not a defense to a charge of usury. Nor is his inability to pay cash a matter for consideration on whether a purchaser was offered a choice between a cash and a time sale. The lender herein is the violator of the law, and against him alone are its penalties enacted. Elder v. Doerr, *supra.*

Inasmuch as the transaction is in violation of the provisions of the Installment Loan Act, the contract and any indebtedness due thereunder is void and uncollectible. § 45-155, R. R. S. 1943. The contract being void, the plaintiff was not entitled to succeed in the replevin action, and judgment should have been entered for the defendant.

For the reasons set out above, we reverse the judgment entered herein and remand the cause to the trial court with directions to set aside the judgment for the plaintiff and to enter a judgment for the defendant for possession, damages, and costs. If for any reason the vehicle cannot be returned to the possession of the defendant, then to determine the value thereof as of the date of replevin and to enter judgment for said amount, damages, and costs.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

I respectfully dissent from the holding of the majority in this case.

The purchase order referred to in the majority opinion contained all of the essential information concerning the transaction including the number and amount of

installment payments to be made. The defendant testified that he read the purchase order and that he understood it. The defendant also testified that at the time he signed the purchase order he received an invoice which stated the "total cash price" and "total time price" for the automobile.

This is a law action in which the findings of the court have the effect of a verdict of a jury. It is a question of fact as to whether the transaction was a time sale made in good faith or a loan made in violation of the Installment Loan Act. The burden of proof was on the defendant to establish that the transaction was a loan.

In my opinion the evidence is sufficient to sustain the judgment of the trial court and the judgment should have been affirmed.

I am authorized to state that Judge Brower concurs in this dissent.

PETER JACOBS, JR., ET AL., APPELLEES, V. ERWIN C. KORST, ALSO KNOWN AS E. C. KORST, APPELLANT.

122 N. W. 2d 760

Filed July 19, 1963. No. 35270.

1. **Vendor and Purchaser: Damages.** In an action for breach of a contract of purchase where the defects in a house may be remedied without materially injuring or reconstructing any substantial portion of the house, the measure of damages is the cost of repairs in making it conform with the terms of the contract.
2. ———: ———. Where such defects cannot be remedied without reconstruction of, or a material injury to, a substantial portion of the house, the measure of damages is the difference between its market value at the time of sale and its market value if it had been as warranted or represented.
3. **Damages: Appeal and Error.** Where a certain theory as to the measure of damages is relied upon by the parties in the trial court, it will be adhered to on appeal whether or not it is correct.

Appeal from the district court for Lancaster County: JOHN L. POLK, Judge. Affirmed.

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

Muffly & Snyder, for appellees.

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

CARTER, J.

This is an action at law to recover damages brought by Peter Jacobs, Jr., and Vinona Jacobs, husband and wife, plaintiffs, against Erwin C. Korst, also known as E. C. Korst, defendant, for breach of warranty arising out of an agreement entered into on May 22, 1959, between the plaintiffs and the defendant. The plaintiffs claimed damages in an amount equal to the cost of placing the house purchased by them in the same condition as was represented and warranted by the defendant. The case was tried to a jury, resulting in a verdict in favor of the plaintiffs in the amount of $1,725. Judgment was rendered on the verdict and the defendant appeals.

The evidence shows that plaintiffs entered into a written agreement with the defendant to purchase the house in question, and they have carried out their part of the agreement. They allege that defendant represented and warranted that he would "Stand behind All Workman Ship & Materials for 1 year from this Date." Plaintiffs allege that the quoted language was written into the contract of sale at the time of the closing of the sale of the house.

The house is of brick veneer construction, and at the time of entering into the contract plaintiffs testified that it appeared to be as represented and warranted. About 3 months after moving into the house plaintiffs discovered cracks in the bricks. The condition increased until 50 percent of the bricks had cracked. The bricks

were alleged to be of inferior quality and their replacement necessary to make the house as represented and warranted. In addition to the replacement of the bricks, there was painting, caulking, and carpentry work to be done, including the replacement of two doors.

The defendant admits selling the house to the plaintiffs but alleges that plaintiffs purchased the house after personal examination and not in reliance on anything defendant may have said or done. Defendant admits that the bricks used contained hairline cracks before they were used in the construction of the house, and contends that the cracks were apparent and should have been observed by plaintiffs. Defendant further contends that the cracks in the bricks in no way affect the livability, use, or value of the house and result in no damage to the premises.

The defendant was an experienced contractor and builder. According to his testimony he purchased the bricks containing hairline cracks for $55 per thousand, when bricks ordinarily used would cost $95 per thousand. He testified that he was required to use these bricks to meet competition in the immediate area. Defendant did not inform plaintiffs of the use of the cracked bricks, but asserts that Jacobs examined the construction carefully and knew or should have known of their use.

The evidence is sufficient to sustain the jury's finding that the house was not as represented or warranted. The evidence as to the cost of replacing the bricks and doing the other work testified to as being necessary is sufficient to sustain the verdict for $1,725. No contention is made that it does not.

The issue raised by this appeal is whether or not the jury was properly instructed on the measure of damages. The trial court instructed as follows on this point in instruction No. 6: "You are instructed that should you find for the plaintiffs under the evidence and the law as given you in these instructions, you will permit

them to recover the fair and reasonable cost of placing the house in substantially the same condition as it was represented and warranted to be in, if any, at the time the agreement was executed."

The trial court, contrary to an instruction requested by the defendant, refused to submit to the jury the question of whether or not the defects, if any, could be remedied with or without substantial reconstruction or material injury to the building. Defendant contends this was error.

The plaintiffs pleaded a breach of warranty and representations made in a contract for the sale of a residence property. They sought damages for the amount of money it would take to put the house in the condition in which it was represented and warranted. The measure of damages pleaded by plaintiffs was not objected to by motion. The defendant denied generally and alleged further that plaintiffs purchased the house after personal inspections thereof and that they knew or should have known of the alleged defects. Defendant denied that plaintiffs were in anywise damaged.

The state of the pleadings and the evidence adduced show that the case was tried on the measure of damages pleaded by the plaintiffs and submitted to the jury by the trial court. The defendant testified at one stage of the trial that the removal of the bricks would cause practically a full reconstruction of the house. No evidence was produced by either party as to the value of the house when it was sold and what its value would have been if it had been as represented.

After the case was tried on the theory of the plaintiffs and the measure of damages pleaded by them, the defendant offered an instruction requesting that the court submit the issue as to whether or not the house could be remedied with or without substantial reconstruction or material injury to the building.

We think the issue is controlled by a line of cases holding that when a case is tried on a certain theory as

to the measure of damages, it is proper for the trial court to instruct on that theory, although such measure of damages may not be the correct one. In Welch v. Reeves, 142 Neb. 171, 5 N. W. 2d 275, a case similar in principle, this court said: "Did plaintiffs' evidence sustain the damages recovered? The only evidence indicating the value of the property is the purchase price. There is no evidence fixing the actual value of the property at the time of the conveyance. That it had a material value is certain. Neither is there evidence as to its value had it been as represented. However, it must be noted that plaintiffs pleaded their case on the theory that their damages were the amount of the cost of placing the property in the condition in which it was represented to be. Defendants did not challenge the sufficiency of the petition by demurrer, but rather joined issue with the plaintiffs on that theory of arriving at the damages. * * * It has long been the rule of this court that, when a certain theory as to the measure of damages is relied upon by the parties in the trial court as the proper one, it will be adhered to on appeal whether it is correct or not." See, also, Haarberg v. Schneider, 174 Neb. 334, 117 N. W. 2d 796; Baum v. County of Scotts Bluff, 169 Neb. 816, 101 N. W. 2d 455.

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

AFFIRMED.

MESSMORE, J., dissenting.

I respectfully dissent from the majority opinion for the following reasons.

The defendant predicates error on the part of the trial court in failing to instruct the jury on his theory of the case, and in failing to submit to the jury as a question of fact whether the alleged defects could be corrected and whether the correction of such defects would result in material injury to or substantial reconstruction of the premises.

The defendant tendered an instruction on his theory

of the measure of damages he deemed applicable to this case under the evidence adduced.

The following are pertinent, relating to the measure of damages, whether it be a building contract or an agreement to purchase.

The measure of damages proper in a case of this nature is twofold, as pointed out in the case of Jones v. Elliott, 172 Neb. 96, 108 N. W. 2d 742, wherein this court said, quoting from Graham v. Anderson, 121 Neb. 733, 238 N. W. 362: " 'There is a generally accepted rule applicable to building contracts that, where defects in materials, construction or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the damage which the owner is entitled to recover is the expense of making the work conform to contractual requirements. See 23 A. L. R. 1436; 65 A. L. R. 1298. This rule has been recognized in Library Board v. Ohlsen, 110 Neb. 146. * * *

" 'There is, however, another generally accepted rule to the effect that, 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 the 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 contract.' "

The trial court, contrary to defendant's requested instruction No. 6, refused to submit to the jury the question of whether or not the defects, if any, could be remedied with or without substantial reconstruction or material injury to the building. This was a question for the jury to determine. If the jury determined as a matter of fact that the defects could be remedied without substantial injury to or material reconstruction of a substantial portion of the building, then the rule of damages first set forth in Jones v. Elliott, *supra,* would apply. If, on the other hand, the jury determined as a matter of fact that the defects alleged and proved were of such

nature that correction of them would result in material injury to or reconstruction of a subsantial portion of the building, then the second rule set forth in Jones v. Elliott, *supra,* would apply.

It is error for the court to give an instruction which assumes as established a disputed question of fact. It is for the jury alone to pass upon conflicting evidence. Willman v. Sandman, 101 Neb. 92, 162 N. W. 419. See, also, Howe v. Provident Loan & Investment Co., 130 Neb. 469, 265 N. W. 255.

In Springer v. Henthorn, 169 Neb. 578, 100 N. W. 2d 521, this court said: "A jury should be fully and fairly informed as to the various items of damages which it should take into consideration in arriving at its verdict. In this respect it is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item."

The failure of the trial court to permit the jury to make a determination as to which measure of damages should be invoked deprived the defendant of a fair trial and constituted reversible error. I would reverse the judgment of the trial court and remand the cause for a new trial.

I am authorized to state that Judge Yeager and Judge Brower concur in this dissent.

GEORGIANA M. ROSE, ADMINISTRATRIX OF THE ESTATE OF NELLIE M. HOOPER, DECEASED, APPELLANT, V. MONA K. HOOPER, EXECUTRIX UNDER THE WILL OF GEORGE M. HOOPER, DECEASED, ET AL., APPELLEES.

122 N. W. 2d 753

Filed July 19, 1963. No. 35411.

1. **Building and Loan Associations: Statutes.** Section 8-317, R. R. S. 1943, is intended for the protection of the building and loan association and, in addition thereto, fixes the property rights

of the persons named, unless a contrary intent affirmatively appears from the terms used in the stock certificate.

2. ———: ———. This provision of the statute is in derogation of the common law and eliminates all legal refinements and technicalities growing out of judicial precedents determining the nature of the transactions therein described since the adoption of the act.
3. **Descent and Distribution.** The Legislature has full power within constitutional limits to provide the manner of distribution of the estates of deceased persons and to define the method of creating the various types of estates in real and personal property. When such action is taken by clear and unambiguous language, this court is required to give effect thereto.
4. **Building and Loan Associations: Statutes.** Section 8-317, R. R. S. 1943, clearly and without ambiguity provides that whenever certificates in a building and loan association are made to the joint account of two or more persons the shares represented thereby shall be payable to any one of them.
5. **Statutes.** In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account in order to determine the legislative will.
6. **Building and Loan Associations: Joint Tenancy.** The withdrawal by one joint owner of funds represented by certificates in a building and loan association payable to the joint account of two or more persons destroys the character of the joint ownership in the funds so withdrawn and property purchased therewith regardless of the consent of the other joint owners to the withdrawal and even though the funds are reinvested by the drawer in property owned by him alone or with others.
7. **Joint Tenancy.** The case of Crowell v. Milligan, 157 Neb. 127, 59 N. W. 2d 346, insofar as it conflicts with this opinion, is hereby overruled.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Sidner, Lee, Gunderson & Svoboda, for appellant.

Spear, Lamme & Simmons and Earl C. Fishbaugh, Jr., for appellees.

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

BROWER, J.

This is an action in equity by the plaintiff Georgiana M. Rose, as administratrix of the estate of Nellie M. Hooper, deceased, to establish the right of said estate to $11,000 represented by paid-up certificates of stock in Nebraska State Savings and Loan Association, hereinafter called the Association. The defendants and appellees were said Association and Mona K. Hooper, executrix of the estate of George M. Hooper, deceased, and Mona K. Hooper, individually. The Association filed an answer by way of interpleader admitting it had the funds represented by said certificates, copies of which were attached to the answer; alleging it had no interest in the ownership thereof; and requesting the court to make a determination of the ownership of the money represented thereby. The matters in controversy therefore were between the plaintiff and the other defendants who will be designated as they were in the trial court throughout this opinion, except where it is necessary to name them.

A trial was had and at the close of plaintiff's evidence the defendants orally demurred to her evidence and moved that the petition be dismissed, which demurrer and motion were sustained by the trial court and judgment of dismissal was entered.

Plaintiff timely filed a motion for new trial which was overruled by the trial court, whereupon she has brought the matter to this court by appeal.

The plaintiff contends the trial court erred in sustaining said demurrer and motion, and that the judgment is contrary to the law and the evidence.

There is no substantial dispute concerning the facts involved herein. That the Association had the $11,000 and was holding the same for the estate of George M. Hooper was alleged in plaintiff's petition and admitted in the answer of defendants. John and Nellie M. Hooper were husband and wife. They lived at Ames, Dodge County, Nebraska. During the years 1950 to and in-

cluding 1956, they invested funds from time to time in the Association and received paid-up certificates in the aggregate sum of $11,000. The deposits were made by John Hooper. All the certificates were made payable either to John Hooper or Nellie M. Hooper, or the survivor of either, or in some cases to Nellie M. Hooper or John Hooper, or the survivor of either. Stock applications were made and filed in either instance, showing the accounts were jointly owned and that either of the payees could cash the same. Some of these were signed by both payees and some by John Hooper only. To what extent each owner contributed to the joint account does not appear though it is shown that Nellie M. Hooper had earnings of her own growing out of her employment as postmistress at Ames.

On April 24, 1957, John Hooper alone went to the Association's office at Fremont and surrendered all the certificates and signed withdrawal receipts therefor. A check in the sum of $11,000 was made out to John Hooper but was not endorsed by him. The following notation was made thereon "Credited to the account of John Hooper or George Hooper, Cert. #36743 & #36744." The investment or paid-up account of the Association was introduced in evidence which shows the issuance of the two certificates so numbered. The account was in the name of John Hooper or George M. Hooper or the survivor of either. The head bookkeeper testified the certificates so payable were issued, No. 36743 being for $10,000, and No. 36744 in the amount of $1,000. The account discloses that a certificate had previously been issued to them as payees with the same designation, it being No. 35768.

George M. Hooper was the son of John Hooper and Nellie M. Hooper, and their only child.

On February 7, 1959, John Hooper died leaving as his only heirs at law, his widow, Nellie M. Hooper, and his son George M. Hooper. He left a will leaving his wife a life estate in all his property and the remainder to his

son George M. Hooper. His son was named and appointed executor. The inventory and appraisement therein disclosed his estate to be valued at $42,130. It did not include the $11,000 in certificates.

On February 10, 1959, George Hooper was appointed conservator of Nellie Hooper.

On August 8, 1960, George M. Hooper died and the defendant Mona K. Hooper, executrix, was appointed as such under his will and as such claims an interest in the certificates.

On October 28, 1960, Nellie M. Hooper died and thereafter the plaintiff Georgiana Rose, who is her sister, was appointed administratrix of her estate. She is the plaintiff in this action.

Semiannual dividends were paid by checks on the $11,000 joint account represented by the certificates issued in the name of John Hooper or George M. Hooper or the survivor on or about the last of June and December of each year up to and including 1961. It was stipulated that the 1962 dividends would abide the determination of this action.

All dividend checks in the years 1957 and 1958 were payable to John Hooper or George Hooper and endorsed by John Hooper. Those of June 1959 were payable to George M. Hooper and were endorsed Geo. M. Hooper, John Hooper estate by Geo. M. Hooper, executor. In December 1959, they were payable as in June and endorsed Geo. M. Hooper, executor. Those of June 1960 were endorsed Geo. M. Hooper, conservator for Nellie M. Hooper. All subsequent checks were made payable to the George M. Hooper estate and were endorsed by Mona K. Hooper, executrix.

The evidence in the case fails completely to throw any light on whether or not Nellie M. Hooper knew of the withdrawal of the funds by her husband or whether she approved or disapproved of John Hooper reinvesting the proceeds of the account represented by the certificates in the joint names of himself and the only son

of the two joint owners. Nor is anything shown as to what transpired between John Hooper or George M. Hooper, or George and his mother in regard thereto. There are allegations in the plaintiff's petition by which fraud is attempted to be attributed to George M. Hooper, but the evidence is completely devoid of proof of fraud. It was alleged Nellie M. Hooper was incompetent at the time of the change of ownership of the certificates but no evidence of her incompetency was offered.

Section 8-317, R. R. S. 1943, governing certificates in building and loan associations, provides in part as follows: "Whenever any such certificates are made to the joint account of two or more persons, the shares represented thereby shall be payable to any one of them or to the survivor or to any one of the survivors of them."

In discussing this statute this court in Tobas v. Mutual Building & Loan Assn., 147 Neb. 676, 24 N. W. 2d 870, laid down these rules: "The words, 'Whenever any such certificates are made to the joint account of two or more persons, the account represented thereby shall be payable to the survivor,' contained in section 8-317, R. S. 1943, is intended for the protection of the building and loan association and, in addition thereto, fixes the property rights of the persons named, unless a contrary intent affirmatively appears from the terms used in the stock certificate.

"This provision of the statute is in derogation of the common law and eliminates all legal refinements and technicalities growing out of judicial precedents determining the nature of the transactions therein described since the adoption of the act.

"The Legislature has full power within constitutional limits to provide the manner of distribution of the estates of deceased persons and to define the method of creating the various types of estates in real and personal property. When such action is taken by clear and unambiguous language, this court is required to give effect thereto."

In the discussion in that case the opinion calls attention to the confusion, contradictions, and perplexing distinctions in the judicial precedents that had existed before the passage of this statute. Thereafter in the cited case the court says: "It seems to us that the Legislature has said when a building and loan association stock certificate is made to the joint account of two or more persons, that irrespective of previous judicial pronouncements concerning consideration, gifts, trusts, testamentary dispositions, and the multitude of other legal propositions contained in former cases on the subject, where one of the payees dies, the survivor or survivors are entitled to the full title thereto as a matter of statutory law. In other words, by causing the stock certificate to be issued in the form mentioned in the statute, the result therein set forth ipso facto obtains. If any other result is intended, the purchaser must manifest that intent by the language used." The cited case refers to the prior cases of McConnell v. McCook Nat. Bank, 142 Neb. 451, 6 N. W. 2d 599, and In re Estate of Johnson, 116 Neb. 686, 218 N. W. 739, which construed a similar provision applicable to deposits in banks, section 8-167, R. R. S. 1943, where that statute was construed in a similar manner.

The case of Tobas v. Mutual Building & Loan Assn., *supra,* involved the collection from the building and loan association of jointly owned certificates by the surviving joint owner. The several cases cited concerning joint bank accounts were deciding the same question. In the case now under consideration the original certificates payable to John Hooper or Nellie M. Hooper, or survivor, had all been cashed by John and converted into certificates payable to John Hooper or George M. Hooper or survivor in the lifetime of Nellie M. Hooper.

The case before us therefore relates to effect of the withdrawal of the account by one of two joint owners in the lifetime of them both and the reinvestment by the

drawer in property in which the other owner retains no interest.

We are cited to a very few cases decided by this court which purport to throw any light upon this problem. In Crowell v. Milligan, 157 Neb. 127, 59 N. W. 2d 346, this court discussed section 8-167, R. R. S. 1943, governing joint accounts in banks and apparently laid down these rules: "One of two joint owners of money, deposited in a joint account payable to either or the survivor, cannot divest the survivorship right in the jointly owned account by withdrawing the money and depositing it in his individual account, without the knowledge and consent of the other.

"Where one joint tenant without consent withdraws the whole or part of the fund of a joint bank account during the life of both tenants the joint tenancy is not destroyed, the proceeds retain the joint tenancy character wherever they can be traced unless the character is changed by agreement of the parties and the deprived tenant can exercise his right of survivorship as to the entire fund which has retained the joint tenancy character." A reading of the cited case however shows that it involved neither joint accounts in banks nor building and loan stock. The case dealt in part with certificates for elevator stock and in mortgage bonds which obviously are not governed by either section 8-167 or 8-317, R. R. S. 1943. It also involved a credit account on the books of an elevator originally in the name of Milligan. This account had been changed by the order of the decedent Milligan on the books of the elevator, into a joint account payable to Milligan and another as joint owners with rights of survivorship. Thereafter Milligan gave directions to withdraw the money from the elevator and place it in the bank account payable to Crowell, the president of the elevator as trustee, to be paid out upon Milligan's order only. Therefore, a joint account in a bank was never involved in the cited case. It ap-

pears therefore to have been decided on general legal principles and not on the statute cited.

The case of Whiteside v. Whiteside, 159 Neb. 362, 67 N. W. 2d 141, was one where a husband drew money from a joint bank account in the names of himself and wife, and the survivor as joint owners. With the proceeds withdrawn he bought cattle which were branded as his own and other property taken in his own name. This court there found the wife had full knowledge of the husband's actions and had no interest in the property so purchased.

In Nelson v. Rasmussen, 164 Neb. 274, 82 N. W. 2d 418, this court found fraud exercised by a son on his mother by which he had her sign a statement making him a joint owner with right of survivorship as to her bank account when she supposed she was signing an authorization for him to draw checks thereon in her lifetime. The court said in such a situation a resulting trust arose and the son was a constructive trustee of the account for the benefit of his mother's estate after her death. The decision in the cited case turned on the creation of the joint account and the fraud of the one joint owner at its inception.

The plaintiff in the case before us contends that the rules hitherto quoted in Crowell v. Milligan, *supra,* are applicable herein. The cited case is discussed both by the plaintiff and defendants. Moreover, plaintiff urges other rules to be adopted by us based on presumptions and holdings with respect to the burden of proof in such cases taken largely from decisions by courts of other jurisdictions. Some of these were based on the common law in the absence of similar statutes such as our own, or from states where similar statutory provisions had been construed to relate to the liability of the bank or building and loan association only and not to involve a law of property applicable to the depositors as well. Plaintiff also urges that certain endorsements on some

of the interest checks hitherto set out raise inferences favorable to her.

The defendants in turn confront us with other presumptions of law and rules concerning the burden of the proof urged as applicable to the present case under the issues raised by the pleadings. They maintain these are favorable to them and controlling herein.

Both section 8-317, R. R. S. 1943, concerning jointly owned certificates in building and loan company shares, and section 8-167, R. R. S. 1943, governing such accounts in banks, have hitherto been repeatedly construed by this court to be a rule of property governing the rights of the depositors.

Section 8-317, R. R. S. 1943, clearly and without ambiguity, provides that whenever certificates in a building and loan association are made to the joint account of two or more persons the "shares represented thereby shall be payable to any one of them."

" 'In the constructon of a statute, effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will.' " Pierce Co. v. Century Indemnity Co., 136 Neb. 78, 285 N. W. 91. The statute is clear and free from ambiguity, and concisely states that either owner of the certificates can withdraw the account. We see no reason to apply it as a rule of property in case of withdrawal by a surviving joint owner and refuse to give a literal interpretation to the statute in the case of a withdrawal made by any such owner in the lifetime of them both.

Under the interpretation of this court holding that section 8-317, R. R. S. 1943, determines and governs the property rights of the joint owners, it follows that the withdrawal by one joint owner of funds represented by certificates in a building and loan association payable to

the joint account of two or more persons destroys the character of the joint ownership in the funds so withdrawn and property purchased therewith regardless of the consent of the other joint owners to the withdrawal and even though the funds are reinvested by the drawer in property owned by him alone or with others.

The plaintiff herein contends such a rule will be the means of fraud and deceit on the part of such joint owners among themselves; that in many instances joint owners in such cases will be deprived of their property and life savings by action of the other owner; and that in certain instances this might follow cannot be denied, but the statute clearly provides that in such cases either joint owner may withdraw the funds. Persons are charged with knowledge of the statute. The depositors or investors choose their associates when they create such accounts and should bear the responsibility arising from their choice. Moreover, in many cases such as the situation now considered by us, the determination of the property rights by application of technical rules governing gifts, trusts, and presumptions arising from such cases would do little to establish the real intention of the joint owners and would in many cases thwart their real intent to as great an extent as the action of the owners under the statute. It is conceded by both plaintiff and defendants in the present case that it is not known whether Nellie M. Hooper knew of the withdrawal of the funds from the joint account by her husband. Neither is it known whether she approved of the change of the account if she knew of it, or whether she disapproved. It seems that the statute was intended to fix the property rights of the joint owners in such cases and that the Legislature by enacting section 8-317, R. R. S. 1943, intended so to do as hitherto determined by this court in Tobas v. Mutual Building & Loan Assn., *supra.*

Our decision in this case does not agree with the citations of law herein quoted from Crowell v. Milligan,

supra, if they were meant to apply to joint certificates in building and loan associations or joint bank accounts. Therefore, the case of Crowell v. Milligan, *supra,* insofar as it conflicts with this opinion, is hereby overruled.

It follows that the judgment of the trial court holding the accounts represented by the certificates payable to John Hooper or George M. Hooper became the property of the latter on the death of the other joint owner and are now a part of the estate of the survivor, George M. Hooper, was correct and should be and is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

LOUIS WEINER, APPELLANT, V. PAUL MORGAN ET AL., APPELLEES.

122 N. W. 2d 871

Filed July 19, 1963. No. 35475.

1. **Pleading.** 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 it does not admit the pleader's conclusions either of law or of fact.
2. **Judgments: Evidence.** As a general rule, while the court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case; however, there are instances where cases may be so closely interwoven, or so clearly interdependent, as to permit a rule of judicial notice in one suit of the proceedings in another, and, in such an instance, the court will take notice of its records to the extent of ascertaining that the controversy involved in an appeal has already been considered by it on a previous occasion.
3. **Pleading.** By section 25-854, R. R. S. 1943, it is provided that if a demurrer is sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct.
4. ———. Section 25-856, R. R. S. 1943, provides that either party to an action may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer, or reply alleging facts material to the case,

occurring after the former petition, answer, or reply.

5. ———. The right to amend under the terms of these provisions of statute is not absolute, and before error can be predicated upon the refusal of the court to permit an amendment to a petition, after demurrer thereto is sustained, the record must show that under the circumstances the ruling was an abuse of discretion.

6. **Pleading: Appeal and Error.** In a case where a demurrer to a petition is sustained, the plaintiff's action is dismissed, and a motion for a new trial and rehearing is filed and ruled upon, the time for appeal begins to run from the date of the ruling on the motion for a new trial and rehearing.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Alfred A. Fiedler, for appellant.

Edward Shafton, Bernard E. Vinardi, Gross, Welch, Vinardi, Kauffman, Schatz & MacKenzie, Morsman, Maxwell, Fike & Sawtell, Wells, Martin, Lane, Baird & Pedersen, and Alexander McKie, Jr., for appellees.

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

YEAGER, J.

This is an action by Louis Weiner, plaintiff and appellant, against Paul Morgan; Bernard E. Vinardi; First National Bank of Omaha, a corporation; Omaha National Bank, a corporation; First West Side Bank, a corporation; and United States National Bank, a corporation, defendants and appellees. It comes to this court on appeal by the plaintiff from an order of the district court sustaining demurrers by the defendants Morgan and Vinardi to a petition filed by the plaintiff, a judgment of dismissal of the action, and the overruling of a motion for new trial by the plaintiff. There were pleadings by the other named parties and rulings thereon, but these do not require mention herein since their rights and liabilities are subordinate to and dependent upon the ruling on the demurrers of Morgan and Vinardi.

Prior to the filing of the demurrers motions for summary judgment were filed by the defendants Morgan and Vinardi, but they are of no concern on this appeal.

By the petition filed herein it was alleged that on April 7, 1961, the district court for Douglas County, Nebraska, in an action pending in that court by Paul Morgan against Louis Weiner, entered a default judgment against Weiner for $12,430.84, which judgment was affirmed by this court on April 27, 1962. The action in the district court, as was also true in this court, was identified only by the docket number. The issue or issues presented for consideration and determination there have not been recited in the petition herein and neither have they been made a part thereof by reference.

It is pointed out that in the petition herein there is no declaration that Paul Morgan was not entitled to a default judgment in that case.

The true gist of the petition here is that there was an action by Paul Morgan against Louis Weiner for money growing out of an employment agreement, wherein the amount of recovery was in dispute; that Weiner being in default, a default judgment was entered and Morgan adduced evidence to prove the amount which he was entitled to recover; that the court determined that he was entitled to recover $12,430.84; that Paul Morgan, who is a defendant here, and Bernard E. Vinardi, who was attorney in that case and is a defendant in the case here, well knowing that Paul Morgan was not entitled to the amount of the judgment rendered, to sustain the recovery, knowingly used false, fraudulent, and deceitful testimony; and that Weiner had no knowledge of this false testimony until it was written for the bill of exceptions. The petition does not so state but the reference is obviously to the preparation of the bill of exceptions in the appeal from the default judgment.

It is nowhere pointed out by the petition herein that in that case this alleged fraud or perjury was called to the attention of the court or that any effort was made in

that proceeding to seek to have the judgment set aside on these grounds.

As has been indicated the plaintiff does not seek by his petition to have the judgment vacated but only corrected as to amount. The request is: "That upon trial the Court take evidence as to the correct amount of said judgment and entered (sic) judgment accordingly." There is nothing in the petition of the plaintiff declaring the amount which the plaintiff contends that the defendant Paul Morgan was entitled to receive in the other action from the plaintiff in this action.

With the record in the state indicated the defendants Morgan and Vinardi filed the demurrers which have been mentioned. These were general demurrers. They contained grounds of special demurrer also, but these special grounds are of no significance in the determination of the matter before the court at this time. A hearing was had and the demurrers were sustained, and at the same time the action as to all parties was dismissed. The order contained reference to and observations upon other matters which are of no concern here. By the order the plaintiff was not accorded an opportunity to amend his petition.

The plaintiff filed a motion for new trial. To the extent necessary to refer to its contents herein it is asserted that the court erred in dismissing the action without affording the plaintiff an opportunity to amend his petition. This contention of the plaintiff was asserted as ground for reversal on appeal to this court. The plaintiff urges that as of right he was entitled to an opportunity to amend his petition following the order sustaining the general demurrers thereto.

The record here discloses no application for leave to amend the petition and nothing to indicate what, if anything, in an amended petition would have been materially different from what was contained in the original petition. This subject will be considered further later herein.

As to the petition to which the demurrers were sustained, it must be said that it contains no allegations of ultimate fact the effect of which would defeat the right of recovery by the defendant herein, Paul Morgan, or the judgment which he obtained in the case of Morgan v. Weiner. There is of course a suggestion that the recovery was excessive. The petition and the prayer thereof amount to nothing more than conclusions and not factual declarations.

There is no declaration in the petition that the plaintiff was prevented by any act or acts of the defendants or any of them, or by improper action of the court, from appearing and defending against the claim of Paul Morgan, and in that action from testing the credibility of the evidence adduced in support of the judgment which was obtained. The claim of falsity is not factually declared, but is presented only by conclusion.

In the light of these observations it becomes clear that the petition was subject to general demurrer on two grounds and that they were properly sustained. The first of the two was that it contained only conclusions of law and of fact. The controlling rule applicable is the following: "A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact." Anschutz v. Central Nat. Bank, 173 Neb. 60, 112 N. W. 2d 545. See, also, State ex rel. Beck v. Obbink, 172 Neb. 242, 109 N. W. 2d 288; Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N. W. 2d 75.

The other ground of propriety in sustaining the general demurrers was based upon res judicata. This is dependent upon the general rule that while a court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case. However, there are instances where cases may be so closely interwoven, or so clearly interdependent, as to permit a rule of judicial notice in one suit of the pro-

ceedings in another, and the court will take notice of its records to the extent of knowing that the controversy involved in an appeal has already been considered by it on a previous occasion. See, Witzenburg v. State, 140 Neb. 171, 299 N. W. 533; Anderson v. Anderson, 155 Neb. 1, 50 N. W. 2d 224.

Examination of the petition in the case here discloses that the attempted declaration of a cause of action in it was but conclusions as to the facts which had been presented to and adjudicated adversely to the plaintiff herein in the other action. Specifically in the other case the question of the truth or falsity of the evidence which it is sought to examine in this case was, in the very nature of things, judicially examined and the adjudication thereon was adverse to the plaintiff in the present case. Thus it becomes clear that reference by the court in this case to the former case was proper which reference demonstrated that the judgment was res judicata here, and accordingly on that ground the general demurrers were properly sustained.

Notwithstanding the demurrable character of the petition the plaintiff urges that in any event he had an absolute right to amend and it was reversible error to deny this right. This contention cannot be sustained.

Section 25-854, R. R. S. 1943, provides: "If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct."

Section 25-856, R. R. S. 1943, provides: "Either party may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer or reply alleging facts material to the case, occurring after the former petition, answer or reply."

As to these sections, the terms do not declare an absolute right of amendment. The case of Coverdale & Colpitts v. Dakota County, 144 Neb. 166, 12 N. W. 2d 764, makes it clear, particularly as to section 25-854,

R. R. S. 1943, that the right is one which is subject to control by the sound discretion of the court by the following: "Before error can be predicated upon the refusal of the court to permit an amendment to a petition, after demurrer thereto is sustained, the record must show that under the circumstances the ruling of the court was an abuse of discretion."

In this case the first request for leave to amend was contained in the motion for new trial and for rehearing after judgment. No showing the effect of which was to assert that facts would or could be pleaded which would render the petition invulnerable to a demurrer was ever made. In view of this it may not well be said the failure to permit an amendment of the petition amounted to an abuse of discretion.

One other matter, it appears, should be mentioned although, in the light of the decision herein, it has no controlling significance. The defendants contend that this court is without jurisdiction to consider the appeal for the reason that within the meaning of section 25-1912, R. S. Supp., 1961, the notice of appeal was not given in time. This provision requires that notice shall be given within 1 month from the date of the order appealed from.

The judgment was entered December 7, 1962. Motion for new trial was filed the same day. On January 21, 1963, the motion for new trial was overruled. Notice of appeal was given on January 23, 1963. The defendants contend that the plaintiff had only 1 month from December 7, 1962, within which to give notice of appeal. The theory is that the order of dismissal was based upon The theory of law and not of fact, hence the time for giving of notice began to run from the date the order of dismissal was rendered and not the date of the ruling on the motion for new trial.

This contention of the defendants is without merit. The correct rule is stated as follows: "When a demurrer to a petition is sustained, the plaintiff's action dismissed,

and a motion for a new trial and rehearing is filed, in the event it is ruled upon, then under section 25-1912, R. R. S. 1943 (now section 25-1912, R. S. Supp., 1961), the time for appeal begins to run from the date of the ruling on the motion for a new trial and rehearing." Brasier v. Cribbett, 166 Neb. 145, 88 N. W. 2d 235. See, also, McGerr v. Marsh, 148 Neb. 50, 26 N. W. 2d 374.

There is a voluminous record in this case in which numerous matters are referred to which it is concluded have no bearing upon the matter properly before the court for consideration, which is the sufficiency of the plaintiff's petition, hence they are not discussed.

In the light of what is said herein the judgment of the district court sustaining the demurrers of the defendants and dismissing the action is affirmed.

AFFIRMED.

MARY ALICE RADER, APPELLEE, V. EARLE M. BURNETT, SR., DOING BUSINESS AS BURNETT'S HOME TRAILER SALES, ET AL., APPELLANTS, IMPLEADED WITH DRIVE-IN REALTY COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.

122 N. W. 2d 747

Filed July 26, 1963. No. 35292.

1. **Usury.** The defense of usury is personal to a borrower and is available only to the borrower himself and to those in legal privity to him.
2. ———. A mere purchaser of the equity of redemption, being neither surety nor privy, cannot avail himself of the usurious contract of his grantor to which he is a stranger and plead usury in such contract.
3. ———. This is true whether the statutes declare the contract void in whole or only to the extent of the usury.
4. ———. The rule of legal privity embraces the heirs, legal representatives, and devisees of the borrower or debtor and those who stand in relation of sureties, guarantors, or accommodation endorsers, with respect to the tainted transaction.
5. ———. A cause of action on a usurious contract is not assignable to a stranger to the transaction.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Reversed and dismissed.

Wilson & Barlow and John R. Doyle, for appellants.

Barney, Carter & Buchholz, for appellee Rader.

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

SPENCER, J.

This is an action brought in the district court for Lancaster County, Nebraska, by Mary Alice Rader, hereinafter referred to as plaintiff, against Earle M. Burnett, Sr., hereinafter referred to as Burnett, the Michigan National Bank, a Michigan corporation organized under the laws of the United States, hereinafter referred to as bank, Drive-In Realty Company, a Nebraska corporation, and Earle M. Burnett, Jr., defendants.

The purpose of the action is to declare a conditional sales contract on a house trailer null and void as usurious and in violation of the Nebraska Installment Loan Act, and for an accounting for all sums paid on the contract. The trial court dismissed the action as to the defendants Drive-In Realty Company and Earle M. Burnett, Jr., and found generally for the plaintiff. It entered judgment in favor of the plaintiff against Burnett and the bank for $4,340.78, interest in the amount of $771.58, and costs. The defendants, Burnett and the bank, have perfected their appeal to this court.

The house trailer in question was purchased by Dale L. Hobbs and Edythe Hobbs, husband and wife, hereinafter referred to as Hobbs, on a conditional sales contract dated March 4, 1958, from Burnett's Home Trailer Sales. The statement of the transaction in the contract is as follows:

"A	Cash Selling Price (Including Taxes, etc.)	$4,400.00	
B	Insurance	267.50	$4,667.50

C	Down Payment:		
	Cash	$1,107.50	
	Trade-in Allowance	Nil.	$1,107.50
D	Unpaid Balance of Purchase Price		$3,560.00
E	Finance Charge		$1,068.00
F	Deferred Balance		$4,628.00"

On the same date, the Hobbs signed a statement that they had been quoted a cash price and a deferred payment price, and that they rejected the cash price and chose to purchase by deferred payments. The conditional sales contract provided for payments of $77.13 per month for 60 months.

Subsequent to the sale, the contract was assigned to the defendant bank. Under date of March 4, 1958, the Hobbs executed a power of attorney, appointing any officer or employee of Burnett's Home Trailer Sales, Tad's Home Trailer Sales, or the Drive-In Realty Company, their attorney-in-fact, authorizing them to execute any papers relating to the transaction and to sign, endorse, or transfer the certificate of title. Five payments of $77.13 were made on the contract signed by Hobbs.

Plaintiff testified that she inspected the trailer on the Drive-In Realty Company trailer lot in May 1958, and was quoted a price of $3,900. An application to purchase, dated May 24, 1958, was signed by her, but nothing came of that transaction. On July 31, 1958, plaintiff and her former husband signed an application to purchase the trailer for $4,628, which provided for $200 down, and showed a balance of $4,428 to be financed. The trailer was then delivered to her.

Plaintiff did not know the Hobbs and had never met them, but she was told that she was taking over their contract. Subsequent to the delivery of the trailer, and on the 23rd of August 1958, plaintiff and her former husband acknowledged the execution and delivery of an assumption agreement, dated August 15, 1958, and signed by them. It was also signed by the Hobbs, by

Burnett, their attorney-in-fact, Burnett's Home Trailer Sales, and the bank. The testimony is not too clear, but would seem to indicate that at the time of the execution of this assumption agreement, plaintiff was present with her then attorney.

The assumption agreement described the house trailer; stated the purchase was made by conditional sales contract; and that the contract and all rights and interest therein were owned by the bank and that there was due thereon $4,242.35 (rather than $4,428 as specified in plaintiff's agreement to purchase), payable by 54 payments of $77.13 and a final installment for the balance, with the first payment due on September 20, 1958. It provided that the original purchasers sold and transferred their rights and interest in the trailer and the conditional sales contract to the plaintiff as a new purchaser. The bank agreed to the assignment and to the release of the Hobbs, the original purchasers.

Plaintiff made the September and the October payments. No payment was made in November, and this action was filed by her on December 1, 1958. The trailer was repossessed by an agent of the bank on January 14, 1959, and plaintiff had not seen it since January 15, 1959, at which time it was on the Drive-In Realty Company trailer lot. The trailer was subsequently sold by the defendants to another purchaser. The trial court found the contract to be usurious and that the trailer was converted by the bank through its agent on January 14, 1959, and that its value on that date was $3,800.

The bank filed a special appearance herein and attempted to preserve its special appearance throughout. The defendants allege several assignments of error, including the question of venue, the validity of the transaction as a valid time sale, and the question of the right of the plaintiff to allege the defense of usury. For the purpose of this opinion, we assume the illegality of the conditional sales contract and will discuss only this

last point. The defendant bank's assignments of error on this point are as follows: "4. The trial court erred in finding and concluding that plaintiff had acquired more than the original purchasers' equity of redemption to the house trailer in question.

"5. The trial court erred in finding and concluding that the plaintiff was in legal privity with the original purchasers of the house trailer in question, and thereby had available to her the assertion that the transaction between the seller and the original purchasers was usurious."

The defendants insist that the defense of usury is personal to a borrower and is available only to the borrower himself and to those in legal privity with him. This is the general rule. See 91 C. J. S., Usury, § 125, p. 713. Plaintiff concedes this is a correct statement of the law, but that it has no application to the facts in this case. It is her contention that her right exists by contract and not by operation of law. She concedes that she is not standing in privity to the Hobbs as privity is defined, because her status arises by contract.

There are several Nebraska cases on the point urged by the defendants. One of the earliest is that of Cheney v. Dunlap, 27 Neb. 401, 43 N. W. 178, 5 L. R. A. 465, which involved five promissory notes secured by a real estate mortgage. The notes were sold without recourse; the holder died; and the original payee, his executor, brought an action to foreclose the mortgage because of the nonpayment of the notes. The then owner of the land and his predecessor in interest, who was a purchaser from the original mortgagor, pleaded the usurious nature of the original transaction. We said: "The plea of usury as a defense is personal to the borrower and his sureties and privies." We also held: "A mere purchaser of the equity of redemption, being neither surety nor privy, cannot avail himself of the usurious contract of his grantor to which he is a stranger and plead usury in such contract."

The case of Building & Loan Assn. of Dakota v. Walker, 59 Neb. 456, 81 N. W. 308, is a little more analogous to the instant situation. It involved the foreclosure of a real estate mortgage given by one Fugate to the plaintiff to secure a promissory note. The defendants Walker purchased the mortgaged premises and assumed and agreed to pay the indebtedness secured by the mortgage. The Walkers, to defeat the foreclosure of the mortgage, pleaded the usurious nature of the transaction between the plaintiff and Fugate, their grantor. We said: "The defense of usury was not available to the defendants, since they were not parties to the loan, but merely purchased the mortgaged premises and assumed and agreed to pay the debt, which fact did not permit them to assail the contract on the ground that it was tainted with the vice of usury. See Cheney v. Dunlap, 27 Nebr., 401; Morling v. Bronson, 37 Nebr., 608; McKnight v. Phelps, 27 Nebr., 858."

In the later case to foreclose a mortgage, which involved a junior mortgage taken subject to the mortgage in question, we held: "The defense of usury is personal to the debtor, and may not be successfully pleaded by the holder of a junior mortgage expressly taken subject to the mortgage to which the defense is sought to be applied." First State Bank v. Niklasson, 116 Neb. 713, 218 N. W. 744.

The most recent case touching on who is privy to a party to a usurious transaction is Commonwealth Trailer Sales, Inc. v. Bradt, 166 Neb. 1, 87 N. W. 2d 705, 70 A. L. R. 2d 1397. This case does not involve the purchaser of an equity of redemption but rather attaching creditors. Like the instant case, it involved a house trailer, except that a chattel mortgage rather than a conditional sales contract was involved. The attaching creditors had secured judgments against the mortgagor. For the purpose of a decision in that case, we assumed the violation of the restrictive provisions of the Installment Loan Act in the giving of the chattel mortgage. We said:

"The general rule is that the defense of usury is for the benefit of the borrower and is personal to him. See, 91 C. J. S., Usury, § 71, p. 648; 55 Am. Jur., Usury, § 121, p. 409.

"As stated in 91 C. J. S., Usury, § 71, p. 648: 'Since usury laws are enacted for the protection of needy borrowers, and not to punish extortion in money lenders, the defense of usury is purely personal to the borrower, or those in privity with him, as discussed infra § 126, such as the debtor's sureties, guarantors, heirs, devisees, and personal representatives. *This is true whether the statutes declare the contract void in whole or only to the extent of the usury,* or whether a penalty is given for the taking. In order to question the validity of a usurious contract, the right must be based on the original debtor's right.' " (Italics supplied.)

In that case we also said: "We have often held that a purchaser of the equity of redemption cannot avail himself of the usurius (sic) contract of his grantor. See, Cheney v. Dunlap, supra; Male v. Wink, 61 Neb. 748, 86 N. W. 472; Bolen v. Wright, 89 Neb. 116, 131 N. W. 185. As stated in Bolen v. Wright, supra: 'In support of this claim defendants have cited a number of cases, commencing with Cheney v. Dunlap, 27 Neb. 401, and ending with People's Building, Loan & Savings Ass'n v. Pickard, 2 Neb. (Unof.) 144. From an examination of those cases, it appears that the controlling point in each of them was that the person seeking to interpose the plea of usury was a stranger to the usurious contract, and it was held: "A mere purchaser of the equity of redemption, being neither surety nor privy, cannot avail himself of the usurious contract of his grantor to which he is a stranger and plead usury in such contract." Cheney v. Dunlap, supra.' The same is true of our holding in a case wherein a subsequent lienholder to a mortgage loan that was usurious sought to raise this issue. See First State Bank v. Niklasson, 116 Neb. 713, 218 N. W. 744. As therein stated: 'The further conten-

tion of defendant that the note and mortgage of St. Edward bank was usurious cannot be sustained, for the reason that the defense of usury is personal to the debtor, his privies and sureties.' In view of these, and other holdings of this court, we do not think the sheriff is in a position to raise the defense of usury. See, also, Fenby v. Hunt, 53 Wash, 127, 101 P. 492; Halsey v. Winant, 258 N. Y. 512, 180 N. E. 253. We think, as stated in 55 Am. Jur., Usury, § 122, p. 410, that: 'The rule embraces the heirs, legal representatives, and devisees of the borrower or debtor and those who stand in the relation of sureties, guarantors, or accommodation indorsers, with respect to the tainted obligation.' "

Plaintiff does not dispute the correctness of the principle of law enunciated in the cases cited above. She does assert, however, that they are not applicable because she is not a mere purchaser of an equity of redemption, but that by contract she has been substituted for the original conditional sales purchaser. It is her position that she paid $200 cash for the interest of the Hobbs in addition to assuming the balance due on the contract, and that this action is merely to enforce the right she obtained by contract. It is true the agreement recites that the Hobbs sold, assigned, and transferred all their right, title, and interest in the trailer and in the contract to the plaintiff.

The provisions covering the agreement of the plaintiff are as follows: "Undersigned new purchaser, in consideration of such assignment and of the agreements of the parties, assumes and agrees to pay the above sum in the manner provided in such contract and to perform all other agreements, covenants, obligations and conditions thereof and of the promissory note executed in connection therewith, and, if so requested by the Bank, to execute a new promissory note as evidence, but not as payment, of the obligation hereunder assumed.

"Undersigned new purchaser acknowledges receipt of a true and complete copy of the original conditional sale

contract, all of the terms, conditions, statements and provisions of which (except as herein expressly modified) are incorporated herein by reference with the same force and effect in all respects as if the same were here again set forth in full and in the same form, that he has read and knows the contents thereof, and agrees to be bound thereby to the same extent as if he had been the original purchaser and had properly executed the original instruments.

"Undersigned new purchaser acknowledges that the Title to said trailer has been transferred to him and that he has made proper application for title (or the equivalent thereof recognized by the state in which this agreement is made) in his own name. He further acknowledges that the trailer is in his possession."

It is to be noted that the original contract was subject to express modification in the assumption agreement, and that only those terms, conditions, statements, and provisions of the conditional sales contract which were not modified were incorporated into the assumption agreement. The terms of the conditional sales contract gave the statement of the transaction described heretofore and then provided for 60 equal installments of $77.13. Although plaintiff's application to purchase provided for a balance of $4,428 to be financed, the assumption agreement provides for the payment of $4,242.35, in 54 installments of $77.13, and a final installment of the remaining balance, with the next payment due and payable September 20, 1958. The $4,242.35 is the "above sum" referred to in the portion of the agreement set out above. It would seem that this would be a modification of that portion of the conditional sales contract. There is nothing in any of the other provisions set out which could be construed to assign any rights the Hobbs might have had based on the assertion of the illegality of the contract.

Plaintiff insists that she paid valuable consideration for the assignment of the cause of action for usury.

What did the plaintiff receive for her $200 if she did not receive an assignment of the cause of action? The Hobbs had paid $1,107.50 cash and made five payments of $77.13 each. In addition to any equity in this $1,493.15, she received the trailer and the right to pay out the contract for a small down payment, rather than financing the balance of $4,428 in her application to purchase.

Assuming, however, that the assumption agreement constitutes an assignment of any cause of action the Hobbs might have had for usury, plaintiff cites no authority to support the assignability of such a cause of action. There clearly is none in this jurisdiction. Our problem then is whether or not a cause of action for usury is assignable to a stranger to the transaction who is not a surety or in privity with the borrower. The decisions of other jurisdictions are not harmonious and are affected by statutes, the bases of the rights of action of original borrowers, and public policy of different states, so they are of little help to us. An examination, however, of the few cases we have found in other jurisdictions sustaining such assignability indicates that except for partnership cases, they cover situations already excluded in this jurisdiction, such as the assumption and agreement to pay a mortgage. We have found no cases involving an assumption agreement of a conditional sales contract, nor have any been called to our attention. We do not perceive any actual distinction between the assumption of the payment of the balance due on a usurious conditional sales contract, and the assumption and agreement to pay a real estate mortgage securing a usurious transaction, which is the situation involved in Building & Loan Assn. of Dakota v. Walker, 59 Neb. 456, 81 N. W. 308. The distinction, if any exists, is more fanciful than real.

If, as suggested by our cases, the purpose of the usury acts is to protect the necessitous borrower or his privies in blood or estate and not to punish the lender, how may we justify the assignability of a cause of ac-

tion for usury to a stranger or one merely seeking a windfall? The answer is apparent in this case. Here, the plaintiff, for an investment of $355, lived in a trailer house for more than 5 months, and then secured a judgment for $5,112.36. This will in no way benefit the original borrower, or in any way protect those intended to be protected by the law. We see no reason to depart from the law established by the import of our previous decisions, and hold that a cause of action on a usurious contract is not assignable to a stranger to the transaction.

For the reasons given, we reverse the judgment of the trial court and dismiss the action at the cost of the plaintiff.

REVERSED AND DISMISSED.

SIMMONS, C. J., not participating.

MESSMORE, J., dissenting.

ORIS GLASS, DOING BUSINESS AS GLASS LAND COMPANY, APPELLANT, V. NEBRASKA STATE BANK, A CORPORATION, APPELLEE.

122 N. W. 2d 882

Filed July 26, 1963. No. 35401.

1. **Banks and Banking.** The presumption is that a bank deposit made in the usual course of business is a general deposit and not a special or trust deposit.
2. ———. A bank in paying out the funds from a general deposit must comply with its agreement with the depositor, and the signature upon which a depositor is to be bound and the bank is to be authorized to disburse the money in a general deposit is whatever authorization that the bank and the depositor agree upon.
3. **Contracts.** When writings show, upon inspection, a complete legal obligation, without any uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included in the writings.
4. **Contracts: Evidence.** Parol evidence of prior or contempora-

neous oral agreement may not be introduced to vary, alter, or contradict the clear and unambiguous terms of a written contract or agreement.

5. ———: ———. Preliminary negotiations, conversations, or oral understandings are merged in a written contract or agreement.
6. **Banks and Banking: Trusts.** The burden of proof that a deposit is for a special purpose or of a trust nature devolves on the party who claims that it is impressed with such character.
7. **Banks and Banking.** The burden of proving that a trust or special deposit exists must be made by clear and satisfactory evidence.
8. ———. A bank may not attempt to pass on the rights of an adverse claimant to the fund deposited, as against a general deposit, and if it pays such funds out without authorization according to the terms of the deposit, it becomes responsible for the amount so paid to the depositor.

Appeal from the district court for Dakota County: JOHN E. NEWTON, Judge. Reversed and remanded with directions.

Mark J. Ryan, Theodore J. Donley, and Harold Dwyer, for appellant.

Leamer & Graham and Don A. Fitch, for appellee.

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

WHITE, C. J.

This is an action by the plaintiff against the defendant bank for the recovery of $4,238.82, part of the bank deposit made in the defendant bank by the plaintiff. After trial, the court entered judgment for the defendant bank and the plaintiff appeals. The sole question involved in this case is whether the bank was legally authorized to debit the plaintiff's account with two checks. The two checks were drawn by another party, Francis L. Sherlock, against his own account and in which account there were insufficient funds to pay said checks in the amounts of $2,184.59 and $2,054.23. The question may be otherwise stated generally as to whether the deposit

of the plaintiff in the defendant bank was a general deposit or whether it was a deposit for the special purpose of paying these two checks and to be considered as a trust deposit.

From an examination of the evidence in this case, the following facts appear: On August 18, 1960, the plaintiff opened an account with the defendant Nebraska State Bank in the name of Glass Land Company by Oris Glass, a trade name under which the plaintiff did business. This account was opened by the deposit of a check in the sum of $4,500 executed by Eugene Russell, president of The Paddock, Inc. It was payable to Francis L. Sherlock and Glass Land Company and bore a notation in the lower left-hand corner, "Escrow account on Sherlock Farm & Bar." This check was unrestrictedly endorsed by the payee, Francis L. Sherlock, and delivered to the plaintiff. There is dispute in the evidence, which will be discussed later, as to what happened on August 17, 1960, in an alleged conversation between Russell, the plaintiff, and the bank teller, James G. Melvin. On August 18, 1960, the plaintiff came to the bank to make a deposit of the check, and the transaction was handled on behalf of the bank by James G. Melvin, a teller. This transaction was in the customary form in making a general deposit. Melvin made out a deposit slip which was introduced in evidence as exhibit 1. This deposit slip was in the usual form without any special notations. At the same time, the plaintiff was also given an account number in the usual form for a general account in the bank. A signature card was completed and executed. The signature card is on a printed form and captioned, "Signature Card," and immediately beneath this appears the notation, "A - Checking Account - Individual." Following the filling in of the name of the depositor, this signature card contains a number of detailed printed stipulations and agreements to which the depositor agrees by making a deposit. The details of these recitals on the signature card are not

pertinent here except to demonstrate the nature of the instrument and the intentions of the parties in making it. Beneath the printed stipulation or agreement appear the words, "Authorized Signature," followed by the handwritten words, "Glass Land Co. By Oris Glass." The rest of this signature card contains the address and the date of August 18, 1960.

On the following day, August 19, 1960, two checks drawn by Francis L. Sherlock against his own individual account, one in the sum of $2,184.59 and the other in the sum of $2,054.23, were debited by Melvin, a teller, against the account of the plaintiff and transferred to the Sherlock account. There were insufficient funds in the Sherlock account to pay the checks. It is undisputed that there was no written check or written authorization for this debiting or for a transfer transaction. Both of the Sherlock checks referred to above were in the bank in the usual course of business on the morning of August 18, 1960, and were there before the plaintiff's account was opened on that same date. Sherlock is not a party to the case; and he was not called nor did he testify at all.

We go now to the defendant's evidence. It is all oral in nature and consists of an attempt to show that the deposit made by Glass was for a special purpose, that the money deposited was for a trust deposit, and that the bank was authorized and directed to debit the money in the plaintiff's account to the Sherlock account. Sherlock did not testify, but it is undisputed that there were insufficient funds in Sherlock's account to cover the two checks written by him. The defendant's testimony, in substance, is that on the afternoon before the deposit was made, August 17, 1960, an oral conversation was had between Eugene Russell, the maker of the deposited check, the plaintiff, and Melvin. Melvin, the teller, testified that Glass and Russell asked him if there was some way they could open up an escrow account to take care of the checks of Francis L. Sherlock. He

testified that after informing them that the opening of such an account was possible, the plaintiff and Russell told him that they would make a deposit for that purpose. Russell, Sherlock, and the plaintiff had been engaged in a transaction involving the sale of real estate, the details of which are not pertinent here except that the sale and the transaction contemplated by the parties was never consummated. Melvin testified that the plaintiff left his telephone number with him with instructions that as soon as checks from Sherlock came into the bank that he was to notify the plaintiff. Melvin then testified, in substance, that after August 18, 1960, he telephoned the plaintiff and received oral authorization from him to transfer money from the new account that had been opened on August 18, 1960, to cover the checks of Sherlock. Melvin transferred from Glass' account to Sherlock's account an amount sufficient to cover the two insufficient fund checks of Sherlock. Glass categorically denies all of this testimony, and testified that he was not even in the bank on August 17, 1960, the date of the claimed oral conversation establishing the special deposit. He further denies having had any telephone or oral conversation with Melvin subsequent to the deposit.

The evidence here shows that this was a general deposit. The presumption is that a deposit is general and not special. When Glass deposited the money, as between Glass and the bank, it ceased to be the money of the depositor and became the money of the bank to which the depositor became a creditor of the bank to the extent thereof. Nichols v. State, 46 Neb. 715, 65 N. W. 774; Board of County Commissioners of Seward County v. Cattle, 14 Neb. 144, 15 N. W. 337; State ex rel. Davis v. Farmers & Merchants Bank, 114 Neb. 378, 207 N. W. 666. In this case, what was the nature of the contract of deposit between the plaintiff and the bank? A bank is authorized to pay only to the person designated according to the terms of the contract. A bank,

in paying out the funds from a general deposit, must comply with its agreement with the depositor. The signature upon which a depositor is to be bound and the bank is to be authorized to disburse the money in a general deposit and charge his account therefor may be whatever authorization that the bank and the depositor agree upon. Federal Land Bank of Omaha v. Omaha National Bank, 118 Neb. 489, 225 N. W. 471; 7 Am. Jur., Banks, § 506, p. 360. A deposit slip, signed by the plaintiff depositor, acceptance of the check, issuance of a signature card, and the signature by the plaintiff depositor to the signature card specifying only one authorized signature for withdrawal, issuance of the general account card, and crediting on the bank books of the deposit generally clearly constituted a written agreement and contract between the bank and the plaintiff depositor not susceptible to any misinterpretation, ambiguity, or indefiniteness. That it expressed the intention of the parties with relation to the nature of the deposit, outside of the presumption applicable, there could be little question under the evidence here presented.

Despite the complete and unambigous terms of this transaction and the reduction of the agreements with reference to the deposit in a clearly understandable form used in the usual course of business, the defendant contends that this deposit was for a special purpose. It introduced evidence, to which there was objection, to show that the real nature of the deposit was for a special purpose and that prior to and contemporaneous with the actual transaction made, there was an agreement that this money was to be deposited and used only for the purpose of paying the Sherlock checks. We think applicable here are the following pronouncements that we have made with reference to the introduction of parol evidence to vary, to alter, or to contradict by prior or contemporaneous oral testimony the terms of a written contract or transaction. In Theno v. National

Assurance Corp., 133 Neb. 618, 276 N. W. 375, we said: "The parol evidence rule is not merely one of evidence, but is a rule of substantive law, which declares that certain kinds of facts are legally ineffective, and forbids such facts to be proved at all."

In Master Laboratories, Inc. v. Chesnut, 157 Neb. 317, 59 N. W. 2d 571, we stated as follows: "The correct rule is set out in Telluride Power Transmission Company v. Crane Company, 208 Ill. 218, 70 N. E. 319, as follows: 'The rule is, that when the writings show, upon inspection, a complete legal obligation, without any uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included in the writings. The fact that a point has been omitted which might have been embodied therein will not open the door to the admission of parol evidence in that regard. * * * The rule is too well recognized to require citation of authorities that all preliminary negotiations, whether oral or written, are merged in the written contract.' "

We conclude, and it seems obvious, that there was neither ambiguity nor omission within the meaning of the foregoing rules as applied to the writings and the written evidences thereof in this general deposit transaction. The undisputed writings in evidence in this case not only declare the nature of the deposit and the terms and the agreements with respect to withdrawal, but it is clear that they comport and comply with the very conditions imposed and required by the bank itself to open a general deposit account. The bank, by the terms of the declaration and the agreement entered into itself, agreed to be bound by and agreed to honor withdrawals only upon the signature of that person who signed the signature card. Contemporaneous or prior oral agreements to the contrary would be inconsistent with and would deny the very thing that the parties here themselves did. At the time Melvin opened the account for Glass, the Sherlock checks which he sub-

sequently paid out of this account, had already been received and were in the bank. Despite this, and it is significant, Melvin made no notation on the various instruments involved, nor any requirement for authorization from Glass to pay the Sherlock checks at the time that he opened this general deposit for Glass. That the bank itself recognized that no withdrawals could be made except according to the terms of the express written agreement is expressed by the following testimony of Melvin on cross-examination. Referring to the conversations at the time of the opening of the account, the following questions and answers were given: "Q Wasn't his (Glass') statement to you that if any checks were to be charged there he was to come in personally and make the transfer himself, isn't that right? A To the best of my knowledge, yes." Redirect examination by Mr. Leamer: "Q Did you fully hear that question and that is your answer? * * * A Yes."

The defendant's theory is that the sum deposited here was a deposit for a special purpose and that when a person makes a deposit for a specific purpose it constitutes a trust deposit and must be treated by the bank as such. The defendant concedes that the burden of proving that a trust deposit existed rests upon the defendant and in order to meet such a test, it must be made by clear and satisfactory evidence. The general rule is well stated in 7 Am. Jur., Banks, § 419, p. 294, as follows: "* * * the burden devolves on the party who claims that the deposit is a special one to show that it was received by the bank with the express or clearly implied agreement that it should be kept separate from the general funds of the bank and that it should remain intact." (See note 13 citing approximately 22 cases.) See, also, Annotations, 86 A. L. R. 375, 16 L. R. A. 516; Ann. Cas. 1913E 45. Two Nebraska cases are cited by the defendant in support of its position. They are State ex rel. Sorensen v. Bank of Otoe, 125 Neb. 530, 251 N. W. 111; State ex rel. Sorensen v. Farmers & Merchants

Bank of Deshler, 125 Neb. 800, 252 N. W. 316. Neither of these cases supports the defendant's proposition as applied to the facts in this case. These cases arose between the depositor and the receiver of an insolvent bank and the question under the particular circumstances was whether the deposit was a trust deposit, which the bank was required to separate out and keep separate from the general funds of the bank. In neither case was the question raised as to whether the bank could transfer funds from one depositor's account to another without a written signature or authorization by the depositor. We have examined the cases from other jurisdictions cited by the defendant to sustain its position in this case that this was a trust deposit. None of them are applicable to the situation present in this case. There is much testimony in the record as to the nature, the liabilities of, and the agreements between Sherlock, the witness Russell who wrote the check that was deposited, and Glass concerning arrangements that either were made or were disputed as to a real estate transaction and a contract for sale of a farm and a bar. It is significant that Sherlock did not testify in connection with this transaction at all. Russell testified that he gave the check to Glass when in fact it constituted a loan to Sherlock. There is no testimony, even from Sherlock, to confirm this. This testimony is inconsistent with the express memoranda that Russell placed on his check denominating it as relating to an escrow account. By maximum reach, it appears that the defendant bank through Melvin came to the conclusion that Glass was holding the funds deposited as trust funds as between the parties. The evidence in this respect falls far short of a clear and convincing nature in order to establish such a trust relationship. But, in any event, even assuming that Glass was a trustee as between the parties, it would not affect the transaction and issue in this case. The general rule is that a bank which receives a general deposit of money becomes the debtor of the depositor and

impliedly contracts to honor his checks up to the sum deposited. It seems beyond doubt that if a bank essays or attempts to pass upon the rights of an adverse claimant to the fund deposited, and pays it over to him, or any part thereof, it becomes responsible for the amount so paid to the depositor. 7 Am. Jur., Banks, § 413, p. 289, notes 18 and 19.

This follows the general rule that a fiduciary or trustee may, as a general rule, deposit trust funds in a bank as a general deposit, and with full knowledge of the bank, and the fact that the funds so deposited are trust funds does not destroy the character of the deposit as being a general one, subject to the withdrawal of the trustee depositor, and does not make the deposit a special one. 7 Am. Jur., Banks, § 421, p. 295; Annotation, 53 A. L. R. 564.

Under the evidence in this case and the law applicable thereto, the judgment is hereby reversed and the cause remanded to the district court with directions to render judgment for the plaintiff in the sum of $4,238.82 together with interest.

REVERSED AND REMANDED WITH DIRECTIONS.

SPENCER, J., dissenting. BOSLAUGH and BROWER, JJ., concurring in this dissent.

I am unable to agree with the majority opinion. I find no fault with the conclusion that the deposit involved was a general deposit and that its terms could not be modified by a contemporaneous oral agreement not embraced in the written contract. That, however, is only one phase of the case.

The majority opinion entirely disregards the fact that a written contract may be subsequently modified by parol. 12 Am. Jur., Contracts, § 428, p. 1006.

As early as Erskine v. Johnson, 23 Neb. 261, 36 N. W. 510, this court, in an opinion by Judge Maxwell, held: "A provision in a building contract, that 'no new work of any description done on the premises, nor any work of any kind whatsoever, shall be considered as extra

unless expressly contracted for in writing before its commencement,' will not preclude the parties from afterwards waiving the same, and making changes in the original contract by parol."

The phase of the case ignored by the majority opinion is whether the bank was subsequently orally authorized to transfer the funds from the account of the plaintiff to pay the two checks involved.

Plaintiff in his petition alleged that the defendant, without any authorization whatever, charged the checks to his account. The answer of defendant contained a general denial, which put the question of authorization in issue.

The plaintiff opened the account in the defendant bank on August 18, 1960, by depositing The Paddock, Inc., check in the amount of $4,500. The two checks written by Sherlock, in the amounts of $2,184.59 and $2,054.23 were received by the bank in the morning mail on August 18, 1960, and were in the bank at the time the account was opened. The custom and practice of the bank was to post all items on the day following their receipt. Consequently, it was not until August 19, 1960, that the bank determined that the Sherlock account was insufficient to pay the two checks which had been received in the mail on August 18, 1960.

On August 19, 1960, the bank teller in charge of returned checks brought the two Sherlock checks to James G. Melvin, another teller of the bank, and the officer who had talked with the plaintiff and had acted for the bank at the time the plaintiff had opened the account.

Melvin then attempted to call the plaintiff by telephone but was unable to reach him. Later that day, at about closing time, the plaintiff called Melvin and, according to Melvin, authorized the transfer of funds from the plaintiff's account to pay the two Sherlock checks.

The fact that the two Sherlock checks were in the bank at the time the plaintiff opened the account is not im-

portant. Any agreement between the plaintiff and the bank was subject to subsequent oral modification.

The evidence on the specific authorization embraced in the second phase of the case is Melvin's testimony about the telephone call from the plaintiff to the bank. He testified that the plaintiff had left his telephone number with him with instructions that as soon as the checks from Sherlock came into the bank, that he was to notify the plaintiff. Melvin then testified in substance that on August 19, 1960, he telephoned the plaintiff and could not contact him. He left his telephone number, however, and the plaintiff called back and gave him oral authorization to transfer money from the account that had been opened on August 18, 1960, to cover the checks of Sherlock. Melvin's testimony in this respect is as follows: "Q The number you had left for him to call, was that the regular bank business number? A Yes. Q Did you then talk to Mr. Glass at 3:00 p.m. as stated? A Yes. Q What did he say and what did you say? * * * A He said, 'Hello Jim, this is Oris Glass'. I said, 'Yes'. He said, 'This is Oris Glass. You called me?' And I said, 'Yes'. And I proceeded to tell him about the two checks and asked him to come in at the time he could come in to transfer some money. He said he couldn't get away right at that time and it being 3:00 o'clock, our hour for closing of business I had to either have him do that or send the checks back or transfer the money, which I told him I had to do one of the three, and he asked me could I do the transferring of the money and I said yes I could. Q Did you then transfer the money? A Yes, I did. * * * Q Was that transfer accomplished by debit memo to the account of Glass Land Company in which the $4500 was placed? A Yes."

Melvin transferred from Glass' account to Sherlock's account an amount sufficient to cover the two insufficient fund checks of Sherlock. Glass denies absolutely all of the testimony with reference to both the original

claimed oral conversation setting up the trust or special deposit account and the subsequent oral authorization to Melvin to transfer the funds to cover the checks.

It is my position that the trial court's judgment may be sustained on the basis of the testimony of Melvin that he held a telephone conversation with Glass on the afternoon of August 19, 1960, the day after the final deposit, by which conversation he received direct oral authorization to transfer these funds. Under the terms of a contract of general deposit with the bank, is the bank bound to pay only upon the authorized written signature, or may it rely upon subsequent oral authorization? So far as I have been able to determine, there is no law applying a different rule to bank contracts than to any other type of contract. The rule is that a bank may require, under the terms of a general deposit, the authority of a written signature on a check, but may honor or may disburse or transfer funds upon an oral authorization of the depositor.

The rule is stated in 5A, Michie, Banks and Banking, § 43a, p. 105: "The relation between a bank and a depositor being that of debtor and creditor, the bank can justify a payment out of the depositor's account only upon the actual direction of the depositor, which may be oral as well as written. It is sufficient if the bank practically carries out the instructions of a depositor as to paying his deposit to the third person; but it is liable for payment of a deposit upon the direction of a person who was unauthorized to give it." The rule seems to be that a check is only a written order, and a verbal direction from a customer to a bank to pay a sum, or transfer a credit, is sufficient authority for the bank in so doing. Whitsett v. Peoples Nat. Bank, 138 Mo. App. 81, 119 S. W. 999; Lind v. Porter, 46 Idaho 50, 266 P. 419, citing 2 Michie on Banks and Banking, p. 927; Ellis v. First Nat. Bank, 22 R. I. 565, 48 A. 986; Petty v Gacking, 97 Ark. 217, 133 S. W. 832, 33 L. R. A. N. S. 175.

In the case of Blose Estate, 374 Pa. 100, 97 A. 2d 358,

a bank officer received authorization from a general depositor shortly before his death for the transfer of funds belonging to the depositor. In that case, the court rested its decision entirely upon the fact finding that the bank officer had received oral authorization from the depositor saying, "* * * a bank may waive its rights to require written orders and may act upon a merely oral order: Ogdon v. Washington Nat. Bank, 82 Ind. App. 187, 145 N. E. 514; See also Watts v. Christie, 11 Beav. 546, 552, 50 E. R. 928; Gaunt v. Alabama Bound Oil & Gas Co. (C.C.A. 8), 281 Fed. 653, 655; 7 Am. Jur. § 504; and 9 C. J. S. § 288, p. 599. If the creditor later seeks to recover from the bank for obeying his oral order, he is estopped: Pierson v. Union Bank & Trust Co., 181 Ky. 749, 205 S. W. 906; see also 2 A. L. R. p. 175."

In Annotation, 2 A. L. R. 176, the rule is stated as follows: "But a bank may, if it so desires, waive its right to a written order, and is authorized to pay out a fund on deposit or transfer the deposit to the name of another on the oral order of the depositor. Rice v. Bank of Camas Prairie (1896) 5 Idaho, 39, 47 Pac. 856; Neff v. Greene County Nat. Bank (1886) 89 Mo. 581, 1 S. W. 747; Whitsett v. People's Nat. Bank (1909) 138 Mo. App. 81, 119 S. W. 999; Ellis v. First Nat. Bank (1901) 22 R. I. 565, 48 Atl. 936. See also First Nat. Bank v. Hall (1898) 119 Ala. 64, 24 So. 526."

A further statement of the rule is in 7 Am. Jur., Banks, § 504, p. 359: "A bank may, however, if it so desires, waive its right to a written order and pay out a fund on deposit or transfer the deposit to the name of another on the oral order of the depositor."

It is clear, therefore, that under the principles applicable to the authority of a bank arising out of a contract of general deposit with a depositor it may justify a transfer of funds or a payment on the basis of an oral authorization from the depositor. This presented a factual question for determination by the trial court. The testimony in this case revolved around a dispute as to

whether Melvin, the bank officer involved, actually received such oral authorization. There was competent testimony to sustain the finding that such authorization was received by the bank. The credibility and reasonableness of this testimony is strenuously attacked in the plaintiff's brief. This being a law action, we may not review a factual determination based upon competent and material evidence, except to determine whether there was sufficient evidence by which a reasonable conclusion could be drawn that such oral authorization was received. Our position should be that the trial court's finding in this respect has the same posture as a jury verdict upon conflicting evidence. Where the sufficiency of conflicting evidence to support a judgment depends upon the credibility of witnesses who appeared and testified before the trial court, its judgment in that respect will not ordinarily be disturbed. Northwestern State Bank v. Hanks, 118 Neb. 442, 225 N. W. 119; Furse v. Lambert, 85 Neb. 739, 124 N. W. 146.

It therefore appears, applying the principles of law applicable thereto, that the plaintiff entered into a general deposit contract with the bank. Under the law applicable thereto, the bank was entitled to withdraw or transfer the funds to cover these two checks on the oral authorization of the plaintiff Glass. The trial court's judgment in this respect should have been affirmed.

CARTER, J., concurring.

It appears necessary to point out in the instant case that the issues contained in the pleadings do not include any contention that there was a modification of the deposit agreement made in writing at the time the deposit was made. The sole issue as shown by the pleadings and the briefs was whether or not the deposit was one for a special purpose which authorized the bank to charge the amounts of the two Sherlock checks to plaintiff's account. The holding of the majority that the deposit was a general deposit, with which the minority takes no exception, disposes of the issues correctly.

That there can be a modification of a written contract before breach by parol without a new consideration is not questioned. I submit, however, that the situation in the present case is nothing more than an attempt to vary the terms of a written contract by parol. There is no evidence of any attempt to modify the deposit agreement and the bank does not so plead or otherwise contend. If a bank may avoid a wrongful withdrawal of funds on general deposit by asserting an uncorroborated authorization by telephone, which is flatly denied by the depositor, the very purpose of written contracts is subverted and the deposit of money in a bank as a place of safekeeping becomes a myth.

The evidence shows that the two checks were in the bank for payment when plaintiff made his deposit. The account on which they were drawn did not contain sufficient funds for their payment. If they were to be unconditionally paid from plaintiff's account, it would seem that authorization could have been obtained at that time. But instead, a written contract for a general deposit was entered into. All negotiations were merged in the deposit contract. The evidence of the bank's employee that he obtained oral authorization by telephone, which was unequivocally denied by plaintiff, to pay the checks from plaintiff's deposit account is indicative of no intention to modify the deposit agreement. That no such intention existed is supported by the fact that neither the pleadings nor the briefs allege any such facts. The rule has always been that a judgment must be supported by allegations in the pleadings and proof by evidence. Hallgren v. Williams, 146 Neb. 525, 20 N. W. 2d 499; National Fire Ins. Co. v. Evertson, 153 Neb. 854, 46 N. W. 2d 489; Miller v. City of Scottsbluff, 155 Neb. 185, 50 N. W. 2d 824.

The position taken in the dissenting opinion is not supported by pleadings or proof. The statement in the dissenting opinion that the majority opinion disregards the fact that a written contract may be subsequently

modified by parol evidence is therefor without substance. No such issue is raised by the pleadings and consequently it is not before the court for its determination.

MARTHA ESSAY, APPELLEE, V. EDWARD ESSAY, APPELLANT.
123 N. W. 2d 20

Filed July 26, 1963. No. 35405.

1. **Partnership.** A dissolution of a partnership is defined by section 67-329, R. R. S. 1943, as the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.
2. ———. A partnership is not terminated on dissolution but continuous until the winding up of the partnership affairs is completed.
3. ———. Under the provisions of section 67-323, R. R. S. 1943, when a partnership undertaking is continued after its termination date as before without an express agreement, the rights and duties of the partners remain the same so far as is consistent with a partnership at will.
4. ———. Where the widow of a deceased partner, who was the beneficiary of her husband's interest in the partnership by his will, enters into a new partnership agreement with the surviving partner immediately following the death of her husband, to which her contribution of capital was her potential interest under the terms of the will, the partnership agreement is not void as between the parties.
5. ———. When a partner denies the interest of his partner and claims it as his own, and excludes his partner from any participation in the business, his conduct operates as a dissolution of the partnership.
6. ———. In a commercial partnership engaged in a business with capital invested jointly by the partners, a managing partner is not entitled to a salary for individual services, nor to an increase of authorized compensation, unless it is allowed by contract.
7. ———. A managing partner having exclusive control of a partnership business not only controls production, sales, and distribution of products but is responsible for keeping all records and books of account, and he is required to account to the partnership for any benefit or profit derived from any transaction connected with the formation, operation, or liquidation of the partnership or from any use by him of its property.

8. ———. A partner who overdraws his share of the earnings of a partnership will ordinarily be held personally liable if his share of the partnership assets is insufficient to satisfy the excessive withdrawals.
9. ———. Where miscellaneous receipts are shown to have come into the possession of the partnership which are not accounted for, the managing partner is required to account to the partnership for them.
10. ———. Where a managing partner received prizes from a manufacturer or wholesaler for the volume of sales of its products, and he does nothing independent of his obligations to the partnership business to obtain them, the prizes belong to the partnership and not to the managing partner.
11. ———. Where a partnership has been dissolved but not terminated, the partners share the net profits as before until there is a winding up of the business of the partnership.

Appeal from the district court for Box Butte County: ALBERT W. CRITES, Judge. Affirmed in part, and in part reversed and remanded with directions.

Wade H. Ellis and Jack Devoe, for appellant.

Wright, Simmons & Hancock, for appellee.

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

CARTER, J.

Martha Essay commenced this suit against Edward Essay for the dissolution of a partnership alleged to exist between them, for an accounting of the operation of the business, for the appointment of a receiver during the winding up of the partnership affairs, and for judgment against Edward Essay for any amount due from him to Martha Essay as disclosed by the accounting. By his answer Edward Essay denied that a partnership existed or had ever existed, and claimed to be the sole owner of the business. The trial court entered judgment for Martha Essay and against Edward Essay in the total amount of $92,517.62 with interest at 6 percent from the dates and on the amounts specified in the decree. The court directed the receiver to sell the partnership

business as a going concern and to make distribution of the proceeds in a manner subsequently to be determined by the court. Edward Essay has appealed.

For convenience we shall refer to Martha Essay as Martha and to Edward Essay as Edward. Martha is the mother of Edward. On and prior to May 13, 1946, Edward and his father, Elias Essay, were engaged in the bottling, sale, and distribution of beverages at Alliance, Nebraska. On May 13, 1946, Elias Essay died. On the day following, Martha and Edward entered into a partnership agreement, which was subsequently reduced to writing, to operate the bottling business under the names of Pepsi-Cola Bottling Company and Standard Bottling Company for a term ending December 31, 1951. Each contributed a half interest in the existing business, Martha acquiring her one-half interest by the residuary clause of the will of her husband, Elias Essay. By the terms of the agreement Martha was to be paid $150 per month as rental for the building used in the business, with a provision for a rent increase when additions under construction were completed. Edward was to be paid $200 per month as salary, and profits and losses were to be shared equally.

The business was operated under the terms and conditions of the written partnership agreement for the term therein provided. Thereafter the business continued to be operated under the sole management of Edward as before without any oral or written agreement with reference thereto. On April 13, 1960, Edward informed Martha that she had no interest in the business and that he was and had been the sole owner thereof since 1939. This suit was commenced on May 13, 1960, 30 days thereafter.

Edward contends that a partnership was not established. The evidence shows that Edward entered into a written partnership agreement with Martha, he signed various instruments with her in which they were designated as partners, he paid checks drawn by Martha on

the funds of the partnership, and he made partnership returns for income tax purposes for several years. Edward's evidence that a partnership never existed is based on technical consideration rather than on the conduct of the parties, which will be hereafter discussed.

Edward contends that the partnership agreement expired by its own terms on December 31, 1951, following its execution. Under the provisions of the Uniform Partnership Act, when a partnership undertaking is continued after its termination date without any express agreement, the rights and duties of the partners remain the same so far as is consistent with a partnership at will. § 67-323, R. R. S. 1943. The conduct of the parties brings them within this section of the statute and conclusively establishes that a partnership continued to exist.

The contention of Edward that no partnership ever existed is based on the following evidence: Edward and his father, Elias Essay, were in partnership prior to June 2, 1939. He states that on that date he purchased his father's half of the partnership for $9,500, for which he gave a note. A note for that amount signed by Edward and payable to Elias Essay was offered in evidence. It does not indicate that it was ever paid. No proof of payment was made other than the testimony of Edward. No written evidence of transfer of the partnership interest was ever made. The note was produced by Edward. The delivery of the note, its payment, and the claim of sale rest largely on the evidence of Edward. The only corroboration was a self-serving affidavit given by Edward to the Selective Service Board of Box Butte County in support of an application for military deferment, to which Elias Essay made a corroborative affidavit that the contents of Edward's affidavit were true. Edward's other contention was that the written partnership agreement was void because Martha had no right to make it. While the latter contention may have been true as to existing creditors, if there had

been any, we fail to find any valid reason for saying that it was void as between the parties. We think a consideration of all the evidence sustains the finding of the trial court that a partnership existed between Martha and Edward from the date of the execution of the written partnership agreement on May 14, 1946.

The trial court found from the evidence that the partnership was dissolved on April 13, 1960, the date Edward informed Martha that she was not a partner and never had been such. The defendant contends, if a partnership is found to exist, that it terminated on May 13, 1960, the date Martha filed her petition for the dissolution and winding up of the partnership. The effect of the evidence is that Edward, on April 13, 1960, excluded Martha from any participation in the business, denied her interest therein, and claimed it as his own. This brings the case within the provisions of the Uniform Partnership Act, section 67-329, R. R. S. 1943, which provides: "The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." See, also, § 67-331, R. R. S. 1943. The evidence sustains the trial court's holding that the partnership was dissolved on April 13, 1960.

Contentions are raised by Edward on various items contained in the audit approved by the trial court. In this respect the court is favored with a very helpful opinion by the trial court regarding the basis of the audit and the reasons for surcharging Edward's settlement account as the trial court did. The audit covers many years during the operation of the business during which time its gross annual sales increased from $48,000 in 1939 to $720,540.87 in 1960. The trial court attached the audit relied on in entering its judgment to the court's opinion found in the record. This court will likewise accept this audit, subject to the exceptions taken thereto by Edward on this appeal.

At the beginning of the partnership there was no money value placed on the contributions of each, the written agreement fixing the contributions of each as one-half of the existing assets of the business as of that date. The agreement made no provision for additional contributions to capital. No evidence was offered of any supplemental agreement for contributions to capital, nor is there any evidence that any such contributions were in fact made. The records of the partnership from January 1, 1950, to December 31, 1954, were not available. In 1956 the Internal Revenue Service audited the records of the partnership for the years 1950, 1951, 1952, 1953, and 1954. The parties accepted that audit which found the total investment account on December 31, 1949, to be $61,814.67. The value of each partner's share therein as of January 1, 1950, was therefore $30,907.33. The audit for the following 5 years was based on the Internal Revenue Service audit. The accounting for the year 1955 was based on the work sheets delivered by Edward to his auditor for the purpose of making up the income tax report. From 1956 to 1960 the audit was made from the books of account of the partnership kept under the direction and management of Edward. The investment account was carried forward from January 1, 1955, by dividing the profits for each year and adding one-half thereof to the investment account of each partner and deducting the withdrawals of each for each year. The evidence shows that Martha drew only for her current needs from 1950 to 1961, while Edward drew large amounts in excess of his share of salary and profits. In 1961 the audit indicates that Edward had overdrawn his share by $138,657.43, while Martha's showed a credit of $181,231.27. There is no evidence that these excessive withdrawals on the part of Edward were business expenses or for the benefit of the business. As the managing partner in charge of the business he is liable to Martha for one-half of the excessive withdrawals in the amount of $69,328.72, with interest at

6 percent from April 13, 1960. See Baum v. McBride, 152 Neb. 152, 40 N. W. 2d 649.

It is contended by Edward that he is entitled to an allowance of $89,318.31 for salary. This is based on a claimed oral agreement in 1952 with Martha that his salary would be $1,200 per month and an oral agreement in 1956 that it would be $1,500 per month. Edward testified to a further oral agreement with Martha in 1959 by which his salary was to be $22,500 per year. These alleged oral agreements were unequivocally denied by Martha. There are no bookkeeping entries indicating the payment of such items of salary. The trial court found that the salary of $200 per month provided in the written partnership agreement was controlling and credited Edward with salary on that basis. The evidence sustains the finding of the trial court that supplemental agreements with reference to Edward's salary were not established. The rule is: In a commercial partnership engaged in a business with capital invested jointly by the partners, a managing partner is not entitled to a salary for individual services, nor to an increase of authorized compensation, unless it is allowed by contract. Efner v. Reynolds, 105 Neb. 646, 181 N. W. 552; Beskas v. Calkins, 135 Neb. 323, 281 N. W. 29. The holding of the trial court that Edward's salary of $2,400 per year should be paid from annual profits, and one-half the balance of the annual net profits credited to the investment account of each partner, is correct.

Edward complains of the finding of the trial court that Martha made no withdrawals from her share of the settlement account during the years 1946 to 1954. Edward also complains of the trial court's action in assessing one-half of the undiscovered receipts, amounting to $19,254.87, against Edward, and one-half of certain insurance proceeds totaling $443, which were received by the partnership and not accounted for. Edward also complains that certain prizes won on volume of sales belonged to him and not to the partnership as

the trial court found. Edward contends further that Martha's withdrawals in 1958 and 1959 exceeded the amounts determined by the court.

Before discussing these assignments of error it is necessary to consider the nature of the partnership and the method of its operation. Edward and Martha were equal partners in which each was to share profits and losses. Edward was the managing partner and had the exclusive control of the business. He not only controlled production, sales, and distribution of products, but was responsible for the keeping of all records and books of account. As the managing partner he is required to account to the partnership for any benefit or profit derived from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property. Bode v. Prettyman, 149 Neb. 179, 30 N. W. 2d 627; Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525. See, also, Frey v. Hauke, 171 Neb. 852, 108 N. W. 2d 228; § 67-321, R. R. S. 1943. Edward therefore had a continuing duty to keep the books and records accurately and the entries therein are conclusive as against him. He is required to account for his transactions and for all money received by him or the partnership, and is liable to his copartner for his failure so to do. A partner who overdraws his share of the earnings of a partnership will ordinarily be held personally liable if his share of the partnership assets is insufficient to satisfy the excessive withdrawals. 68 C. J. S., Partnership, § 385 b, p. 897.

From 1956 to 1961 miscellaneous receipts came into the possession of the partnership, which were not accounted for, which totalled $38,509.75. As the managing partner, Edward is required to account to the partnership for these funds. Martha is entitled to one-half of these funds amounting to $19,254.87 with interest at 6 percent from the date of the dissolution of the partnership.

The evidence shows that Edward made claims under

an insurance policy for damages to partnership property totaling $443. Three checks totaling this amount were issued to the Pepsi-Cola Bottling Company by the insurance company. The checks were cashed, having been endorsed by the endorsement stamp of the Pepsi-Cola Bottling Company. The party cashing the checks was never ascertained. The partnership received the checks but no part of the money was credited to its account. Edward asserts he never knew the checks had been sent to the Pepsi-Cola Bottling Company and claims he had never seen them until produced in this proceeding. The amount was properly charged to Edward as an obligation to the partnership. One-half of the amount, $221.50 with interest at 6 percent from the date of the dissolution of the partnership, was properly held to be due to Martha from Edward.

The evidence shows that Edward received two checks from the Pepsi-Cola Company as prizes for the volume of vending machines purchased from that company. One was a prize consisting of a week-end trip for two people within 300 miles of home for having purchased 25 vending machines. The value of this prize was $250, which was sent to Edward by check. The other prize was a two-weeks trip to Bermuda, having a value of $1,176.06, which amount was sent to Edward by check. This prize was for having purchased more vending machines than any other bottler in the Denver region on a per capita basis. Edward cashed both checks and retained the money, amounting to $1,426.06. He claims this money as his own. It will be observed that the prizes were the result of purchases of vending machines by the partnership with partnership funds, in the course of the partnership business. The trial court found that the $1,426.06 was partnership property and required Edward to account for it. A partner has the duty of exercising the utmost good faith toward his copartners. He will not be permitted to derive a secret personal benefit out of partnership business. 68 C. J. S., Partner-

ship, § 99, p. 538. In the instant case the prizes were the result of the efforts of the partnership. Edward as managing partner was required to give his best efforts on behalf of the partnership in the promotion of sales of vending machines. He did nothing independent of his obligations to the partnership to win these prizes. They were won by the partnership and, in the absence of an agreement by the partners to the contrary, the prize money belongs to the partnership and must be accounted for by Edward. "The rule rests upon legal duty. The law will not permit those associated in relationships, in which mutual trust and confidence are ingredients, to put themselves in a position where their individual interests may have a tendency to cause them to relax in their vigilance for the common good, or, without knowledge or consent of their associates, to make individual profits out of the common activities." Johnson v. Ironside, 249 Mich. 35, 227 N. W. 732. Edward was properly required to account to the partnership for the $1,426.06 and $713.03 thereof is due Martha from Edward with interest at 6 percent per annum from January 1, 1959.

Edward asserts that the partnership is entitled to credit for $350 for each month Martha was paid $500 as rent for the building in which the business of the partnership was carried on. The evidence shows that Martha was paid $150 a month for the rent of the building until new construction was completed as provided in the partnership agreement of May 14, 1946. Edward admits that additional rent was agreed upon and that it had been $500 per month for a considerable period of time. The evidence does not sustain a finding that any overcharge of rent occurred. The evidence shows that Edward allocated $4,500 per year for rent and charged $1,500 per year to Martha's settlement account for several years. The trial court properly reconciled this improper allocation by awarding judgment to Martha against Edward for $3,000, it being one-

half of the $6,000 improperly allocated to Martha's settlement account. Interest was properly charged at 6 percent during the periods of time the amounts were improperly allocated.

Edward complains of the denial of his claim for salary and expenses which he filed with the receiver in the amount of $2,399.58. We find no such claim in this record, nor is it pointed out in the briefs of the parties. The claim having been filed with the receiver, it would appear that it was for the determination of the court upon the consideration of the receiver's report. We are of the opinion therefore that the trial court acted prematurely in denying this claim and that its order in so doing should be vacated and the matter left for the determination of the court on the evidence when the final report of the receiver is before the court for its approval.

The court also made the following finding: "The court further finds that after April 13, 1960 and until the appointment of the receiver, the defendant's share of the partnership investment account, being overdrawn and the plaintiff owning all of the partnership investment account, the plaintiff was entitled to all the profits earned by the partnership during this period; * * *." We think this was error.

We point out that although the dissolution of the partnership occurred on April 13, 1960, as found by the trial court, the partnership did not terminate on that date. The partnership terminates with the winding up of the partnership business. § 67-330, R. R. S. 1943. In the instant case Edward purported to divest Martha of her interest in the partnership on April 13, 1960. Thereafter Edward retained possession of all the assets of the partnership and continued to operate the business. When Martha was thus dispossessed of her interest in the partnership business she had an election of remedies. She could have demanded an accounting and claimed the value of her share with interest from the date of

dissolution, or she could demand an accounting and a winding up of the affairs of the partnership, which would include an accounting of all profits of the business until the partnership was terminated and its affairs wound up. In the one, she acquiesces in the termination of the partnership and demands payment for her interest in the partnership with interest on the money value of her investment during the time it is being used by the remaining partner or partners. In the second, she does not acquiesce in the termination of the partnership but demands a winding up of the partnership and is entitled to share in the profits until the partnership business has been finally terminated. 40 Am. Jur., Partnership, § 391, p. 399. In the case before us Martha sought the dissolution and termination of the partnership by a judicial proceeding. She has in effect elected to take the profits on her interest in the partnership until the termination of the partnership rather than to treat the business as terminated on April 13, 1960, and demand interest on her investment.

Martha relies on this court's holding in Frey v. Hauke, *supra,* to the following effect: "If a partner claiming an interest in the profits earned after the dissolution of the partnership has no interest in the assets or capital of the partnership after dissolution, he is not entitled to share in the profits earned." In that case the plaintiff brought suit for the value of his interest in the partnership and for damages for the breach of the partnership agreement. This indicates that plaintiff acquiesced in both the dissolution and the termination of the partnership. He sought the value of his interest as of the time of dissolution and damages for the alleged breach of the partnership agreement. Under such circumstances plaintiff has elected to sue upon the terminated agreement which eliminates any possible claim he might have had for future profits. The case has no application to the one at bar because of the difference in circumstances.

We hold that the net profits earned from April 13, 1960, to July 24, 1961, are to be shared equally, and that such rule applies until the partnership is terminated by a winding up of its affairs. The accounting and judgment of the district court should be modified in this respect.

A supplemental transcript and a supplemental bill of exceptions have been filed in this court which refer to issues raised and litigated in the district court after the present appeal was lodged in this court. Such issues are not before us on the present appeal and they will not be considered.

We have examined the remaining assignments of error and find no prejudicial error in them. The judgment of the district court is affirmed in part and in part reversed and the cause remanded with directions as set forth in this opinion.

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

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1963

VICKI NAPIER, APPELLANT, V. ALFRED PEDERSEN, APPELLEE.
123 N. W. 2d 577

Filed October 4, 1963. No. 35415.

1. **Trial.** In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom.
2. ———. Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury.
3. **Automobiles: Negligence.** Where the negligence of the driver of the automobile in which a guest is riding is the sole proximate cause of injuries to the guest, then the guest has no right of recovery as against a third person.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Schrempp, Lathrop & Rosenthal, for appellant.

Cassem, Tierney, Adams & Henatsch, for appellee.

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

BOSLAUGH, J.

This is an action for damages brought by Vicki Napier, plaintiff, against Alfred Pedersen, defendant. The plaintiff was a passenger in an automobile operated by Mary

K. Campbell and was injured when the Campbell automobile was involved in an accident with the defendant's automobile at an intersection.

At the close of all the evidence, the plaintiff moved for a directed verdict on the issue of the defendant's liability. The trial court overruled the motion and submitted the issue of the defendant's negligence and the issue of proximate cause to the jury. The jury returned a verdict for the defendant. The plaintiff's motion for new trial was overruled and she has appealed.

The plaintiff assigns as error the failure of the trial court to direct a verdict for the plaintiff on the issue of the defendant's liability.

The accident happened in Omaha, Nebraska, at about 9 a. m. on November 12, 1960. Mrs. Campbell was driving north on Fiftieth Avenue and the defendant was driving east on Izard Street. The speed limit on both streets is 25 miles per hour. There are no stop signs at the intersection. The accident occurred when the front of the defendant's automobile collided with the left rear of the Campbell automobile in the intersection. After the impact, the Campbell automobile struck a large tree approximately 65 feet north and west of the point of impact. The plaintiff was injured when the Campbell automobile collided with the tree.

Much of the evidence as to how the accident happened is in conflict. In determining whether the plaintiff was entitled to a directed verdict on the issue of the defendant's liability, the evidence must be considered most favorably to the defendant, every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference which may be drawn therefrom.

The defendant testified that he decreased his speed as he approached the intersection and looked to the south when he was about one car length west of the intersection; that he saw no traffic approaching the intersection; that he looked to the south again when he was near the

crosswalk, or west curbline of the intersection, and saw the Campbell automobile; and that the Campbell automobile was then 30 to 35 feet south of the intersection. The defendant testified that his speed at that time was 10 miles per hour and he estimated the speed of the Campbell automobile to be 30 to 35 miles per hour; that he further reduced his speed and turned slightly to the left; and that the right front headlight of the defendant's automobile struck the left rear fender of the Campbell automobile. After the accident there was paint on the lens of the headlight but the impact did not break the glass. The defendant further testified that after the impact the Campbell automobile struck the east curb north of the intersection, then crossed to the west side of the street, went over the curb, and struck the tree.

The plaintiff's principal contention is that the failure of the defendant to look to the south and see the Campbell automobile before approaching within one car length of the intersection was negligence as a matter of law. The plaintiff relies upon Eden v. Klaas, 165 Neb. 323, 85 N. W. 2d 643, in which it was held that the failure of a driver, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence as a matter of law.

The defendant in this case testified that there was a 4-foot embankment, bushes, and a garage south and west of the intersection which interfered with his observation of traffic approaching the intersection from the south. There is a conflict in the evidence as to the location and extent of these obstructions but the jury could have found that they prevented the defendant from observing traffic approaching the intersection from the south until he was close to the intersection.

The intersection involved in Eden v. Klaas, *supra*, was an intersection of county roads which were flat and level and there was no interference with vision from a

vehicle entering the intersection from any direction for a distance of at least 250 feet. The facts in the Eden case distinguish it from this case and the rule announced in that case is not applicable here.

It was a question for the jury in this case as to whether the defendant was guilty of negligence. Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557.

It was also a question for the jury in this case as to whether any negligence of the defendant was a proximate cause of the plaintiff's injuries. The jury could have found that Mrs. Campbell was negligent and that her negligence was the sole proximate cause of the plaintiff's injuries. If the negligence of Mrs. Campbell was the sole proximate cause of the plaintiff's injuries, then the plaintiff had no right of recovery as against the defendant. Burhoop v. Brackhan, *supra*.

The plaintiff's motion for a directed verdict on the issue of the defendant's liability was properly overruled. The judgment of the district court is correct and it is affirmed.

AFFIRMED.

JAMES GIESLER ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE, DON HANSEN, DOING BUSINESS AS DON'S MOBIL, ET AL., INTERVENERS-APPELLANTS.
123 N. W. 2d 650

Filed October 4, 1963. No. 35419.

1. **Actions.** The right of a plaintiff to dismiss a cause of action before submission to the court is a statutory right and is not a matter of judicial grace or discretion.
2. **Setoff and Counterclaim.** Under section 25-603, R. R. S. 1943, where a setoff or counterclaim has been presented, the defendant has a right to proceed to the trial of his claim, although

the plaintiff may have dismissed his action.

3. **Setoff and Counterclaim: Pleading.** To entitle the defendant to proceed on a setoff or counterclaim it must state a separate cause of action against the plaintiff and be pleaded as fully and distinctly, and with the same requisites, as an original cause of action.
4. **Setoff and Counterclaim.** Where a setoff or counterclaim does not state a separate cause of action against the plaintiff, a dismissal by the plaintiff of his cause of action has the effect of withdrawing the entire case from the consideration of the court.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Reversed and remanded with directions.

Haney, Walsh & Wall, for appellants.

Herbert M. Fitle, Bernard E. Vinardi, Frederick A. Brown, Edward M. Stein, Sebastian J. Todero, Walter J. Matejka, and Frederick S. Geihs, for appellee.

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

CARTER, J.

This is an action for a declaratory judgment seeking to have declared unconstitutional an ordinance of the city of Omaha purporting to regulate the doing of business on Sunday. The plaintiffs were the owners of eight separate drug stores in the city of Omaha. Two parties intervened in the action, one the owner of a gasoline filling station and the other the owner of a drug store. The city of Omaha was the sole defendant in the original action and in the petitions in intervention.

The petition and the petitions in intervention asserted that the Sunday closing ordinance, ordinance No. 21945 of the city of Omaha, was unconstitutional and void as being in conflict with specified sections of the state and federal Constitutions, and certain specified sections of the statutes of Nebraska. After the issues were made up and the case set for trial the plaintiffs and interveners filed a dismissal of their respective petitions.

The city of Omaha filed objections to the dismissals. The trial court dismissed the petitions of the plaintiffs and interveners, but directed that the trial proceed on the issues raised by the amended answer of the city of Omaha. The plaintiffs and interveners assign this as error.

The right of plaintiffs and interveners to dismiss their petitions before final submission of the case to the court is controlled by section 25-601, R. R. S. 1943, which provides in part: "An action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court; * * *." It is a statutory right and not a matter of judicial grace or discretion. Duffy v. Cody, 129 Neb. 737, 262 N. W. 828. The trial court properly dismissed the actions by virtue of this statutory provision. The defendant contends that the trial court properly retained the case for trial under section 25-603, R. R. S. 1943, which provides: "In any case where a set-off or counter-claim has been presented, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed the action or failed to appear." The nature of the pleadings filed by the defendant to the petitions of plaintiffs and interveners is of controlling importance in determining the correctness of the court's order in retaining the case for trial.

The answer filed by the defendant admits certain facts pleaded in plaintiffs' petition and denies the facts not admitted. The prayer of the answer was for an order dismissing plaintiffs' petition and the dissolution of a restraining order previously entered, the denial of plaintiffs' application for a temporary and permanent injunction, a request for an order declaring ordinance No. 21945 to be valid and effective, and a prayer for general equitable relief. By an amended answer the defendant asserted the validity of the ordinance and that it was entitled to a judgment declaring its validity. No

prayer for relief was contained in the amended answer.

No contention is made that the case had been submitted at the time the dismissal was filed. Defendant relies solely on section 25-603, R. R. S. 1943, to sustain its position.

The right of a party to voluntarily dismiss an action is governed by the common law except as modified by statute. The right to dismiss is liberally construed in favor of the right, but strictly construed to the extent that it is in derogation of the common law. In Plattsmouth Loan & Bldg. Assn. v. Sedlak, 128 Neb. 509, 259 N. W. 367, this court quoted with approval the following: "The right of a plaintiff to take a nonsuit or dismiss the action upon discovery at any stage of the trial that, in the then state of his case, he cannot recover or safely proceed further, is essential to an efficient administration of the law and often enables justice to prevail when otherwise it would miscarry. * * * So the wisdom and policy of the common law always freely accorded the privilege to litigants, while statutory limitations of its exercise have usually been restricted by the courts within their exact terms."

By the terms of section 25-603, R. R. S. 1943, a defendant who has presented a setoff or counterclaim may proceed with the trial of his claim irrespective of plaintiff's dismissal. Defendant contends that this situation existed in the present case. A setoff or counterclaim is a separate claim from that asserted by the plaintiff. It must state a cause of action against the plaintiff. Counterclaims and setoffs are required to be separately stated and numbered, which was not done in the instant case. The answer of the defendant stated no cause of action against the plaintiffs. It was defensive only. The alleged statement of an affirmative defense was nothing more than the inverse statement of the prayer of the petitions of plaintiffs and interveners.

A cross-demand, whether it be a setoff, counterclaim, recoupment, or for other affirmative relief, must allege

facts which make up a separate cause of action relied on as a cross-demand against plaintiffs' claim. Snyder v. Collier, 85 Neb. 552, 123 N. W. 1023, 133 Am. S. R. 682; In re Estate of Nilson, 126 Neb. 541, 253 N. W. 675; Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N. W. 2d 298.

In 71 C. J. S., Pleading, § 174, p. 354, the rule is stated as follows: "The cross demand must be pleaded as fully and distinctly, and with the same substantial requisites, as an original cause of action; it must be sufficient in itself, without recourse to other parts of the pleading or to other pleadings, unless by express reference." We fail to find any facts pleaded which entitle the defendant to any affirmative relief against the plaintiffs and interveners.

While a counterclaim or setoff is required by statute to be separately stated and numbered, we cannot say that a failure to comply in that respect is fatal where the quesiton is not timely raised. State v. Coughran, 19 S. D. 271, 103 N. W. 31. Assuming that the formality of the pleading is sufficient, the contention of the defendant must fail for the reason that the facts pleaded do not state a cause of action against the plaintiffs and interveners. Under such circumstances the defendant is not within the provisions of section 25-603, R. R. S. 1943, and the dismissal by plaintiffs and interveners had the effect of withdrawing the entire case from the consideration of the court.

The trial court was in error in proceeding with the case upon the filing of the dismissal by the plaintiffs and interveners. The action of the court in holding the case for trial on the answer and purported counterclaim of the defendant, and entering a judgment thereon, is reversed and the cause remanded with directions to dismiss the entire action.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INQUIRY OF JOHN WILLIAM PERRY, A MINOR CHILD. ROBERT L. JONES ET AL., APPELLANTS, V. STATE OF NEBRASKA ET AL., APPELLEES.

123 N. W. 2d 633

Filed October 11, 1963. No. 35355.

1. **Appeal and Error: Infants.** An appeal from a finding and adjudication of the district court by the authority of Chapter 43, article 2, R. R. S. 1943, that a child is or is not neglected or dependent is disposed of in this court by trial de novo.
2. ———: ———. Any final order or judgment entered by a separate juvenile court may be reviewed by the Supreme Court of Nebraska within the same time and in the same manner prescribed by law for the review of any order or judgment of the district court.
3. **Infants: Statutes.** A statute providing as to who are neglected children should be liberally construed to aid the purpose of its enactment.
4. ———: ———. Whether a child is a neglected child within such statute is a question of fact, and each case must be determined on its own facts.
5. **Parent and Child: Infants.** The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless.
6. ———: ———. The jurisdiction of the state arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet its needs and wants, and residence within the state suffices even though the domicile may be in another jurisdiction.
7. ———: ———. A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it should be in danger of so becoming in the near future.
8. ———: ———. Under the facts presented herein, it is against the intent of the law to permit the removal of a child from this jurisdiction unless a proper showing is made that it will not become a neglected or dependent child.
9. **Evidence.** A self-serving declaration is one made by a party in his own interest at some time and place out of court, and does not include testimony which he gives as witness at the trial.

Appeal from the separate juvenile court of Douglas

County: SEWARD L. HART, Judge. Reversed and remanded with directions.

Richard G. Stehno, for appellants.

Donald L. Knowles, Kenneth P. Weiner, James M. Murphy, and Sebastiano Caporale, for appellees.

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

SPENCER, J.

This is an action initiated by petitioners in the juvenile court of and for Douglas County, Nebraska, for the purpose of having the juvenile court declare John William Perry to be a neglected child pursuant to section 43-201, R. R. S. 1943. The judge of said juvenile court in dismissing the petition stated: "* * * I am going to dismiss the matter on the grounds that this Court does not have jurisdiction over acts of *negligence* (neglect) occuring (sic) in another State. I am going to add that even assuming that the Court might properly have jurisdiction over *negligence* (neglect) in another State, that there has been no competent evidence offered to support the allegations of neglect since all of the testimony offered has been self-serving testimony. The petition is dismissed."

Petitioners prosecuted an appeal to this court. They set out seven specific assignments of error. Briefly, they may be summarized as follows: First, was the decision of the court contrary to law; and second, was the decision of the court contrary to the evidence adduced? We sustain the position of appellants on both points.

John William Perry, who was born October 15, 1959, is the son of Clifton J. Perry and Annie Belle Perry, nonresidents of Nebraska and at all times material herein residents of Kansas City, Missouri. The petitioners, hereinafter referred to as appellants, are Robert L. Jones and Ethel Jones, husband and wife. Ethel Jones is a

sister of Clifton J. Perry and the paternal aunt of John William Perry.

On February 16, 1961, the appellants, who are residents of Omaha, Nebraska, after a call from a relative telling them of conditions in the Perry home, went to Kansas City. When they arrived at the Perry home, they found John William Perry, hereinafter referred to as the child, with its father. It was on a bare floor, clothed only with a diaper and a dirty undershirt. It had a bad cold, was crying, and "his nose was running down to his chin * * *." The house was poorly heated, very filthy, and had what Mr. Jones described as a "rotten stinking odor," which was so bad that appellants left the home to return when Mrs. Perry was expected to be present. When in the house they observed many large holes in the baseboard of the kitchen and the back of the house which they assumed to be rat holes.

When the appellants returned, they brought some things for the child. Mrs. Perry was then home. She told them that conditions were real bad and that the Perrys could not take care of the child. The mother had packed all of the child's belongings in a cardboard box. The box contained clothing which was dirty and ragged and was several sizes too large for the child. Its condition was such that appellants had it destroyed. On the way back to Omaha appellants stopped overnight with relatives at Atchison, Kansas. These relatives, who observed the condition of the child, were witnesses at the hearing and testified to the child's condition at that time.

When appellants received the child, in addition to the bad cold, he was nervous and seemed to be afraid of the slightest noise. He was extremely dirty. The dirt was ground into his skin, with a ring of dirt on his neck and stomach. He also had a diaper rash with open sores on his buttocks. His stool was white and chalky and he had no strength in his legs. Appellants took the child to a doctor who said the child had not had proper food.

He was given shots, put on vitamins and a proper diet, responded to treatment, and developed normally. His whole personality changed and he became an active, normal child.

The evidence indicates that the Perrys had two other children, ages four and six, who have been legally adopted by an older brother of Mrs. Jones and now live in Minnesota. Mrs. Perry also had three children by a previous marriage. They do not reside with her but are being raised by three different families. Mrs. Perry is working in a Kansas City nursing home for the aged for $30 per week and is away from home from 6 a. m. until 7 p. m. seven days a week. In the 6½ years that Mrs. Jones has known Mrs. Perry, the living conditions of the Perrys have gotten progressively worse. Mr. Perry is an alcoholic, lazy, and shiftless. At the time appellants took the child he was unemployed because he had been discharged when he failed to report for work.

The evidence indicates that there was no specific agreement or understanding between the appellants and the Perrys as to whether the appellants would keep the child permanently or how long the arrangement would continue. While appellants are anxious to adopt the child, they have no objection to returning it if conditions have changed so that the child will be properly cared for.

From February 16, 1961, to the time of the trial, the Perrys had not seen the child, had not sent any clothing to it or money for its care, nor had they made any other provision for it. Mrs. Perry did write appellants five or six times to say she was coming to Omaha, but she did not appear. In October 1961 Mrs. Perry wrote she was coming to Omaha for the child. Appellants had been advised that the Perrys had separated and that Mrs. Perry was using another family name. They had also had a letter from Mr. Perry advising them that he had seen pigpens cleaner than Mrs. Perry's present

home, and urging them to keep the child. Appellants then filed this proceeding.

The action was filed with the consent of the county attorney, and a deputy county attorney handled the proceeding at the hearing. The court appointed a guardian ad litem for the child who sent the mother a copy of the petition and advised her of the date of the hearing. She sent the copy of the petition back with a letter which reads as follows:

"1015 Troost
Kansas City Mo
Dear Mathews & Kelley
I not signing anything & dont sent me any more paper. & dont put my name on any thing my Lauer said so.

Signs
Mrs. Annie Bell"

The father had been notified of the proceeding, and through his attorney stated that he would not be present.

An appeal from a finding and adjudication of the district court by the authority of Chapter 43, article 2, R. R. S. 1943, that a child is or is not neglected or dependent, is disposed of in this court by trial de novo upon the record. See Krell v. Sanders, 168 Neb. 458, 96 N. W. 2d 218. Section 43-238, R. R. S. 1943, provides that any final order or judgment entered by a separate juvenile court may be reviewed by the Supreme Court of Nebraska within the same time and in the same manner prescribed by law for review of any order or judgment of the district court.

A statute providing as to who are neglected children should be liberally construed to aid the purpose of its enactment. Whether a child is a neglected child within such statute is a question of fact, and each case must be determined on its own facts. Stanley v. State, 105 Neb. 260, 179 N. W. 1019.

Appellees urge that this case is controlled by State v. Gross, 173 Neb. 536, 114 N. W. 2d 16. While the law

stated therein is controlling, there is very little factual resemblance between the two cases. Here the evidence is conclusive that the parents had failed or neglected to provide proper subsistence and necessary care for the child's health. Here the appellants were faced with an emergency situation. The information they had, while hearsay, was that conditions had not changed. Rather, the broken home and the use by the mother of another family name might suggest that they had gone from bad to worse. Appellants were, and had reason to be, concerned about the child's welfare. To protect the child they sought the aid of the juvenile court. While the child was not neglected in their home, it was readily apparent to them that unless conditions had radically changed, the child would be neglected if removed from its present environment to the mother's home.

At the time the child was taken by appellants it was being deprived of subsistence, care, nurture, and certainly proper medical attention. The meager record provided is ample to show gross neglect at the time the child was taken by appellants. This case presents a situation where the court is required to act to protect the interests of the child at the very least to the extent of exercising jurisdiction until a proper showing has been made that the mother is a fit and proper person to assume control and that conditions have so changed that the child will not be neglected.

The record indicates that the guardian ad litem had requested a report on the mother's home in Kansas City from the Kansas City welfare bureau but the court felt this report to be immaterial at that stage of the proceeding. In the view we take of the proceeding, it was extremely material. Appellants were attempting to protect the welfare of the child. The mother was threatening to take the child. It does not seem logical that the court should depend on a highly speculative probability that conditions had changed for the better when actual impartial evidence was readily available.

The jurisdiction of a state to regulate the custody of an infant found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. As we said in In re Application of Reed, 152 Neb. 819, 43 N. W. 2d 161: "The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the child, but it arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants, and residence within the state suffices even though the domicile may be in another jurisdiction."

The general rule is stated in an annotation found in 4 A. L. R. 2d at page 16: "Where there is no outstanding judicial award of custody by a foreign court the courts are nearly unanimous in holding that even though the children may be domiciled without the state, power in the court exists to make an award of custody of children present in the state in furtherance of the welfare of the children."

In State v. Gross, 173 Neb. 536, 114 N. W. 2d 16, we held: "A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it should be in danger of so becoming in the near future." Clearly, there was every reason to believe that the child was in danger of becoming a neglected child if removed from his present home in Nebraska.

Under the facts presented herein, we declare the rule to be that it is against the intent of the law to permit the removal of a child from this jurisdiction unless a proper showing is made that it will not become a neglected or dependent child.

The trial court concluded in part that there was no competent evidence adduced of the neglect testified to for the reason that the evidence was all self-serving. We are at a loss to understand the court's reasoning.

We must assume the court was confusing the testimony with a self-serving declaration, which is a statement made out of court which is offered as evidence in the trial. There were no self-serving declarations involved herein. It is true that all of the witnesses were either the appellants, relatives of one of the appellants, or friends of the appellants, but they all testified to the facts as they saw them, and were examined and cross-examined by the attorneys participating and by the court itself. The State was represented by a deputy county attorney, the appellants by their own attorney, and the child by a guardian ad litem.

As we said in Powerine Co. v. Grimm Stamp & Badge Co., 127 Neb. 165, 254 N. W. 722: "A self-serving declaration is one made by a party in his own interest at some time and place out of court, and does not include testimony which he gives as witness at the trial."

In passing, we note that the parents were fully advised of the proceeding, had been served with copies of the petition, and had consulted attorneys in their own jurisdiction, but failed to appear or to object in any manner to the proceeding. The proceeding was filed November 13, 1961, and came on for hearing December 6, 1961. The Perrys had been notified of the hearing by appellants' attorney. The court continued the hearing to December 20, 1961, and instructed the guardian ad litem to notify the Perrys by certified mail, but they did not appear. Evidence was adduced and the hearing was continued until January 9, 1962. No one appeared for the Perrys at the time, and the court continued the hearing to April 24, 1962, at which time the court announced his decision. This does not indicate too great a concern for the welfare of their child by the Perrys.

For the reasons given, we reverse the judgment of dismissal entered by the trial court and remand the cause with directions to award the custody of the child to appellants subject to the further order of the court.

REVERSED AND REMANDED WITH DIRECTIONS.

JOSEPH ANDERSON, APPELLANT, V. VALLEY FEED YARDS, INC., A CORPORATION, APPELLEE.

123 N. W. 2d 839

Filed October 11, 1963. No. 35384.

1. **Principal and Agent.** Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. The distinguishing features of agency are its representative character and its derivative authority.
2. ———. Whether a particular relationship is an agency depends on the relations of the parties as they in fact exist, without regard to what they call their relationship.
3. **Landlord and Tenant.** A provision in a lease for the payment of a percentage of the gross revenue of a business conducted by the lessee on the premises does not by itself alter the existence of the relationship of landlord and tenant and create an agency.
4. ———. Subject to specific exceptions, the lessor of land is not liable for bodily harm caused to his lessee, or others upon the demised land with the consent of the lessee or sublessee, by any dangerous condition whether natural or artificial, which existed when the lessee took possession.
5. ———. Where a lessor knows at the time of leasing that a dangerous condition exists thereon which renders the premises unsafe for the public use intended under the provisions of the lease, the lessor is liable for injuries sustained by patrons of such lessee who, upon invitation express or implied, are admitted to such demised premises to make use of the same for the particular purpose for which it was leased.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

Lyle Q. Hills, for appellant.

McGinley, Lane, Mueller & Shanahan, Kennedy, Holland, DeLacy & Svoboda, and Jesse D. Cranny, for appellee.

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

WHITE, C. J.

This is a tort action by the plaintiff, Joseph Anderson, for injuries sustained on July 1, 1956, when he dove into shallow water from a diving platform constructed on the edge of a lake on premises owned by the defendant, Valley Feed Yards, Inc. The defendant's amended answer admits ownership; alleges that a lease of the premises was made in September 1949 to Nebraska Lakes, Inc., for resort purposes, including the swimming area; and alleges that the diving platform and swimming facilities were constructed during the period of resort operation by the Nebraska Lakes, Inc., under the lease. On motion for summary judgment, after depositions, exhibits, affidavits, and requests for admission were received in evidence, the trial court sustained the defendant's motion for summary judgment.

The questions presented by the assignments of error are twofold:

1. Was the written agreement between the defendant, Valley Feed Yards, Inc., and Nebraska Lakes, Inc., a lease or was it a contract creating Nebraska Lakes, Inc., an agent of the defendant in operating the resort premises, including the swimming and diving area?

2. Assuming that the contract was a lease of the premises from the defendant to the resort operator, Nebraska Lakes, Inc., was there liability on the part of the defendant lessor for negligence in the construction and maintenance of the diving board and platform by the lessee in conducting a resort open to and used by the public for a paid consideration?

The defendant owns land containing approximately five lakes created many years ago as the result of excavation under a sand and gravel lease. This land abuts the Platte River. On September 10, 1949, about 7 years before the accident and about 5 years before the installation of the diving board at the swimming area of the resort, the defendant and Nebraska Lakes, Inc., entered into a written "lease" agreement. This agree-

ment undisputedly declares and defines the rights, duties, obligations, and the power to use and control the defendant's land involved in this action. The agreement is called a "lease" and throughout is characterized by the use of terms and language importing and declaring the relationship of landlord and tenant as it is commonly understood in legal terms. The premises are legally described, and the Nebraska Lakes, Inc., agrees to "use and occupy" the premises for resort purposes for a period of over 23 years. Reservations by the lessor on the unrestricted use of the premises which it did "demise and lease" to Nebraska Lakes, Inc., are provisions as to prohibit the removal and damaging of fences and trees without the written consent of the lessor, a reservation of the right of inspection of the premises, the right to use the roads for the use of the lessor's vehicles, restrictions against subletting without written consent of the lessor, and a requirement that the lessee keep and operate the business in a lawful manner. The lessor reserves the right to grow crops on the premises, reserves ownership in tenant-constructed buildings on termination of the lease, and provides for reentry and control of the premises in the event of default in the payment of rent or the performance of other covenants by the lessee, Nebraska Lakes, Inc. The lease provides for rental payments of a flat sum per year plus a percentage of the gross income from the operation of the resort. The lease was subject to the preexisting lease rights of the Lyman Richey Sand & Gravel Company to remove gravel and sand.

Evidence was introduced by both parties as to the actual operation of the resort. The officers and managers of Valley Feed Yards, Inc., and Nebraska Lakes, Inc., testified. It is not asserted that there is any other, further, or different evidence than that which was introduced. Their testimony is in substantial agreement and undisputed. It demonstrates that Nebraska Lakes, Inc., took possession under the lease of September 10,

1949, and had operated and was operating a resort on the premises at the time of the accident in conformity to the terms of the lease agreement. There is no evidence that the defendant directed or attempted to direct the operation or management of the resort in any respect. The evidence is conclusive that Nebraska Lakes, Inc., as lessee, selected the portion of the property to be used for the swimming area and the installation of the diving board; that it hired and fired its employees; and that it determined the gate charges, hours, and all of the details as to manner of operation. It constructed, repaired, and maintained all of the structures used for resort and swimming purposes. It equipped the swimming area with piers and floats, and about 4 or 5 years after the commencement of the lease, it constructed the diving platform and board involved in the plaintiff's accident and injury. The only conclusion that could be drawn from all of the testimony is that Nebraska Lakes, Inc., was the sole and exclusive operator of the resort and swimming area. The defendant never interfered with, or had the right to interfere with, the exclusive control and operation by Nebraska Lakes, Inc., of the resort and swimming area. The plaintiff cites Brasier v. Cribbett, 166 Neb. 145, 88 N. W. 2d 235, where the question of whether an agreement for the operation of an airport constituted an agency or a lease was before the court. In holding that an agency was created because supervisory authority over operations of the business of the airport was retained by the purported lessor and that the purported lessee was devoid of the requisite control and possession of the premises, we laid down the following rule as a testing yardstick in such cases: "In Valentine Oil Co. v. Powers, 157 Neb. 87, 59 N. W. 2d 160, this court said: 'Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. * * * The distinguishing features of agency are its

representative character and its derivative authority. Whether a particular relationship is an agency depends on the relations of the parties as they in fact exist, without regard to what they call their relationship.' See, also, Restatement, Agency, § 1, p. 7; 2 C. J. S., Agency, § 2, p. 1026."

In Restatement, Agency, § 1, p. 7, it is stated: "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."

As the plaintiff states, where there is control, there is agency. Here, either in the lease agreement or in the actual operation of the swimming area or resort, there is a complete absence of the retention of supervisory authority over the defendant. There was a grant of possession and control of all of the premises for the operation of the swimming area and resort with the manner of conduct and operation of the business resting solely in Nebraska Lakes, Inc. Reservations and restrictions in the lease as to cropping rights, subletting, right of inspection, right to reentry in default, use of roads, and rights of a previous lessee to mine sand and gravel could in no way alter this conclusion, and authority supporting such a conclusion is not cited. We point out that the reserving of rights existing in the landlord at the time of the lease is not proof of affirmative control, direction, and supervisory authority of the business operated by the lessee on the premises. Nor does the provision for payment of a percentage of the gross revenue of the resort operation as rental alter the existence of the relationship of landlord and tenant and create an agency. Van Avery v. Platte Valley Land & Investment Co., 133 Neb. 314, 275 N. W. 288. From what has been said, it is clear that the contention of the plaintiff that an agency relationship existed cannot be sustained.

The plaintiff next contends that even assuming the only relationship present was that of lessor and lessee,

the defendant lessor leased the premises for a public purpose, knew that members of the public were generally invited, and owed the duty to protect the plaintiff against the dangerous condition of the swimming area with its diving platform and board. The undisputed evidence is that the lake or pond had been in existence for many years prior to the lease agreement of September 10, 1949. Undisputed is the fact that all of the artificial conditions, the piers, the floats, and the other equipment and structures were placed on the premises by the lessee, Nebraska Lakes, Inc., *after the lease agreement went into effect.* The diving platform and springboard were constructed by the lessee itself and placed on the premises 4 or 5 years later in 1953 or 1954. It is also undisputed that there was no covenant by the lessor to make repairs or improvements; that none were made by the lessor; and that the lessor exercised no control or performed any acts whatsoever in connection with their construction, placement, or operation.

Applicable here is the following from Sipprell v. Merner Motors, 164 Neb. 447, 82 N. W. 2d 648: " 'Subject to limited exceptions, the general rule is that guests and invitees of the tenant derive their right to enter upon the premises leased through the tenant, and have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects on the premises than the tenant has.' * * * the exceptions contemplated by this statement have no relation to conditions arising after leasing and surrender of control but only to those existing at the time of leasing."

The precise question as to a lessor's duty toward invitees on premises leased for a public purpose was passed on in Nelson v. Hokuf, 140 Neb. 290, 299 N. W. 472, wherein it was declared: "In Van Avery v. Platte Valley Land & Investment Co., 133 Neb. 314, 275 N. W. 288, this court approved the following rules. 'Subject to specific exceptions, the lessor of land is not liable for

bodily harm caused to his lessee, or others upon the demised land with the consent of the lessee or sublessee, by any dangerous condition, whether natural or artificial, which existed when the lessee took possession.' 'Where, however, premises are leased for a public or semipublic purpose, and the lessor knows at the time of leasing that a dangerous condition exists thereon which renders the premises unsafe for the public use intended, the lessor is liable for injuries sustained by patrons of such lessee who, upon invitation express or implied, are admitted to such demised premises to make use of the same for the particular purpose for which it was leased.' "

Perhaps the most succinct statement of the rule applicable to a lease for public purposes is the following from Restatement of the Law of Torts, § 359, p. 971, quoted in Van Avery v. Platte Valley Land & Investment Co., *supra:* " 'A lessor who leases land for a purpose which involves the admission of a large number of persons as patrons of his lessee, is subject to liability for bodily harm caused to them by an artificial condition *existing when the lessee took possession,* if the lessor * * * (a) knew or should have known of the condition and realized or should have realized the unreasonable risk to them involved therein, and * * * (b) had reason to expect that the lessee would admit his patrons before the land was put in reasonably safe condition for their reception.' "

That the lake or pond itself did not constitute a dangerous condition or a nuisance is well settled. City of Omaha v. Bowman, 52 Neb. 293, 72 N. W. 316, 66 Am. S. R. 506, 40 L. R. A. 531; Toft v. City of Lincoln, 125 Neb. 498, 250 N. W. 748; Robbins v. City of Omaha, 100 Neb. 439, 160 N. W. 749.

The conditions and requirements of these applicable rules not having been met, it is clear that there was no duty imposed on the lessor as to the diving board and other artifical conditions placed and constructed on the premises after the commencement of the lease.

We, therefore, reach the ultimate conclusion that under the undisputed facts and circumstances of this case, the rights reserved and retained by the lessor were not the proximate cause of the plaintiff's injuries, nor could such retention of rights by the lessor be made the basis of a duty to construct or reconstruct or change improvements and conditions made exclusively by the lessee, or to make the added improvements reasonably safe for lessee's invitees.

Under the applicable rules as to motion for summary judgment, the pleadings have been pierced to show conclusively that no genuine issue of fact exists and that the defendant is entitled to judgment as a matter of law. The judgment of the trial court is correct and is affirmed.

AFFIRMED.

DONNA MAE GROTHENDICK, ALSO KNOWN AS DONNA MAE MORELAND, APPELLANT, V. DONALD M. GROTHENDICK, APPELLEE.

123 N. W. 2d 646

Filed October 11, 1963. No. 35396.

1. **Divorce.** In an action for divorce where the custody and maintenance of children are involved and a decree has been rendered fixing custody and maintenance, if the circumstances of the parties shall change, or it shall be to the best interests of the children, the court is empowered by statute afterwards from time to time on its own motion or on the petition of either parent to revise or alter, to any extent, the decree so far as it concerns the care, custody, and maintenance of the children or any of them.
2. **Divorce: Appeal and Error.** In the absence of error or a showing that the action of the court was unreasonable, such action will not ordinarily be vacated or set aside on appeal.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Kelley, Grant & Costello, for appellant.

White, Lipp, Simon & Powers, for appellee.

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

YEAGER, J.

This is a proceeding to modify or change the part of a decree of divorce relating to the custody of two minor children of the plaintiff, who is appellant here, and the defendant, who is appellee here, in an action in the district court for Douglas County, Nebraska. The plaintiff instituted the action for divorce but the record here fails to disclose to which of the parties the decree awarded the divorce. The decree has not come to this court as a part of the record.

The proceeding here was instituted by the plaintiff by the filing on May 23, 1962, of a petition in that action in which she declared that the parties were divorced on December 4, 1959; that the defendant was awarded custody of the two children; that on June 17, 1960, the court on its own motion placed the children in the custody of the district court, and at that time placed them in possession of the plaintiff; that on November 21, 1960, the custody was continued in the district court but it was provided that possession be given to a boarding home approved by the court for 6 months or less; that on September 15, 1961, erroneously stated in the petition as August 16, 1961, on motion of the plaintiff to modify the previous order with reference to custody and to grant it to plaintiff, custody was instead awarded to the defendant; and that possession was awarded to the parents of defendant until the further order of the court, with permission to the plaintiff to visit them on the fourth Sunday of each month between the hours of 1 p.m. and 7:30 p.m. The prayer was for modification of the previous award by granting custody to her. To this petition the defendant, on June 25, 1962, filed a general denial.

On June 29, 1962, the defendant filed an applica-

tion for a grant of right to remove the children under his custody to the State of Colorado.

A hearing was had on the petition of plaintiff and the application of defendant, and an order was entered granting full custody of the children to the defendant with right to remove them to his home in the State of Colorado.

At the hearing evidence was adduced on behalf of both parties but from it all and the transcript, there is nothing whatever which discloses a reason for the original decree or the modifications subsequent thereto and prior to the order involved here.

At the hearing involved here the fitness of the parties did not become the subject of inquiry. The only real subjects of inquiry on this hearing were the suitability of environment which could be provided respectively by the parties, the desires of the children, and impairment of rights of visitation by the plaintiff in the case of an award such as was granted by the court.

There could not in reality be anything said unfavorably as to the respective environments offered, and also there was nothing, which if the opportunity was afforded, from which an inference flowed that the offers would not be fulfilled.

The record discloses that the children desired the result which was accomplished by the order which was entered. This information came from the children.

The rights of visitation were presented and remarked upon by the trial judge at the hearing involved here as is disclosed by the record, and in the light of this in effect he concluded by the order that the impairment of the rights of visitation was not sufficient to defeat the right of custody of the children in the defendant and their removal to Colorado.

It may be well observed here that it must be presumed that the earlier award of custody to the defendant was predicated upon information sustaining its propriety.

On the question of change of custody and mainte-

nance of children after a decree has been rendered, section 42-312, R. R. S. 1943, provides: "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them." See, also, Waldbaum v. Waldbaum, 171 Neb. 625, 107 N. W. 2d 407; Jones v. Jones, 173 Neb. 880, 115 N. W. 2d 462.

The only substantial change made by the order from which the appeal is taken here is that the full and unqualified custody of these children is granted to the defendant and he is permitted to remove them to the State of Colorado.

A probable practical effect, as the court recognized, was to deprive the plaintiff of monthly visitation. This right has not been denied but distance would in probability deprive her of these opportunities.

The district court heard the parties testify and in the very nature of things had the opportunity to make observation which opportunity, also in the nature of things, is denied to this court, and in this light in its discretion made this order. In all of this there is nothing to justify an adjudication that it abused its discretion or violated its duty, or that the action was unreasonable. In the light of this no basis exists for a reversal of the action of the district court. See Passmore v. Passmore, 144 Neb. 775, 14 N. W. 2d 670.

The judgment of the district court is therefore affirmed.

AFFIRMED.

MARTHA ESSAY, APPELLEE, V. EDWARD ESSAY, APPELLANT.
123 N. W. 2d 648

Filed October 11, 1963. No. 35405.

SUPPLEMENTAL OPINION

Appeal from the district court for Box Butte County: ALBERT W. CRITES, Judge. On motion for rehearing. See *ante* p. 689, 123 N. W. 2d 20, for original opinion. Former opinion modified. Motion for rehearing overruled.

Wade H. Ellis and Jack Devoe, for appellant.

Wright, Simmons & Hancock, for appellee.

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

CARTER, J.

The appellee asserts on rehearing that this court was in error in holding that "the net profits earned from April 13, 1960, to July 24, 1961, are to be shared equally, and that such rule applies until the partnership is terminated." Upon a reconsideration of this point we conclude that the opinion was in error in this respect.

It is the general rule that the right of a partner to share in the profits earned by the continuance of a partnership business after its dissolution is founded upon the use to which such partner's interest in the capital and assets of the partnership has been put in earning subsequent profits, and if the partner claiming an interest in profits earned after the dissolution has no interest in the assets or capital of the partnership after dissolution, he is not entitled to share in such profits. 40 Am. Jur., Partnership, § 390, p. 398.

From the date of dissolution, in this case April 13, 1960, until the appointment of a receiver on July 24, 1961, Edward Essay continued to manage the business and devoted his time and skill to its operation. Where the profits earned after dissolution and before a final

accounting are attributable in part to the personal skill or services of a partner, it is a factor to be considered in the apportioning of the shares of the partners.

We conclude, however, that the interest which Edward Essay may have in the profits earned after the dissolution of the partnership can be determined only after the interests of the partners in the capital and assets of the partnership are determined. We hold that this court prematurely decided the shares that each partner was to have in the profits after dissolution. We direct the trial court to reserve its ruling with reference thereto until there has been a final accounting of the capital and assets of the partnership, and that the profits earned after the dissolution be then apportioned in the proportion that each had in the partnership assets at the time of dissolution, subject to a consideration of the service and personal skill of Edward Essay in earning such profits, either by adequate compensation therefor or by increasing his share of the profits as equity requires. Vangel v. Vangel, 45 Cal. 2d 804, 291 P. 2d 25, 55 A. L. R. 2d 1385.

Our former opinion appearing *ante* p. 689, 123 N. W. 2d 20, is accordingly modified in accordance herewith and the motion for a rehearing overruled.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

STATE OF NEBRASKA, APPELLEE, V. LOREN ROBERT GARST, APPELLANT.
123 N. W. 2d 638

Filed October 11, 1963. No. 35426.

1. **Automobiles.** By statute it is provided that whenever it comes to the attention of the Director of the Department of Motor Vehicles that a person has accumulated a total of 12 or more points within a period of 2 years for traffic violations, such director is authorized to summarily revoke the license and

privilege of such person to operate a motor vehicle in this state, such revocation to be for a period of 1 year from the date of the signing of the order of revocation.

2. ———. Section 39-7,130, R. R. S. 1943, provides in part that within 24 hours after the revocation provided for by section 39-7,129, R. R. S. 1943, the Director of the Department of Motor Vehicles shall notify in writing the person whose license or privilege has been revoked, and such notice must be mailed to such person by either registered or certified mail to the last-known residence of such person.

3. ———. The last-cited statute discloses that the intention of the Legislature is that the Director of the Department of Motor Vehicles could and should rely upon the last-known residence as shown by the files in his office.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

Thomas J. Gorham, for appellant.

Ralph D. Nelson and Jerry L. Snyder, for appellee.

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

MESSMORE, J.

The appellant, Loren Robert Garst, hereinafter called the defendant, was charged with unlawfully operating a motor vehicle within the corporate limits of the city of Lincoln while his Nebraska operator's license was under suspension and before it was reinstated. As presented to the jury by the trial court's instructions, the basic issues were whether or not the defendant was operating a motor vehicle within the corporate limits of the city of Lincoln, and whether or not the operator's license of defendant to drive a motor vehicle was under suspension at the time of said operation. The trial court also submitted to the jury the issue as to whether or not the defendant was given proper notice of the suspension of his Nebraska operator's license. The jury returned a verdict of guilty. The defendant filed a motion for new trial. The trial court overruled the defendant's motion

for new trial and the defendant brings this case to this court for review.

The defendant contends that the trial court erred in overruling the defendant's motion at the close of the evidence by the State and at the close of all of the evidence, for the reason that sufficient notice of suspension of the defendant's license to operate a motor vehicle in this state was not given to the defendant as provided for by law under section 39-7,130, R. R. S. 1943.

William Edwards testified that he was employed by the State of Nebraska, Department of Motor Vehicles; that he was the chief examiner of driver's licenses and supervisor of the office of financial responsibility and had under his control records of individuals who have had their Nebraska operator's licenses previously suspended.

Abstracts of court records involving defendant were received in evidence and show violations of the law relating to the operation of motor vehicles. There also appears in the record a letter from the Department of Motor Vehicles, dated December 6, 1960, addressed to the defendant at 901 West Seventh Street, Grand Island, Nebraska, wherein the defendant was notified that his operator's license and privilege to operate a motor vehicle in this state had been revoked by the Director of Motor Vehicles for a period of 1 year from December 6, 1960, because the defendant had accumulated a total of 12 or more points within a 2-year period. The letter set forth the violation date of each offense, the conviction date, the number of points accumulated by the defendant, and made a demand for the return of the defendant's Nebraska operator's license immediately to the Director of Motor Vehicles at the State House, Lincoln, Nebraska.

An order was entered revoking the defendant's license to operate a motor vehicle for a period of 1 year from December 6, 1960.

The letter was returned to the State of Nebraska,

Department of Motor Vehicles, at the State Capitol Building, unclaimed.

The defendant's Nebraska license to operate a motor vehicle, dated September 21, 1959, appears in the record.

A police officer testified that he made contact with the defendant on December 5, 1961, with reference to an injury accident on Vine Street between El Avado Avenue and Mahoney Drive, at approximately 11:29 p.m. This officer observed a 1962 Ford Thunderbird automobile sitting next to the north curb of Vine Street, and a man standing on the sidewalk facing south. A power pole was broken off and a mailbox bent over. The right front of this automobile was caved in. The person standing near it was the defendant who showed this officer an Arizona driver's license. The defendant stated that he was the driver of the automobile involved in the accident; that he was going at a speed of 35 to 40 miles an hour, traveling west on Vine Street; that there were no other occupants of the automobile and no other vehicle involved in the accident; and that he hit a power pole and a mailbox. The defendant was asked whether or not he had a Nebraska operator's license and he said no, that he was working as a salesman and had only an Arizona operator's license. The defendant was then asked if his operator's license was suspended. The defendant stated that he did not know whether or not it was suspended.

A police officer who was with the officer who testified as above corroborated his testimony.

The defendant testified that at the time he was given a ticket for the violation referred to in an exhibit and which occurred in Grand Island, the date of the violation being November 25, 1960, and the date of hearing November 26, 1960, in police court, he did not give any name or address. The address appearing on this abstract for conviction report is 901 West Seventh Street, Grand Island, Nebraska. The defendant further testified that he did not receive a letter from the Department of Motor

Vehicles relating to his operator's license in Nebraska and the revocation of it. The defendant further testified that his mother was living in Grand Island and he was in Phoenix, Arizona, and that she wrote him a letter and informed him that she had received a letter from some office in the state that she believed related to his operator's license. Defendant sent his mother a letter and enclosed his operator's license, but did not know what his mother did with it. This operator's license was identified by William Edwards, chief examiner of driver's licenses of the Department of Motor Vehicles, and was on file in his office at the time the instant offense was committed. The defendant further testified that he was aware of the points he had accumulated in Nebraska for violation of traffic laws; and that he had made inquiry in 1961 to the financial responsibility section of the Department of Motor Vehicles as to the points he had accumulated.

There is no question but that the defendant had accumulated sufficient points to require a suspension or revocation of his operator's license as provided for in section 39-7,128, R. R. S. 1943. See Bradford v. Ress, 167 Neb. 338, 93 N. W. 2d 17.

Section 39-7,129, R. R. S. 1943, provides in part: "* * * whenever it shall come to the attention of the director that such person or any other person has, as disclosed by the records of such director, accumulated a total of twelve or more points within any period of two years, as set out in section 39-7,128, the director shall summarily revoke (1) the license and privilege of such person to operate a motor vehicle in this state * * *. Such revocation shall be for a period of one year from the date of the signing of the order of revocation * * *."

Section 39-7,130, R. R. S. 1943, provides in part: "Within twenty-four hours after the revocation provided for by section 39-7,129, the Director of the Department of Motor Vehicles shall notify in writing the person whose license or privilege has been revoked that such license

or privilege has been revoked. Such notice shall * * * (4) be served by mailing it to such person by either registered or certified mail to the last-known residence of such person * * *."

The record discloses that the notice of revocation of such license to operate a motor vehicle was mailed by certified mail to the defendant's last-known residence as shown by such records in the Department of Motor Vehicles. The last-known residence of the defendant was established by the address given on the certified copy of the abstract for conviction report received by the department as heretofore identified, which was dated less than 2 weeks prior to the entry of the order of suspension and the mailing of the notice.

This court has held that a person's right to operate a motor vehicle is not in fact a right, but a privilege, and that the Legislature may provide the manner in which this driving privilege be granted and the manner in which it may be revoked. It is apparent that the Legislature made no requirement that notice of revocation or suspension of a license to operate a motor vehicle in this state be actually received by the individual or that such individual have actual knowledge of the suspension or revocation of his operator's license. This is apparent from a reading of section 39-7,130, R. R. S. 1943.

The record shows that the defendant in this case did have actual knowledge of the State's action in regard to his operator's license. He was notified by his mother that she received a letter from the Department of Roads or some state office relating to the operator's license of defendant. As a result of discovering this matter, the defendant relinquished his operator's license, and it was in the files of the director of financial responsibility of the Department of Motor Vehicles at the time the offense charged in the instant complaint was committed.

A reading of the aforesaid sections discloses that the Legislature placed a mandatory duty upon the Director

of the Department of Motor Vehicles to keep the record of convictions of traffic violations and to suspend the privilege of an individual who had accumulated a certain number of points, as set forth in the statute, and directed that the notice of suspension be mailed to the last-known residence of the individual. It would appear that the Legislature intended that the Director of the Department of Motor Vehicles could and should rely upon the last-known residence of such person as shown by the files in his office. To interpret section 39-7,130, R. R. S. 1943, otherwise would place a duty upon the director which would be uncertain in nature and almost impossible to perform.

As the record discloses, it is apparent that all of the requirements of section 39-7,130, R. R. S. 1943, with reference to mailing notice relating to suspension or revocation of operator's licenses, were complied with. The judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

MARVIN L. KOCH, APPELLEE, V. MAE ETTA KOCH, NOW SINCE HER REMARRIAGE, MAE ETTA GOULD, APPELLANT.
123 N. W. 2d 642

Filed October 11, 1963. No. 35459.

1. **Divorce.** 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.
2. ———. Where one against whom a divorce decree has been granted remarries, it is the general rule that such party is thereafter estopped to assail the validity of the divorce.
3. **Parent and Child.** Where one of the parents has had the custody of the minor children of the parties for a long period of time, during which time they have been properly cared for and strong mutual attachments thus permitted to develop, the welfare of the children will generally best be served by leaving them with the parent to whom the children have become attached.

4. **Divorce.** Where the care, custody, and control of children have been awarded to one of the parents by a divorce decree which has become final, such care, custody, and control will not ordinarily be changed in the absence of changed conditions or where the best interests of the children demand it.
5. ———. It is the better practice to keep the custody of children awarded in a divorce suit within the jurisdiction of the court having control over them unless the best interests of the children demand otherwise.
6. **Divorce: Attorney and Client.** In a divorce action it is ordinarily within the discretion of the court to allow or refuse to allow attorney's fees.

Appeal from the separate juvenile court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

William L. Walker and Earl Ludlam, for appellant.

Wagener & Marx, for appellee.

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

CARTER, J.

This is an application by Mae Etta Gould to secure the vacation of an order of the district court consenting to the adoption of her children, Daniel LeRoy and David Charles Koch, ages 9 and 8 years respectively. The application also petitioned the court to grant the custody of the two minor children to the applicant. After trial the trial court vacated the order of the district court consenting to the adoption of the children and denied the petition of Mae Etta Gould for the custody of the children. Mae Etta Gould has perfected an appeal to this court.

We shall herein refer to Mae Etta Gould as Mae and Marvin L. Koch as Marvin. Mae and Marvin were married on December 30, 1951. They resided in Lincoln, Nebraska, for about 3 years thereafter, during which time, on May 9, 1953, Daniel LeRoy was born. In July 1954 they moved to California. On June 6, 1955, David Charles was born. Shortly after the birth of David

Charles marital difficulties developed. On August 22, 1956, Marvin brought the two children to Lincoln and placed them in the care of his mother. On August 22, 1956, Mae commenced a suit for divorce in California. On October 3, 1956, Marvin commenced a suit for a divorce in Nebraska, a summons being personally served on Mae in California on October 17, 1956. Marvin obtained a default decree of divorce in Nebraska on January 3, 1957. Mae filed a motion to vacate the decree and a motion for a new trial on January 23, 1957. Both motions were withdrawn on May 11, 1957. By the decree of divorce the two minor children then residing within the jurisdiction of the court were awarded to Marvin. Mae married Alfred L. Gould on September 6, 1958, and was divorced from him on May 22, 1961. Mae visited the children in Lincoln during the summers of 1957 and 1960. On July 30, 1960, Marvin married Sharon Greuter after which he established a home in which Daniel LeRoy and David Charles have since lived.

On April 20, 1957, Mae and Marvin entered into a property settlement agreement. In addition to a division of property it was agreed that Marvin was to have the care and custody of Daniel LeRoy and David Charles Koch subject to Mae's right to visit the children at reasonable times in Nebraska; Mae waived her right to support by Marvin and agreed to dismiss with prejudice the divorce action pending in California; and the parties stipulated that such settlement might be incorporated in the judgment of the court in which any divorce action between the parties may be pending.

On September 27, 1961, the district court for Lancaster County, Nebraska, entered its order giving its consent to the adoption of Daniel LeRoy and David Charles Koch by Sharon Marie Koch. On November 15, 1961, Mae filed a motion to vacate the consent to adoption, that the permanent custody of the minor children be awarded to her, and that she be permitted to take them to California.

Marvin denied generally, and it was upon the issues thus raised that the case was tried.

It is the contention of Mae that the decree of divorce obtained in Nebraska was void for want of jurisdiction in that Marvin was at all times after July 1954, and until August 1956, a resident of California. We do not deem it necessary to discuss the question of jurisdiction of the divorce proceeding in that Mae is estopped to assert its invalidity against Marvin. The facts are undisputed that Mae relied upon the validity of the divorce decree by subsequently entering into a marriage with Alfred L. Gould and a property settlement with Marvin. This issue is controlled by Attebery v. Attebery, 172 Neb. 671, 111 N. W. 2d 553, wherein it is said: "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,'" subject to exceptions not applicable here. See, also, In re Estate of Nelson, 81 Neb. 363, 115 N. W. 1087; Carpenter v. Carpenter, 146 Neb. 140, 18 N. W. 2d 737.

Mae appears to contend that irrespective of her estoppel to raise the question of jurisdiction of the court in granting the original divorce decree, she may properly assert her right to the custody of the children. The default divorce decree found that Marvin was a fit and proper person to have the exclusive care, custody, and control of the minor children of the parties and that Mae was neither a fit nor proper person to have such care, custody, or control. In addition thereto, in the

property settlement the parties agreed that Marvin should have their care and custody. Mae offered no evidence of any changed conditions that necessitated a change of custody. On the other hand, the evidence establishes that the children are well cared for in the home of Marvin and Sharon, that they are well adjusted and happy, and that they have great affection for both Marvin and Sharon. Mae testified that as far as she was able to observe during her visits in Lincoln in 1957, 1960, and 1962, the children appeared to be well cared for and that she had no objections to make in that respect.

The evidence shows that Mae has a good home in Anaheim, California, which would be adequate for the care of the children. She is employed and earns a gross income in excess of $400 per month. Her mother, who is to live with her, would care for the children during her working hours. There is no evidence of her present unfitness to have the custody of the children.

We point out, however, that Marvin has had the custody of these children since August 22, 1956. Mae has been somewhat indifferent to their welfare since that time, although she sent them presents a few times. She did visit them twice prior to the trial during the 6 years they have been in the care and custody of Marvin.

The best interests of the children require that they be left in the care and custody of Marvin and Sharon. For 6 years they have been cared for properly, first by Marvin and his mother and then by Marvin and Sharon. All the evidence points to the fact that they have a good home, that they are adjusted and happy, and that they are being properly cared for. They are doing well in school, and proper religious training is being afforded. No reason appears from the evidence why these children should be taken from their present environment and their care and custody placed elsewhere. The evidence preponderates in favor of a finding that the best interests of the children require that the application be

denied and that their care and custody be left with Marvin and Sharon.

The decision in this case is controlled by the case of Stanley v. Stanley, 155 Neb. 125, 50 N. W. 2d 558, a case very similar on its facts to the present case. In that case we said: "Little more can be said in favor of the requested change than that the defendant is the mother of the child; that she desires custody; that her husband is more affluent than the plaintiff; and that the proposed new environment is more physically attractive. This is not regarded as a sufficient change of circumstances to justify an award of the custody of this child to the defendant."

It is a sound principle of law that where one of the parents has had custody of a child for a long period of time, in this case for 6 years, during which time it has been properly cared for and strong mutual attachments thus permitted to develop, the welfare of the child will best be served by leaving it with the parent to whom the child has become attached. Williams v. Williams, 161 Neb. 686, 74 N. W. 2d 543. There was no change of circumstances shown by the record which would sustain a change of the custody of the children. Nor is there any evidence to sustain a finding that the best interests of the children require a change in their custody. The judgment of the trial court is in conformity with this finding and it is approved.

Complaint is made that the trial court erred in not extending the right of visitation beyond that granted in the original decree of divorce. The decree of divorce provided: "* * * that the defendant shall have the right to visit with said children in the State of Nebraska at all reasonable times; * * *." We point out that Mae is a resident of the State of California and that she desires that the order of the trial court be amended to permit visitation by the children in that state. The better practice is to keep the custody of children within the jurisdiction of the court having control over them, un-

less the best interests of the children demand otherwise. Young v. Young, 166 Neb. 532, 89 N. W. 2d 763; Caporale v. Hale, 169 Neb. 751, 100 N. W. 2d 847; York v. York, 246 Iowa 132, 67 N. W. 2d 28. We find no error in the award of visitation rights by the trial court.

It is contended that the trial court erred in not granting an attorney's fee to the former wife. In Vasa v. Vasa, 165 Neb. 69, 84 N. W. 2d 185, this court said: "In a divorce action it is ordinarily within the discretion of the court to allow or refuse to allow suit money and attorney's fees." In this case the custody of the children had been with Marvin. No change in circumstances was pleaded or proved. Mae had agreed in writing that the custody of the children was to be given to Marvin. She found no fault with the care that had been given them. The trial court, under such circumstances, did not abuse its discretion in denying an attorney's fee. The request for the allowance of an attorney's fee in this court is likewise denied.

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

AFFIRMED.

WHITE, C. J., not participating.

ELMER A. MICHELSEN, SR., ET AL., APPELLANTS, V. ARNOLD UPTON ET AL., APPELLEES.

123 N. W. 2d 850

Filed October 18, 1963. No. 35346.

1. **Adjoining Landowners.** Where the plaintiffs were as well aware of the situation as the work of excavating progressed as were the defendants, there was no occasion for notifying plaintiffs of what was being done.
2. ———. When the possessor of adjoining land to where an excavation is being made knows or has reason to know of the danger, he is guilty of contributory negligence if he fails to take such precautions as an ordinarily prudent man would take under like circumstances to guard his premises against harm.
3. **Negligence.** The rule in regard to contributory negligence of

the adjoining owner appears to be that where such negligence is the proximate cause of the injury, or where it has materially contributed to the injury, there can be no recovery.

4. **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.
5. ———. 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.
6. ———. 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 trial court to decide the question, as a matter of law, rather than submit it to the jury for determination.

Appeal from the district court for Cass County: JOHN M. DIERKS, Judge. Affirmed.

James F. Begley, for appellants.

Wear, Boland, Mullin & Walsh, A. Lee Bloomingdale, Smith & Lebens, Tyler & Frerichs, and Otto Wellensiek, for appellees.

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

MESSMORE, J.

The plaintiffs, Elmer A. Michelsen, Sr., and Edith May Michelsen, brought this action at law against Arnold Upton and Dora Upton, Byron Baker, and Colbert and Gerber, a partnership, defendants, for damages for alleged negligence resulting in the collapse of the plaintiffs' building into an excavation made on the adjoining land owned by the defendants Upton. The trial court sustained the motion of defendants Baker and Colbert and Gerber, a partnership, for directed verdict and dismissed the plaintiffs' petition as to such defendants at the close of plaintiffs' case-in-chief. At the close of all of the evidence the trial court sustained the defendants

Uptons' motion for directed verdict or dismissal of the plaintiffs' petition. The plaintiffs filed a motion for new trial which was overruled by the trial court. Upon the overruling of the motion for new trial, the plaintiffs perfected appeal to this court.

The record shows that the plaintiffs Michelsen are joint owners of the east one-third of Lot 4, Block 71, Weeping Water, Nebraska. This property was 22 feet wide by 132 feet long. Located thereon was a building 22 feet wide and 50 feet long, the front of which was set back from the lot line approximately 4 or 5 feet. Plaintiffs purchased this building at a judicial sale on October 29, 1958. The building was at least 35 or 45 years old. At the rear of the building was a cement-block addition 8 feet by 8 feet, and a frame porch, or lean-to, 13 feet by 7 feet. There was a full basement under the south one-third of the building, with a crawl space beneath the concrete-block addition which was entered from the basement. Beneath this addition was the neck of a cesspool located about 4 feet from the east line of the plaintiffs' property. The rest of the cesspool was underground and covered with dirt. All of the cesspool was located on the plaintiffs' property and did not extend onto the Upton property. A sewer line ran through the cesspool out to the city main. The front or north wall of the Michelsen building was brick with plate glass front and entrance, the east and south walls were concrete on concrete footings, the west wall was 2 by 8 studs butted up against the Rhoades building on the west, and it had a flat roof. The east wall of the building consisted of a concrete wall 8 or 9 inches wide, with footings 4½ to 5 feet deep, with about 2 feet of it underground, and cement blocks laid on top of the footings. The footings in the basement area on the east and south sides were about 3 feet wide and approximately 8 feet deep. The concrete-block addition had a separate concrete footing which was approximately 2 feet in the ground.

The Upton property was purchased by them on March 28, 1960. The lot was 66 feet wide east to west, and 132 feet long running north and south.

The substance of the pleadings, insofar as necessary to consider, is as follows.

The plaintiffs, in their petition and the amendments thereto, alleged negligence against all of the defendants in substance as follows: In failing to give plaintiffs notice of the nature and extent of the excavation; in excavating at a depth of approximately 8 feet below the base of the foundation of the plaintiffs' building, when defendants knew or should have known that the dirt and soil below the foundation would crumble and fall away, thereby removing the support from the plaintiffs' building; in failing to shore up or support the soil, earth, and walls of the building when defendants knew or should have known that the soil and earth on the plaintiffs' property would crumble and fall into the excavation, thereby removing the lateral and subadjacent support for plaintiffs' building; in failing to provide adequate support to prevent the collapse of the plaintiffs' building after the defendant Arnold Upton informed plaintiffs on the day of the collapse that such support would be provided to protect the plaintiffs' building; and in excavating in wet and inclement weather which had softened and weakened the soil without taking precaution to protect against erosion of the plaintiffs' soil beneath the foundation of plaintiffs' building. The plaintiffs further alleged that as a direct and proximate result of the aforesaid wrongful, careless, and negligent acts of the defendants and each of them acting in concert, on June 11, 1960, soil and earth below the foundation of the plaintiffs' building was eroded, crumbled, and fell into the excavation, and the building collapsed and was totally destroyed.

The defendants Upton admitted certain excavation work was done upon the property owned by them, denied all other allegations of the plaintiffs' petition, and

alleged contributory negligence on the part of the plaintiffs as follows: In failing to give notice or disclosure to defendants, or any one of these defendants, of the existence and location of a certain cesspool located under plaintiffs' building and in the vicinity of plaintiffs' east lot line, at a time when plaintiffs knew that the cesspool was partially filled with water and contained approximately 500 gallons of liquid, and at a time when the plaintiffs knew or should have known that said cesspool extended across plaintiffs' lot line and encroached upon the adjoining Upton property below ground level; in failing to take timely action or precautions for the protection of the cesspool and the natural support of plaintiffs' building at a time when plaintiffs knew that excavation work was being conducted at a depth below the foundation of plaintiffs' building on the adjoining Upton property; in knowingly allowing and permitting the cesspool to undermine and weaken the foundation of plaintiffs' property, notwithstanding plaintiffs' actual knowledge of excavation work on the adjoining nearby property; in failing to take timely action to shore up the east wall of plaintiffs' foundation, notwithstanding ample notice and knowledge of the plans for said excavation work on an adjoining property, and notwithstanding actual observation by plaintiffs of said excavation work adjacent to their building; and in failing to properly repair the cesspool and sewer line upon said property at a time when it was discharging water and sewage into the surrounding area and weakening the west wall of the excavation upon the Upton property and the dirt support of plaintiffs' building.

The defendant Colbert and Gerber, a partnership, filed an answer admitting that this defendant did excavation work upon the property owned by the defendants Upton. The answer alleged that Arnold Upton and Byron Baker directed this defendant and its employee, Elwood Starner, as to the place and location of the excavation upon the Upton property; that the defendant Byron Baker

assisted Arnold Upton in the supervision of the manner and method of the excavation; that the excavation was done according to directions; and there was no encroachment on plaintiffs' property; that it did not excavate any closer than within 2 feet of the plaintiffs' property as directed by defendants Arnold Upton and Byron Baker; and that the west wall of the excavation was completed on Friday, June 10, 1960. The answer then set forth the location of the cesspool which impaired and diminished the natural support of the ground and building on the plaintiffs' lot and rendered the ground and building likely to collapse if proper and lawful excavation for building purposes was made near the west lot line on the Upton property. The answer then set forth other matters and negligence on the part of the plaintiffs not necessary to set out.

Defendant Byron Baker's answer admitted that certain excavation work was done by Colbert and Gerber on property owned by the defendants Upton, and denied all other allegations contained in the plaintiffs' petition. This answer then alleged that any damage allegedly sustained by plaintiffs was proximately caused and contributed to by the negligence and contributory negligence of the plaintiffs in a degree more than slight and sufficient in law to bar recovery by the plaintiffs against this answering defendant, and then set forth certain elements of negligence chargeable to the plaintiffs which need not be asserted.

The defendant Colbert and Gerber, a partnership, amended its answer to contain a general denial of the plaintiffs' petition as amended, except as admitted in such defendant's answer.

The plaintiffs' reply was a general denial of the allegations of the answers of the defendants except such as constitute admissions of the plaintiffs' petition.

For convenience we will refer to the plaintiffs by using the name Michelsen, Sr. The defendants Upton will be referred to as Upton, the defendant Byron Baker

as Baker, and the defendants Colbert and Gerber as the partnership.

The plaintiffs assign as error that the trial court erred in sustaining the motion to dismiss and directing a verdict in favor of defendants Baker and the partnership at the close of the plaintiffs' case-in-chief; that the trial court erred in sustaining the motion to dismiss and directing a verdict in favor of the defendants Upton at the close of all the evidence; and that the decision and judgment of the trial court are contrary to law and the evidence.

Elmer A. Michelsen, Jr., testified that during June 1960, there was a laundromat business carried on on his father's property with 16 washing machines and 5 driers. The laundromat was leased to the Mid-States Operating Company. He was acquainted with Upton and Baker, and Baker was doing some work for him at the time of trial. He testified that on occasions he helped his father with his affairs. He had heard that Upton was going to build a new building on the property immediately east of the property of his father. He watched the excavation work on Tuesday and Wednesday, June 7 and 8, 1960. On Tuesday the excavation had proceeded down 4 or 5 feet over to the laundromat building. The excavation was lower than the footing on his father's building. On Wednesday night the excavation was down 6 or 7 feet by the laundromat building. He noticed the progress of the excavation from 7 to 11 feet on Tuesday, Wednesday, and Friday. The footings on the east wall of his father's building, or the foundation, were approximately 4½ to 5 feet, with about 2 feet in the ground. The footing at the rear of the building was deeper and wider. The basement was about 8 feet deep, 12 feet long, and 22 feet wide. The grade of the excavation was straight up and down along the footings of his father's building. On Friday afternoon, the footings of his father's building began to show, and dirt had crumbled underneath to some extent. The same evening

he went down to the building and observed the wall being separated from the floor, and a crack down the southeast corner of the building with diagonal cracks running off this crack both ways. He went home, called Upton, and told him about what he had seen. Upton apparently did not want to be bothered at that time. He talked to Upton the next morning, and Upton told him he had seen the damage and would take care of it. This was on Saturday. He then went down to the building. The bottom of the wall had pulled out a little more, and there were more cracks. The condition of the building became serious. There was a slight drizzle, and it had rained .96 of an inch Wednesday night and all day Thursday, and about half an inch on Friday night. After supper he went back to the building. His father and some other men were trying to shore up the building with telephone poles. The building started to fall, and then it collapsed.

On cross-examination this witness testified that he never at any time observed anybody working across the lot line separating his father's property from the Upton property.

The plaintiff, Michelsen, Sr., testified that he never received any written notice that a building was to be built and excavating done on the Upton property; that on the second day after the excavation started he observed it; that he discovered there was a cesspool under his property shortly after he bought it; that after the excavation was made and the building collapsed, he determined that the cesspool was all on his property; that he saw Upton Saturday morning and told him something should be done about calking up the wall; and that Upton said he could not do anything about it, and that Baker was in Omaha getting the necessary poles to fix it. He further testified that the excavation was straight up and down at the east wall of his building; that the dirt had crumbled; and that the footings of the building fell down and then the building collapsed.

On cross-examination this witness testified that he was at the excavation site on the average of once a day; that he believed the cesspool would be possibly 8 or 10 feet at the bottom; that he saw liquid in the cesspool after he bought the property; and that the reason he did not shore up his building was not because he did not receive any written notice, and not because he did not know of the excavation, but because he figured it was the responsibility of someone else to shore up the building.

Ross Gerber testified that he was a member of a partnership engaged in general excavating and had an employee by the name of Starner who operated the machine on the Upton property; that Upton contacted this witness by telephone with reference to the work to be done; that the machine had been operating in Weeping Water; that he talked to Baker during the time the excavation work was in progress as to how it was progressing; and that the excavation was 43 feet 8 inches in width. Upton was billed for the work and paid the bill. The excavation was 2 feet from the east line of the Michelsen property. After the excavation was finished, the space from the west edge of the hole or excavation over to the Michelsen-Upton property line was 2 feet.

Arnold Upton testified that he purchased the property for the purpose of building a supermarket; that there was a small cabin-type building, possibly 10 feet by 12 feet, on the lot; that on the west one-third of the lot was the Lane building used for a recreation parlor, and on the center one-third of the lot was a house; and that he had the Lane building and the house removed. A small building remained and was used by Rothe as a plumbing shop. With reference to the building that he was going to build on the lot, he was going to put in a bowling alley, and to do so he had to excavate to a depth of 11 or 12 feet. The length of the building was extended to 132 feet. Baker was building the building, and this witness was to do the cement work. The ma-

chine came onto the property on June 6, 1960. He believed that Baker told the operator of the machine to clear up the rubble, and not to go closer than 2 feet from the Michelsen building. The building Upton was going to build was to be 40 feet 8 inches wide and 132 feet long. Upton futher testified that he told Michelsen, Jr., that he had bought this land and was going to put a building on it.

On cross-examination this witness testified that prior to the excavation he and Michelsen, Sr., had a conversation, and Michelsen, Sr., wanted some dirt from the excavation put on his property; that Michelsen, Sr., asked Upton a few times about shoring up his building, and Upton told Michelsen, Sr., that he did not believe that shoring up the building was his responsibility; that Michelsen, Sr., knew that Upton was going to build a building with a bowling alley in it because they had talked about it prior to the time of the building; and that Michelson, Sr., knew that excavation was to be done on the lot and that there would be about 3 feet between the Upton building and the Michelsen building.

Baker testified that he was a general builder and contractor; that he first talked to Upton about a building on February 10, 1960, and agreed to build a building for Upton; that the conversation between Starner, the operator of the excavation machinery, and this witness was in regard to clearing up the rubble and instructions not to go closer than 2 feet from the Michelsen building; and that Upton instructed Starner to the same effect. On cross-examination this witness testified that as to the width of the excavation, it was measured the last day, when the excavation was completed, and it was right at 2 feet from the west edge of the property line between the Michelsen and Upton property.

Starner testified that he did the excavation work; that he started on Monday, June 6, 1960; and that he saw Michelsen, Sr., when he was working sometime Monday

afternoon, and saw him two or three times a day every day after that.

Lynn Rothe testified that he was a plumber; that he was in and out of his plumbing shop, which was located on the Upton property, every day and knew about the excavation; that on Friday, June 10, 1960, he did some repair work on a sewer line in the southeast corner of the Michelsen building, or on the outside edge of it; that the sewer line came out around the east side of the cesspool; that the sewer line broke, and he made a temporary repair; that the sewer line served the Michelsen building and originated inside of the laundromat on the Michelsen property; and that it ran to the south and came out around the cesspool and hooked onto the sewer line. He further testified that when he arrived, a couple of clay tile were broken clear off. It was a clay-tile sewer. The cesspool let loose prior to the time the sewer line broke, and as the cesspool broke and failed, the sewer line dropped and broke. There was dirty water with an unpleasant odor down in the excavation. The diameter of the cesspool was approximately 8 feet, and it extended east 1½ to 2 feet underground over into the Upton property.

Max Burroughs testified that he was a consulting engineer; that he went to Weeping Water and made an investigation, a visual observation, of the soil and surroundings including the building; that the soil was of a clay type which would normally support a weight of from 2,000 to 3,000 pounds per square foot; and that the building and equipment therein placed a weight of approximately 500 pounds per square foot on the footings. This witness further testified that the water in the cesspool would be under a hydrostatic head and would wash out the slope of the excavation; that in his opinion the primary and basic cause of the collapse of the plaintiffs' building was the failure of the cesspool; and that if the cesspool had not failed, the plaintiffs' building would not have collapsed.

Parts of the deposition of Michelsen, Sr., were read into evidence. He testified that the cesspool had in it 400 or 500 gallons of water; that he knew it was under the building when he bought it; and that it was made out of rock. He first found out that Upton was going to build a building about 2 months before he put it up, because Upton told him so. He never told Upton there was a cesspool under the building. When Upton told him he was going to build a store, Michelsen, Sr., told Upton he could not go very deep because Michelsen's building did not have a basement in it, and if Upton got below the footings the building would fall, but Upton said he was going right up to Michelsen's building, that it was his dirt and his lot line. Michelsen, Sr., told Upton he might get into trouble and might get himself a lawsuit, and Upton said it was his property and he had a right to go as close to the line as he wanted to.

The plaintiffs, in support of their contention that the defendants were negligent, cited Restatment, Torts, § 819, p. 204, as follows: "f. Specific acts or omissions which may be negligence. Under particular circumstances and conditions, it may be negligence: (1) to excavate sand, gravel, loam, or other friable soil otherwise than in sections; (2) not to furnish temporary support by shoring; (3) to fail to give timely and sufficient notice of the proposed excavation; (4) to maintain an excavation under such conditions or for such a length of time as to expose the adjoining lands with artificial additions to unreasonable risk of harm as by exposure to rain, frost or weathering; (5) to make use of improper instrumentalities or improper use of proper instrumentalities; (6) to employ incompetent workmen; (7) to neglect to ascertain in advance whether the excavation as planned is likely to expose adjoining lands with artificial additions to unreasonable risk of harm; (8) to represent to the adjoining landowner that a certain method will be followed or that certain precautions will be taken, and thereafter without adequate notice change

the method or omit the precautions. Any act or omission which would constitute negligence because of its tendency to harm the land or structures of another in cases other than the making of excavations is equally negligent if done or omitted in the course of excavating."

The plaintiffs cite authority as follows: "Thus, it is quite generally conceded that the owner of land who intends to make an excavation thereon should, in the exercise of due care, notify the adjoining landowner of the intended improvement, and allow time so that he may take the necessary precautions to protect the buildings on his land, * * *. The obligation to give the notice, like that to see that the excavation is made with due care, seems to rest upon the recognized proposition that a party in possession of fixed property must take care that it is so used and managed that other persons shall not be injured, whether it is managed by his own servants or contractors or their servants. * * *

"The failure to give notice is evidence of negligence and may be sufficient to justify a finding that the excavator did not use reasonable care in respect of the excavation, * * *.

"A notice that an excavation is to be made on an adjoining lot, to be sufficient, must inform the person to whom it is given of the nature and extent of the excavation, so that he may, after the excavator has done all that is reasonably prudent for the safety of the building, take the necessary precautions to protect his property absolutely. * * * Where the plans of the person making an excavation are changed so as to render the work more dangerous to the adjoining premises, notice of such change must be given to the adjoining owner." 1 Am. Jur. 2d, Adjoining Landowners, § 51, p. 726.

It has been held that the person who makes the excavation is liable for the damage caused. On the principle that all who participate in a tort are answerable for damages resulting therefrom, not only the person who makes the excavation, but any person who directs

the excavation to be made or under whose authority it is made, may be held liable for the resulting injury to the adjoining land. See 1 Am. Jur. 2d, Adjoining Landowners, § 72, p. 742.

The plaintiffs cite Spohn v. Dives, 174 Pa. 474, 34 A. 192, wherein the court held: "One who makes an excavation upon his own land deeper than the foundation of the building upon an adjoining lot, without notifying the owner of the building to protect his property, is liable for the fall of the foundation wall caused by his failure to use ordinary care and diligence to protect it."

The plaintiffs also cite Bland v. Fox, 172 Neb. 662, 111 N. W. 2d 537, wherein this court held: "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. * * * 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."

In many cases the adjoining landowner's personal knowledge of the intended excavation has been held to dispense with the necessity of giving notice. See Annotation, 50 A. L. R. 486 at p. 507.

In Jamison v. Myrtle Lodge No. 355, 158 Iowa 264, 139 N. W. 547, it was held that notice of excavation on a lot, affecting lateral support of an adjoining lot, need not be given the adjoining owner, he being in occupancy of his lot and aware of the situation from the progress of the work. The court said: "The plaintiffs were occupying their property and as well aware of the situation as the work of excavating progressed as defendant, and for this reason there was no occasion for notifying plaintiffs of what was being done. Schultz

v. Byers, 53 N. J. Law, 442 (22 Atl. 514, 13 L. R. A. 569, 26 Am. St. Rep. 435); Novotny v. Danforth, 9 S. D. 301 (68 N. W. 749)."

The evidence discloses that the plaintiff, Michelsen, Sr., was well aware of the intention of the defendants Upton relating to the proposed excavation, and that he considered it a threat to his building. It is obvious from the evidence that the plaintiffs had full, complete. and adequate notice of the intention of the defendants Upton to excavate on their lot.

With reference to the defendant partnership, the evidence is undisputed that its work was carefully and skillfully done. The plaintiffs made no objection or complaint as to the method or manner in which this work was done. The evidence shows that there were 2 feet of clay or dirt left between the excavation and the plaintiffs' building, which was according to specifications. The plaintiff Michelsen, Sr., and his son both testified that the machine never went across the lot line. The plaintiffs made no request to this defendant to protect the plaintiffs' building. There is no evidence of negligence on the part of the defendant partnership. The trial court did not commit error as contended for by the plaintiffs.

With reference to the defendant Baker, the evidence fails to establish the exact legal relationship, if any, of this defendant to the other defendants. Baker did have an arrangement with Upton for the construction of a building. Just what the terms of the agreement were is not shown. Upton was present on every occasion when Baker talked to the excavators after the work started, and the excavators agreed to stay 2 feet from the plaintiffs' building. Arnold Upton paid the excavators. The evidence fails to show that Baker was in any way connected with the excavators which in any manner would make him liable for their actions. There is no evidence that Baker hired or controlled the excavators, or that he offered or agreed to do so. The only conclu-

sion to be drawn from the record is that as the prospective builder, Baker was interested in seeing that the excavation was the right size and in noting its progress. He was also interested for the reason that he was using dirt that came from the excavation to fill a lot he owned. The plaintiff, Michelsen, Sr., testified that he did not believe it was Baker's fault that the building collapsed, and he always felt that way. The record discloses no negligence on the part of the defendant Baker, and the trial court did not commit error as contended for by the plaintiffs.

The defendants Upton, in their answer, raised the issue of contributory negligence on the part of the plaintiffs.

"Knowledge, or reason to know, of the danger arising from an excavation is necessary to contributory negligence. Vigilance to discover that an excavation is being made and the danger therefrom is not required of the possessor of the supported land. But when he knows or has reason to know of the danger he is guilty of contributory negligence if he fails to take such precautions as an ordinarily prudent man would take under like circumstances to guard his premises against harm." Restatement, Torts, § 819, p. 205.

The rule in regard to contributory negligence of the adjoining owner appears to be that where such negligence is the proximate cause of the injury, or where it has materially contributed to the injury, there can be no recovery. See Jamison v. Myrtle Lodge No. 355, *supra.*

In the case of Feeley v. Butterworth & Sons, 42 Wash. 2d 837, 259 P. 2d 393, the plaintiff instituted an action to recover damages when his land and garage caved into an excavation dug by the defendant. The evidence disclosed that water from an unknown underground drainpipe on the plaintiff's land discharged water into the slope of the excavation. The court said: "* * * in view of the respondents' defense and the convincing showing that the * * * (plaintiff), by means of a concealed pipe,

artifically discharged surface waters into the land of the * * * (defendant), it is difficult for us to see how * * * (plaintiff) can counter by showing that his own acts did not cause his injury. * * *

"As to whether lateral support was ever deprived the plaintiff in the first instance, the evidence discloses that the excavating work was properly done, with due care for plaintiff's property rights; * * * that the slide occurred, or the bank was washed away, mainly by waters discharged from the concealed drainpipe; * * *. An even steeper adjoining slope, left by the excavation, did not cave in or give way." The above-cited case is somewhat similar in comparison to the facts in the instant case.

The evidence in the instant case shows that Michelsen, Sr., alone knew of the existence of the cesspool containing 400 or 500 gallons of water. He took no steps to protect his land or building, and did not inform any of the defendants of the existence of the cesspool because he did not think it was any of their business.

It appears to be well settled that an excavating landowner is not liable for injuries to buildings on adjoining land unless the landowner is negligent in his manner of excavating.

In Resnick v. Kazakes, 122 Neb. 489, 240 N. W. 585, modified on other grounds on rehearing, 123 Neb. 654, 243 N. W. 861, which is the only decision in this state wherein this court had occasion to speak upon the subject, the court said: "It clearly devolved upon the defendant to provide the proper support for his building where timely notice of the plaintiffs' intention to excavate for a building on the adjoining lot was given. And the plaintiffs are not liable in damages to the defendant for the alleged weakening of the walls of the defendant's building where it is shown that the plaintiffs used due care in their excavation. Wahl v. Kelly, 194 Wis. 559 (217 N. W. 307); Christensen v. Badger Improvement Co., 187 Wis. 598 (204 N. W. 510)." See, also, Covell v.

Sioux City, 224 Iowa 1060, 277 N. W. 447.

The evidence shows that the clay-type soil was sufficient to support the plaintiffs' building. Only the presence and condition of the cesspool, which was known only to the plaintiffs, necessitated support of the plaintiffs' building. The leaking sewer line broke on Friday, June 10, 1960, and the cesspool under the plaintiffs' building was discharging its contents into the soil supporting the building. The support had been so undermined that on Friday night there were large cracks in the walls of the plaintiffs' building, and the wall had pulled away from the floor. The evidence not only fails to show that anything could have been done to prevent the collapse of the plaintiffs' building, but in fact shows that nothing could have been done, because the subsequent efforts of Michelsen, Sr., Upton, and others to support the building later on Saturday were unavailing.

Some contention is made by the plaintiffs that the defendants were negligent in failing to provide a survey and emplace stakes; in excavating over and onto the plaintiffs' property; in excavating in wet and inclement weather; and that such acts were the proximate cause of the collapse of the plaintiffs' building, and sufficient to create an issue of fact to be submitted to the jury.

The record shows that there is no evidence that the rain in any manner eroded the excavation so as to contribute to the collapse of the plaintiffs' building, or that it was improper to excavate after the rain. An expert witness testified that the rain would not affect the clay-type soil into which the excavation was made, and would not affect the load capacity of the soil; and that rain in the amount which fell in this case would not erode the clay-type soil, and would wet the soil to a depth of only an inch or two inches. Michelsen, Jr., testified that on Friday, after the rain had ceased, the excavation was in dry soil. There is no competent evidence introduced by the plaintiffs in contradiction of such facts.

There are other rules that are pertinent to a determination of this appeal.

"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. * * * 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, 172 Neb. 797, 112 N. W. 2d 385. See, also, 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.

In Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co., 161 Neb. 451, 73 N. W. 2d 679, this court said: "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."

We conclude that the trial court did not commit prejudicial error with respect to the defendants Upton as contended for by the plaintiffs.

For the reasons given in this opinion, the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND J. NICHOLS, APPELLANT.

123 N. W. 2d 860

Filed October 18, 1963. No. 35472.

1. **Criminal Law.** It is not the province of this court in a criminal

case to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.

2. ———. In a criminal action this court will not interfere with a verdict of guilty based upon conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt.

3. **Criminal Law: Evidence.** In order to warrant a conviction on circumstantial evidence, the circumstances taken together must be of such conclusive nature and tendency as to produce a reasonable and moral certainty that the accused committed the offense charged beyond a reasonable doubt.

4. ———: ———. In determining the weight of circumstantial evidence, a jury must find that the facts and circumstances are of such a conclusive nature as to exclude to a moral certainty every other rational hypothesis except that of guilt of the accused.

5. **Criminal Law: Trial.** An instruction with respect to circumstantial evidence is not in error when it states that if all of the facts and circumstances relied upon by the State to secure a conviction can reasonably be accounted for upon any theory consistent with the innocence of the defendant, then the jury should acquit him.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Affirmed.

Robert V. Burkhard, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

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

WHITE, C. J.

This is a criminal action brought by information against the defendant, Raymond J. Nichols, charging him with leaving the scene of an accident involving personal injury or death in violation of section 39-762, R. R. S. 1943.

Two questions are presented by the appeal:

1. That the verdict is not sustained by sufficient evidence.

2. That the court committed prejudicial error in giving instruction No. 8 relating to circumstantial evidence.

The evidence for the State discloses that the defendant, on the afternoon of August 4, 1962, picked up one Velma Byrd in his 1954 yellow and white Buick, drove to Nineteenth and Leavenworth Streets, Omaha, Nebraska, parked his car and put the keys in his pocket, together with Byrd spent the early part of the afternoon in a friend's apartment, and later all three retired to the Russell Bar immediately below the friend's apartment and continued the drinking which had begun earlier in the friend's apartment. Arguments ensued between Byrd and the defendant. The defendant left and went to another bar, and Byrd and the friend, Turner, followed. After some conversation, Byrd and Turner left, and the defendant left about a half hour later and returned to the Russell Bar where he encountered Byrd and Turner again at about 12:30 a.m. on August 5, 1962. The defendant and Byrd argued and he slapped Byrd and tore her blouse, following which the defendant was escorted out of the bar by two bartenders, one of whom was Dennis Parr. Byrd, fearful that the defendant would assault her, stayed in the bar with Turner until closing time, 1 a.m. Shortly after 1 a.m., Parr, the bartender, while he was outside dumping refuse, heard the screeching of brakes, heard a crash, and as he rounded the corner running, observed a vehicle a few feet from the east curb of Nineteenth Street, and about 15 feet south of the intersection with Leavenworth Street, facing east, and observed a man lying on Nineteenth Street near the east curb, his head directly in front of the vehicle. The vehicle backed up and Parr came up to within a foot or two of the vehicle, looked inside, and saw the driver whom he immediately recognized as the defendant. Byrd, narrowly missing being hit, also identified the defendant. Parr yelled, "don't run," but the defendant left the scene, driving north on Nineteenth Street without identifying himself to the person struck and

without rendering him assistance. Parr telephoned the rescue squad, returned to the scene, and observed that the person struck was bleeding around the head and face and appeared to be unconscious. The rescue squad arrived and Adolph Jansenius, the person struck, was removed to the county hospital.

The applicable rule in this case with reference to the question of the sufficiency of the evidence was stated recently in State v. Wilson, 174 Neb. 86, 115 N. W. 2d 794, as follows: "It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. * * * In a criminal action this court will not interfere with a verdict of guilty based upon conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt."

The defendant first argues the credibility and weight of the bartender's testimony which is admittedly crucial to the State's case. He argues a lack of corroboration of Parr's testimony in identifying the defendant as the driver of the car at the crash scene and further contends Parr's testimony is impeached because he identified the car as a yellow 1953 or 1954 Buick, whereas it was yellow and white. He also argues that Parr in some of his testimony identified the defendant by the name of "Jerry" and that, therefore, the probative force of Parr's testimony is destroyed as a matter of law. He contends the fact that Parr was running and ran up to the scene of the accident produced a state of excitability in Parr destroying the credibility of his identification of the defendant when he reached the car at the crash scene. He also argues that the defendant could not have left the bar, got in his car, and drove the short distance to where the accident occurred in the time that Parr took to leave the bar and go about 40 feet to a trash barrel at the time he heard a screeching of brakes and a crash.

There is no requirement, either case defined or statu-

tory, as to corroboration of identification of accused for the crime charged. The other contentions are clearly directed to the weight and credibility of the witness and wholly within the province of the jury. We point out that the partial color identification of the vehicle, under the circumstances, adds to the probative force of Parr's testimony. Also, the argument as to shortness of time lapse between the time Parr left the Russell Bar building and the time of the accident is premised on the unwarranted assumption that the defendant left the building at almost exactly the same time. There is no merit to these contentions as to sufficiency of the evidence.

The defendant argues lack of proof of corpus delicti, or the "body of the crime," because Jansenius, the injured person, was not identified at the scene. But, Jansenius testified he left the bar at closing time, 1 a.m., waited perhaps 10 minutes, and started to cross the street to his car which places him at the scene of the accident. Further, the police officer dispatched to the scene of the accident testified that the injured person was Adolph Jansenius. There is no evidence that there was another accident at or near the scene of the defendant's accident, either in point of time or place. Short of direct identification by name of a witness actually viewing the accident, it is difficult to see how proof could be more conclusive as to this element. There is no merit to this contention.

The defendant now argues error in instruction No. 8. The portion of this instruction attacked is: "In order to warrant a conviction on circumstantial evidence, the circumstances, taken together, must be of such conclusive nature and tendency as to produce a reasonable and moral certainty that the accused committed the offense charged."

The failure of this language to include the injunction that the facts and circumstances must be of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt is asserted as

prejudicial error. The jury must determine if there are other reasonable theories consistent with innocence and exclude them to a moral certainty. Hansen v. State, 121 Neb. 169, 236 N. W. 329.

However, all instructions must be read together and and if the instruction or instructions taken as a whole correctly state the law and are not misleading, there is no prejudicial error. Instruction No. 8 contains the following further language immediately following that portion of the context challenged: "* * * *if all the facts and circumstances relied upon by the State to secure a conviction can reasonably be accounted for upon any theory consistent with the innocence of the defendant, then the jury should acquit him.*" (Emphasis supplied.)

Taken as a whole, this instruction demands a positive finding that the evidence is of such a conclusive nature as to produce a reasonable and moral certainty of guilt and requires the jury to acquit if there is any reasonable theory consistent with the defendant's innocence. This instruction, if anything, is more favorable to the accused than the minimum boundaries set in Hansen v. State, *supra*. The Hansen case requires a choice among rational hypothesis or theories of guilt. It demands a finding that the weight of the evidence produces a conclusion that excludes every rational theory but guilt. This instruction demands acquittal if any reasonable theory or hypothesis is consistent with innocence. There is no error in instruction No. 8. The assignments of error, therefore, may not be sustained. The judgment of the trial court is correct and is affirmed.

AFFIRMED.

CLARENCE STANTON, APPELLANT, V. E. E. MATTSON, APPELLEE.

123 N. W. 2d 844

Filed October 18, 1963. No. 35630.

1. **Sales: Usury.** Legislative Bill 811, adopted at the 73rd session of the Legislature, and becoming effective on July 18, 1963, is a bill for the regulation of interest on money.
2. **Constitutional Law: Interest.** The power of the Legislature to regulate interest on money is limited by Article III, section 18, Constitution of Nebraska, which provides that it may not be done by local or special laws.
3. ———: ———. By Article III, section 18, of the Constitution of Nebraska, the Legislature is prohibited from passing local and special laws regulating the interest on money. It prohibits class legislation which does not operate equally and uniformly upon all members of the class brought within its operation.
4. **Constitutional Law.** The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated.
5. **Constitutional Law: Interest.** The designation of retail installment sales contracts as a class to the exclusion of all others including manufacturers, distributors, and others making such contracts, in fixing maximum interest to be charged, is special and not general legislation inhibited by Article III, section 18, of the Constitution of Nebraska.
6. ———: ———. The statutory definition of an installment sales contract as one in which a lien is taken or title retained, to the exclusion of other such contracts, is special and not general in that it has no reasonable relation to the regulation of interest on money.
7. ———: ———. The exclusion of motor vehicles from the provisions of sections 6 and 7 of Legislative Bill 811 makes such sections special as distinguished from general provisions.
8. **Constitutional Law: Sales.** Legislative Bill 811 is unconstitutional and void in that it contravenes Article III, section 18, and Article I, section 16, Constitution of Nebraska.

Appeal from the district court for Dodge County:

ROBERT L. FLORY, Judge. Reversed and remanded with directions.

Lyle B. Gill, for appellant.

Kerrigan, Line & Martin, for appellee.

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

CARTER, J.

This is an action brought under the Declaratory Judgments Act to test the constitutionality of Legislative Bill 811 which was enacted at the 1963 legislative session and became effective on July 18, 1963. The trial court held the act to be constitutional and plaintiff has appealed.

The evidence was stipulated. It shows that on August 30, 1963, plaintiff purchased a used refrigerator from a partnership doing business in Fremont under the name of Kavich Furniture Store. The cash price of the refrigerator was $130. Plaintiff indicated a desire to pay $10 cash and the balance in 12 monthly payments. The $10 was paid and the conditional sale contract here involved was executed. The amount shown to be due under the contract was $132, payable in 12 installments of $11 each. This amount consisted of the balance of the cash price of $120 and $12 shown as the time price differential. The plaintiff has not made any payment other than the $10 downpayment, and does not intend to make further payments. The defendant is the holder of the contract by assignment for collection purposes.

It is contended by the plaintiff that the price differential charge of $12 is interest in excess of 9 percent and that the conditional sale contract is void for usury. Plaintiff asserts that defendant is about to commence proceedings to repossess the refrigerator. Plaintiff alleges that Legislative Bill 811 is unconstitutional for the following reasons: 1. It is a special law regulating interest on money in violation of Article III, section 18,

of the Nebraska Constitution. 2. It is a grant of special privileges to certain persons, including the seller and his assignee, in violation of Article I, section 16, and Article III, section 18, Constitution of Nebraska. 3. The act contains unreasonable, arbitrary, and capricious classifications for permitting charges of interest in excess of the maximum legal rate fixed by section 45-101, R. R. S. 1943. 4. The act provides for different penalties to be applied to different persons or groups for exceeding the maximum rate allowable by law when no reasonable difference exists for the classifications made.

The defendant contends that the price differential referred to in Legislative Bill 811 is not interest, that the conditional sale contract involved in this case was drawn pursuant to the requirements of the act, and that the act is in all respects constitutional. Defendant further asserts that, if the price differential is in fact interest, it is not a special law inhibited by Article III, section 18, of the Constitution, nor a grant of special privileges to certain persons inhibited by Article I, section 16, or Article III, section 18, of the Constitution. It is further alleged that Legislative Bill 811 is a complete act in itself and that the classification of persons and property therein contained are not unreasonable, arbitrary, or capricious, and therefore creates an exemption from section 45-101, R. R. S. 1943, providing that the highest rate of interest that may be charged upon any loan or forbearance of money shall be $9 per year upon $100.

This court under a similar statute held the price differential provided for therein to be interest and, if such interest charge exceeded 9 percent per annum, the contract was usurious and void. Elder v. Doerr, *ante* p. 483, 122 N. W. 2d 528. Pursuant to this authority we hold the $12 differential in the instant case to be an interest charge in excess of the maximum statutory rate of interest fixed by section 45-101, R. S. Supp., 1961. The parties appear to be in agreement that if

Elder v. Doerr, *supra,* properly declares the law of this state, the price differential of $12 in the instant case is interest in excess of 9 percent per annum.

The issue raised in this case is whether or not the interest in the amount of $12 per $100 per year provided by section 5 (1) of Legislative Bill 811 is inhibited by the Constitution of this state. In Elder v. Doerr, *supra,* the power of the Legislature to fix a maximum rate of interest that can be charged upon any loan or forbearance of money, goods, or things in action, is recognized. The power to do so, however, is limited by Article III, section 18, Constitution, which provides in part: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Regulating the interest on money." Under this constitutional provision, the Legislature may fix rates of interest for the hire of money or the forbearance of a debt in installment sales contracts if the classification is reasonable and has relation to the public interest. The provision prohibits the Legislature from passing any act which does not operate equally and uniformly upon all persons in a class, or which grants to any person any special or exclusive privileges or immunity. The Legislature may make a reasonable classification of persons and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class that has some real relation to the subject and purpose of the legislation, which render appropriate its enactment. State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835; United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576; United States Cold Storage Corp. v. Stolinski, 168 Neb. 513, 96 N. W. 2d 408.

Section 5 (1) of Legislative Bill 811 provides: "Notwithstanding the provisions of any other law, the time price differential for any motor vehicle or other goods sold under a retail installment contract shall not exceed

twelve dollars per one hundred dollars per year; Provided, a minimum time price differential of fifteen dollars may be charged on any retail installment contract." It is clear at the outset that the benefits of the act accrue to retail sellers of motor vehicles or other goods sold under a retail installment contract while all others, including manufacturers, distributors, and others having occasion to sell on an installment contract, are not entitled to benefit by its provisions. Are there real differences in situation and circumstances that warrant making retail sellers on installment contracts a reasonable classification for fixing a higher interest rate for a loan or forbearance of money, goods, or things in action?

We can see no valid reason, nor has one been pointed out to us, that warrants retail sellers to charge a rate of interest that is denied to all others. We have held that a licensee who is properly required to pay a license fee and subject himself to regulation by a regulatory body, is within a reasonable classification of persons and affords the Legislature a legal basis for different treatment. Althaus v. State, 99 Neb. 465, 156 N. W. 1038. But in the earlier case of Althaus v. State, 94 Neb. 780, 144 N. W. 799, we held an act unconstitutional because of a lack of a reasonable classification of property. The situation as to classification of persons in the present case is identical to the want of classification of property in the first Althaus case.

This court in Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306, 5 L. R. A. N. S. 136, commented on the principle before us in the following language: "If laborers are clearly within the general scope and reason of the act, so that the provisions exempting them from its operation arbitrarily permit them to do acts in contravention of its terms and purposes which are forbidden to the public at large, there can be no doubt that the statute must fail. Statutes must be general and uniform throughout the state, and must operate alike upon all

persons and localities of a class reasonably constituted with reference to the relations and circumstances provided for." In State ex rel. Custer County Agricultural Society v. Robinson, 35 Neb. 401, 53 N. W. 213, 17 L. R. A. 383, this court said: "It has been frequently held by this court that a law which is general and uniform throughout the state, and operates alike upon all persons or localities which come within the relations and circumstances provided for, is not objectionable to the constitution or wanting in uniformity." See, also, Low v. Rees Printing Co., 41 Neb. 127, 59 N. W. 362, 43 Am. S. R. 670, 24 L. R. A. 702.

As we have heretofore said, no valid reason for classifying retail sellers of personal property for the purpose of excluding them, and them alone, from the penalties of usury, has been demonstrated. Some suggestion has been advanced to the effect that the business risk involved in retail installment sales contracts furnishes a basis for a proper classification. We point out that any seller of personal property is confronted with the same problem of credit risk; it is not a hazard that is limited to retail installment sales. The making of business decisions as to whether or not an installment contract should be made is as common to all persons making such contracts as it is to the retail seller. Classifications of persons for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference. We can come to no other conclusion than that the classification of persons for the purposes of the legislation is special and not general and is inhibited by Article III, section 18, of the Nebraska Constitution.

It is provided in section 1 (5) of Legislative Bill 811, in part, as follows: "Retail installment contract or contract shall mean an agreement evidencing a retail installment sale entered into in this state pursuant to which a buyer promises to pay in one or more deferred installments the time sale price of goods and pursuant

to which the title to or a lien upon the goods is retained or taken by the seller as security for the payment of the retail installment contract." Legislative Bill 811 is an interest statute. We fail to see any connection between the fixing of an interest rate and the fact that security for the loan is taken or the title to the property retained. The provision is special and not general. It therefore is inhibited by Article III, section 18, of the Nebraska Constitution.

It is provided in part in section 6 of the act: "Where a buyer makes any subsequent purchases of goods, other than motor vehicles, from a seller from whom he has previously purchased goods * * *." The exclusionary words "other than motor vehicles" make the provision special and not general, and is likewise inhibited by Article III, section 18, of the Constitution. Section 7 of the act, in excluding motor vehicles from the operation of this section, is likewise subject to the same infirmities contained in section 6.

We point out that Article III, section 18, of the Constitution, requires that the fixing of interest rates must be uniform as to all members of the class. Provisions excepting persons or property from the classification made are in conflict with the legitimate purposes of the act, to wit, the fixing of an interest rate for installment sales contracts that is equal and uniform as to all within the class. What we have said in dealing with section 5 of the act applies as well to sections 1 (5), 6, and 7 of the act. The very purpose of Article III, section 18, of the Constitution, is to prevent legislative action which grants benefits or immunities to persons or property within the general class that is made the subject of legislation. Article I, section 16, Constitution.

It is pointed out that the court, in Elder v. Doerr, *supra,* held a similar act unconstitutional, pointing out the infirmities that necessitated that conclusion. It is argued that, since the Legislature took immediate steps to correct the act in accordance with the holdings of

that case, the present act should be sustained. The argument overlooks the proper function of the courts in dealing with constitutional questions.

All acts of the Legislature are presumed to be constitutional. The courts will not declare an act of the Legislature unconstitutional except as a last resort on the facts before the court. Courts will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. A court has no power to summarily pass upon the constitutionality of an act of the Legislature. It has power only to decide justiciable disputes. Its power to declare an act of the Legislature unconstitutional arises only when it affects a right of a litigant in such a case. A holding that an act of the Legislature is unconstitutional determines its validity only on the questions determined by the court. Silence by the court does not have the effect of validating sections or provisions of the act not brought in issue and not determined by the court. The argument that the court in Elder v. Doerr, *supra,* by not determining issues that were or might have been raised has approved their constitutionality, is not the rule and is contrary to the basic philosophy of our judicial system.

For the reasons stated we hold Legislative Bill 811, adopted at the 73rd session of the Legislature, to be in violation of Article III, section 18, and Article I, section 16, of the Constitution of Nebraska, and therefore void and of no force and effect. The judgment of the district court is reversed and the cause remanded with directions to enter judgment for the plaintiff in accordance with the prayer of his petition.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

I respectfully dissent from the holding of the majority in this case.

I do not agree that all contracts which were made in conformity with an act of the Legislature that is subsequently declared invalid are, also, necessarily invalid.

If, as this court has said, an unconstitutional act is, in legal contemplation, as inoperative as though it had never been passed, and the court cannot grant relief based upon it, the act should not be effective to invalidate contracts which were made in conformity with it.

It seems to me that the validity of such contracts should be determined by the application of the law as it existed prior to the enactment of the invalid statute.

BROWER, J., concurring.

I concur with the opinion of the court in all respects except that I think the decision should be applied prospectively only.

ERNEST R. LLOYD ET AL., APPELLEES, V. JOHN H. GUTGSELL, DOING BUSINESS AS JACK'S TRAILER SALES, APPELLEE, IMPLEADED WITH MOBILE HOME FINANCE COMPANY, A CORPORATION, APPELLANT.

124 N. W. 2d 198

Filed October 18, 1963. No. 35465.

1. **Equity.** The equitable principle expressed in the maxim, "He who comes into equity must come with clean hands," being founded on public policy, public policy may require its relaxation or limitation.
2. **Interest: Usury.** The borrower as a participant in a usurious transaction is in vinculis and not in pari delicto to the lender as regards usury.
3. **Equity: Usury.** Even when the parties have been found to be in pari delicto, relief may be awarded on the ground that in the particular case public policy will be deemed to be best conserved by that course.
4. **Interest.** In a finance transaction, regardless of the term used, if the result is a charge for the loan of money or for the forbearance of a debt the result is interest.
5. **Sales: Usury.** In considering whether a transaction is a time sale made in good faith or a loan, the court will look through the form and examine the substance.
6. ———: ———. If a purported time sale is in fact a loan, and the loan is in violation of the Installment Loan Act, the penalties of the act apply to it.
7. ———: ———. Where a time sale price is determined by

applying a certain schedule of rates or charges to the cash price, the resulting product is interest.

Appeal from the district court for Lancaster County: PAUL W. WHITE, Judge. Affirmed as modified.

Crosby, Pansing, Guenzel & Binning and Donn E. Davis, for appellant.

Kerrigan, Line & Martin, for appellees Lloyd.

Paul E. Galter, for appellee Gutgsell.

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

SPENCER, J.

This is an action by Ernest R. Lloyd and Marion P. Lloyd, husband and wife, hereinafter referred to as plaintiffs, against John H. Gutgsell, doing business as Jack's Trailer Sales, and Mobile Home Finance Company, a foreign corporation with its home office at Drayton Plains, Michigan. The action seeks to cancel a conditional sales contract and a promissory note covering the purchase of a house trailer, for the return of the payments made, and to secure a certificate of title to the trailer free of encumbrance.

Judgment was entered for the plaintiffs. Only the defendant, Mobile Home Finance Company, has appealed to this court. It will hereinafter be referred to as defendant. Whenever it is necessary to mention the other defendant he will be referred to by his trade name, Jack's Trailer Sales.

About the first of September 1960, plaintiffs, desiring to purchase a Detroiter house trailer, went to Jack's Trailer Sales lot in Lincoln, Nebraska, and contacted one Able, a salesman for Jack's Trailer Sales. The exact trailer they wanted had to be specially ordered. A sales agreement was apparently drawn up and executed, but no copy of it was produced.

Plaintiffs were told that the cash price of the trailer they wanted was $4,500, and that $750 would be a suffi-

cient downpayment. Plaintiffs testified that they asked Able if they could finance the trailer anywhere they wanted, and he said yes, but that the company Jack's Trailer Sales financed trailers through would give plaintiffs the same rate as the bank. They also testified he said this rate would be 6 percent interest, and that the company did not have too much red tape about moving a trailer around. Able did not testify, so this testimony is undisputed.

The next conversation material to this transaction was on September 9, 1960, the day the trailer was delivered to the plaintiffs at Fremont, Nebraska. Ernest R. Lloyd testified that he called Lincoln to check on the delivery of the trailer, and was told that it was on the way. He was told that the driver was bringing the papers and that the price of the trailer had been raised $500 but that a $500 credit had been given, supposedly for some trade-in furniture. He testified he was told this was done so that it would go through the finance company more easily. There was no other conversation relative to financing the transaction. The sales contract, exhibit No. 1, brought up by the driver, was signed by the plaintiffs and delivered to the driver. It provides in part as follows:

"CONDITIONAL SALE CONTRACT

VENDOR Jack's Trailer Sales of Lincoln, Nebraska
(Print Name of Dealer) (City) (State)

VENDEE Ernest R. Lloyd - Marion P. Lloyd of A. C. Nel-
(Print Purchaser's Name)
sen Trailer Court, Fremont, Dodge, Nebr
(Street) (City) (Township) (County) (State)

"The undersigned Seller hereby sells, and the undersigned Buyer hereby purchases, subject to the terms and conditions herein set forth, the personal property described below, (hereinafter referred to as 'property'), delivery and acceptance of which, in good order, is hereby acknowledged by Buyer to-wit:

New or Used	Make or Trade Name	Year	Length, Color and Model	Serial Number
New	Detroiter MOBILE HOME	1960	51' Desert Rose & White 51-3FK-10W-CA	FJ-51-3FK-IOW-CA-K-3628

Upon the following terms:

(1) Total Cash Price $5000.00

(2) Down Payment Cash $750.00
Trade $500.00 . . . . $1250.00

(3) Unpaid Balance of Cash Price
(1 minus 2) $3750.00

(4) Cost of Insurance to Buyer . . . . $ 340.00
Insurance Coverage: [ ] $——— Fire and Theft
[ ] $——— Deductible Collision
[ ] Vendor's Single Int. and Emb't.
[ ] Life and Disability (Restricted)
For ——— months

(5) Other charges (Itemize) . . . . ———
. . . . . $———

(6) Net Principal Balance Due
(3 plus 4 plus 5) $4090.00

(7) Time Price Differential
(Finance and Service Charge) . . $1229.00

AMOUNT OF NOTE —(8) TIME BALANCE OWED (6 plus 7) . $5319.00

(9) Time Selling Price (2 plus 8) . . . $6569.00

which time balance Buyer hereby promises and agrees to pay in 60 installment (s) of $88.65 and ——— installments of $——— each, payable on the October 15, 1960 day of each and every month hereafter, with interest at the highest lawful rate after maturity, as is evidenced by Buyer's note of even date herewith, * * *."

The promissory note is attached to the contract in such a manner that it could be detached by tearing a perforated line separating it from the contract, but this has not been done and it is still attached to the contract. Exhibit No. 1 is a form prepared and furnished to the dealer by the defendant. The name of the defendant does not appear in the body of the contract, but the promissory note is made payable at the office of Mobile Home Fi-

nance Company, 4615 Dixie Highway, Drayton Plains, Michigan. There is a printed assignment on the back of the contract as well as on the back of the note. Both of these run to the defendant and both of them were completed by the dealer under date of September 13, 1960. These indicate that it was contemplated that the financing was to be done by the defendant.

Defendant alleges five assignments of error, which we condense to the points argued in defendant's brief, as follows: Was the transaction a loan or a bona fide purchase on time; and, are the plaintiffs barred from equitable relief under the "clean hands" doctrine? Considering the last point first, it is true that the plaintiffs, at the time they signed the contract, knew that they were being given a fictitious credit for $500, but they also knew that this merely offset the inflated sales price. They were purchasing the trailer on the basis of the quoted $4,500 cash sale price.

The evidence is undisputed that the defendant is affiliated with the manufacturer of Detroiter Mobile Homes, and secures its finance business contacts through the manufacturer's representatives in the field. Defendant was peculiarly situated to know the actual value of the trailer. Its representative testified that defendant had a rule requiring a 25 percent downpayment but the maximum it would advance on the contract would be the invoice price of the unit plus freight. The invoice price was $3,759.10, and the freight was approximately $115. He further testified the defendant actually advanced $3,750 on this contract to Jack's Trailer Sales. Three thousand seven hundred fifty dollars was the exact balance of the quoted cash price. This would indicate that the $340 included for cost of insurance was not advanced by Jack's Trailer Sales but was loaned to the plaintiffs as a part of the transaction with the defendant. It was the defendant who was getting the benefit of the charges made for financing the cash price.

Defendant's representative testified it was not bound

to take all finance contracts on Detroiter trailers from Jack's Trailer Sales, but checked each one presented and took only those it wanted. It did take this one. Further, as noted, the promissory note was drawn payable at its place of business in Michigan.

This court has in the past refused to apply the so-called "clean hands" doctrine in usury cases against the borrower as a participant in a usurious transaction, on the theory that the borrower is in vinculis and not in pari delicto to the lender as regards the usury. State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215. This is not a new doctrine. It is found in the early English and American cases. In 1781, Lord Mansfield, in summing up to the jury in Lowe v. Waller, 2 Doug. 735, told it: "* * * the statute of usury was made to protect men who act with their eyes open; to protect them against themselves." This case and other English cases embracing the same point were followed in an opinion written by Chief Justice Marshall, in Scott v. Lloyd (1835), 34 U. S. 418, 9 L. Ed. 178. Chief Justice Marshall analyzed the English usury cases, some of which were in the form of sales rather than the loan of money, and concluded: "Yet, it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding the form, and examining into the real nature of the transaction. If that be, in fact, a loan, no shift or devise will protect it." That is and has been the rule in this jurisdiction. To hold otherwise would make usury statutes a hollow mockery.

The same reasoning applies where the purchaser is merely a passive participant in an active misrepresentation by the seller. In this instance, the seller urged the plaintiffs to finance the transaction with the defendant, and the deal for the defendant was handled by the seller. Plaintiffs had no contact with any other

representative of the defendant until after the transaction was completed. Further, the defendant was in a better position than the plaintiffs to know the actual value of the trailer. Regardless of the price paid for it, defendant knew the invoice price was only $3,759.10. To hold the plaintiffs to be barred from raising the defense of usury in this case or in like situations would permit unscrupulous sellers to avoid the usury statute by a misstatement which in no way is initiated by or is actually beneficial to the purchaser.

We believe the rule to be applied in cases of this nature is the one set out in Weaverling v. McLennan, 116 Neb. 466, 217 N. W. 956: "The equitable principle expressed in the maxim, 'He who comes into equity must come with clean hands,' being founded on public policy, public policy may require its relaxation or limitation. Even when the parties have been found to be in pari delicto, relief has at times been awarded on the ground that in the particular case public policy has been deemed to be best conserved by that course."

The undisputed testimony of the plaintiffs as to their conversation with Able concerning financing and the rate of interest to be charged leaves no room for any question on the nature of this transaction. It was a cash sale with the balance above the downpayment to be financed. No time sale price was discussed. The first time the plaintiffs heard or saw the actual time price was when exhibit No. 1 was signed. Item 9 listed a time selling price. Exhibit No. 1 was provided by the defendant finance company. The assignment to defendant is printed on the form. The expectation was that the defendant would finance the transaction and advance the balance of the cash price to the seller. The time price differential is the charge for this advance along with the advance for insurance. The time price differential exceeds 9 percent simple interest, so the transaction was a usurious one, as found by the trial court.

It is apparent on the face of exhibit No. 1 that we

have a finance transaction, and that usurious interest is being exacted. As we said in General Motors Acceptance Corp. v. Mackrill, *ante* p. 631, 122 N. W. 2d 742, regardless of the term used, if the result is a charge for the loan of money or for the forbearance of a debt, the result is interest.

Defendant argues that this transaction was an installment sale and that the usury rules are not applicable to installment sales. With this broad statement we must disagree. We have repeatedly said that in considering whether such a transaction is a time sale made in good faith or a loan, the court will look through the form and examine the substance. State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55. Here exhibit No. 1 clearly discloses the nature of the transaction, and we find it to be a scheme or artifice to avoid the effect of the usury statute. Unless this is true, usury could be avoided in every case by placing the transaction in the mere form of a time sale contract. Our law is well settled that if a purported time sale is in fact a loan, and the loan is in violation of the Installment Loan Act, the penalties of the act apply to it. See Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122.

There seems to be an impression that if a cash price is quoted and the buyer is unable to pay cash, it is then possible to apply a certain schedule of rates or charges to the cash price in order to determine the time sale price, the difference being denominated a time price differential. It is possible to do so if the resulting charge does not exceed 9 percent simple interest. If it does, we have a usurious transaction. Where a time sale price is determined by applying a certain schedule of rates or charges to the cash price, the resulting product is interest. This is merely a sale for a cash price, with the difference between the money the buyer has and what he needs being financed. When we look through the form, can we come to any other

conclusion but the one that the difference between the price and what the buyer finally pays is the cost of carrying the balance of the cash price? To put it another way, the charge is for the forbearance to collect the full cash price, or for the use of money. A rose is still a rose though we may label it a violet. This charge, regardless of its label, is interest. See General Motors Acceptance Corp. v. Mackrill, *supra*. A transaction handled in this manner is essentially a loan to finance the balance of the cash purchase price, and if payable in installments must meet the requirements of the law covering finance transactions.

We specifically pointed to this conclusion when we said in State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55: "It is not a time sale if a car dealer, in selling a car, actually agrees with the buyer that he will finance (take care of) the balance of the cash purchase price agreed upon and does so, either directly or through others, even though he obtains the schedule of payments and the total amount thereof from a rate chart furnished by a finance company or obtains that information from a finance company by calling its office and then fully informs the buyer of the amount he will be required to pay and the terms thereof. Such a transaction would be a loan to finance the balance of the cash purchase price and if payable in installments must meet the requirements of the statutes relating thereto. And the fact that the buyer knew the terms and provisions of such loan at the time it was made and voluntarily entered into it would not have the effect of waiving the illegality of any provision thereof, if such provision was actually in violation of any of the inhibitory provisions of the installment loan statutes, for the purpose of the Legislature in enacting such laws was, as a matter of public policy under its police powers, to regulate the lenders of money on installment loans as a protection to those of the general public who find it necessary to borrow money on that basis."

The judgment rendered by the trial court includes a money judgment against both the defendant and Jack's Trailer Sales for $1,781.90. This amount included the $500 fictitious trade-in added by Jack's Trailer Sales to offset the inflated price. It is erroneous in that respect. Further, it is undisputed that the defendant received no part of the cash downpayment of $750, and ought not in equity and good conscience be charged with that payment.

We direct that the money judgment rendered against the defendant should be reduced by these two items of $500 and $750, and in all other respects affirm the judgment.

AFFIRMED AS MODIFIED.

BOSLAUGH, J., concurring.

I believe that the court has reached the correct result in this case. Therefore, I concur in the result although I do not agree with all of the statements which are contained in the opinion of the court.

The majority opinion states that if a time price is determined by applying a schedule of rates or charges to the cash price, the difference is necessarily interest. This statement is contrary to what the previous opinions of this court have declared to be the law.

In a number of decisions, commencing with Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429, this court has held that a time sale made in good faith at a price in excess of a cash price is valid even though the difference between the two prices exceeds the lawful interest for a loan. In Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122, the court said: "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, *which price is arrived at by schedules* furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury." (Emphasis supplied.) In McNish v. General

Credit Corp., 164 Neb. 526, 83 N. W. 2d 1, the court said that it was essential that the buyer actually be informed of and have the opportunity to choose between a time sale price and a cash sale price.

By a series of decisions this court has held that a time sale made in good faith is valid; that it is essential that the buyer be quoted a cash price and a time price; and that the time price may be computed by the use of schedules. The effect of the language in the majority opinion is to destroy the validity of all time sale contracts which were made in good faith in reliance upon previous decisions of this court. Such a result should be avoided if at all possible.

If the law is to be changed, I believe that the change should be made by legislative process. But, if the change is to be made by judicial decision, then the decision should operate prospectively only. In that respect I concur in Judge Brower's remarks concerning the prospective operation of such a decision.

BROWER, J., concurring.

I concur in the result reached by the court in its decision herein. The opinion holds that the difference between the cash price and time price of merchandise is interest and if the time price differential is more than 9 percent it is a usurious transaction. With this conclusion I agree.

The original reason for the exclusion of the time differential from the operation of the usury statute is discussed in an article appearing in 55 Northwestern University Law Review, p. 303, stating: "This view has traditionally been justified on the theory that a person finding it necessary to borrow money is in a disadvantageous bargaining position and deserving of statutory protection, whereas a purchaser's position is not analogous since should he find the price unsatisfactory he can always refrain from making the purchase.

"This distinction appeared before the advent of large scale credit buying in a period in which the interests

of the merchant class were considered paramount. It is subject to attack for disregarding the facts of present day economic life. It is difficult to understand why a consumer should be granted the protection of the usury statute when he makes a loan to facilitate a purchase, but is denied that protection when he makes the same purchase on credit granted by the dealer."

To my mind the person without adequate funds to buy an automobile or household furniture or appliances, radios, or a television set, or many other items for cash who must have one for his business or family is in about the same position as far as being able to walk away from the dealer and go elsewhere as a debtor is to go from one finance company to another. I can see little difference in the two situations.

The rule that a time sale of goods or merchandise did not involve interest which grew up long before its adoption in this state appeared to be sound reasoning at the time it originated. At that time such dealings were quite simple and modern commercial transactions based on time sale credit were not in vogue. There were in such a transaction other risks and factors.

Since then installment sales have increased by leaps and bounds. The rapidity of their increase and the volume of such sales can be seen from the tables in the discussion in the article on Retail Installment Sales in 45 Marquette Law Review (1962) 555.

I am convinced that the seller of merchandise and the buyer think of the amount paid to effect a time sale as interest. Even though the buyer is totally unable to appreciate the rate of interest he is paying I think he knows that some interest is being paid and wouldn't know anything about a "time differential" unless it was explained to him. The dealer must buy other goods to sell in turn and in many cases must pay interest himself. In most cases I believe he would consider the difference between the cash and time

price as interest if it were not carefully explained to him by the finance company or his lawyer.

In short I think today it is interest received for forbearance of the dealer to collect the cash price and that the same law of usury should be applied to the time differential as to interest on a loan.

To my mind however this is a new rule of law in conflict with our previous holdings.

Beginning with the case of Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429, this court held: "A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan."

A long line of cases followed, always giving lip service to this rule and asserting that a sale of property by an owner on time if made in good faith was not usurious regardless of the amount that the time price exceeded the cash price. In most all subsequent cases this court discussed numerous situations between seller and buyer with generally a finance company involved to determine whether the transaction was a loan or a time sale. This was because the difference between the cash and time price generally exceeded the interest which would have been allowed under the various interest statutes. After looking through "form to substance" the transaction was generally held to be a loan involving interest.

In my opinion this court in changing the rule should clearly overrule Grand Island Finance Co. v. Fowler, *supra,* by name and the long line of cases stemming from it. That would avoid confusion and lend clarity to the opinion.

However, in such a case a great number of important financial transactions have been consummated relying on the faith of these decisions of this court. We should not in my opinion endanger their validity by a decision acting retroactively.

I have never hitherto favored prospective decisions. I am sure courts do not favor them except in cases in which great numbers of persons have acted on important matters. relying on such decisions. I feel however that the present situation is such a case.

This has been done in cases of importance in other states. Knecht v. St. Mary's Hospital, 392 Pa. 75, 140 A. 2d 30; Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N. W. 2d 795. It has been approved by the Supreme Court of the United States in Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A. L. R. 254. In at least one decision this court has done so. Fielding v. Publix Cars, 133 Neb. 818, 277 N. W. 331. Finally it has been applied to its rules in distinguishing time sale transactions from usurious loans by the Arkansas court in Hare v. General Contract Purchase Corp.. 220 Ark. 601, 249 S. W. 2d 973. I would have applied the rule announced in our opinion prospectively.

There is a discussion in 60 Harvard Law Review 437 on the prospective operation of decisions holding statutes unconstitutional. From this note it is apparent that many courts have made their decisions prospective only when setting aside a statute upon which many persons have relied and important transactions taken place. I would have applied our decision in Elder v. Doerr, *ante* p. 483, 122 N. W. 2d 528, prospectively also.

ELIZA WOODS, APPELLEE, v. GEORGE WOODS, APPELLANT.
124 N. W. 2d 197

Filed October 25, 1963. No. 35564.

1. **Appeal and Error.** The filing of a praecipe is essential to the procurement of a bill of exceptions in the district court.
2. ———. A motion for an extension of time for preparing and filing a bill of exceptions will not be granted where it appears that a praecipe for a bill of exceptions has not been filed within

the time prescribed by Rule 7c, Revised Rules of the Supreme Court.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. On motion to extend time for preparation and filing of bill of exceptions. Motion denied.

Stern, Harris & Feldman, for appellant.

Jerome P. Grossman, for appellee.

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

CARTER, J.

This matter arises on a motion for an extension of time for the preparation and filing of a bill of exceptions. Objections to the extension were filed on the ground that no praecipe for a bill of exceptions was filed within the time prescribed by Rule 7c of the Revised Rules of the Supreme Court.

The pertinent part of Rule 7c provides: "The party appealing may order a bill of exceptions by filing in the office of the clerk of the district court a praecipe therefor within the time allowed for filing a notice of appeal." A party appealing may perfect his appeal with or without a bill of exceptions. If he desires a bill of exceptions he must file a praecipe within the time provided in the rule.

In the instant case no praecipe was filed within the time prescribed by Rule 7c. Under Rule 7f an extension of the time provided in Rule 7d can be obtained in accordance with its provisions. Rule 7f provides in part: "Where a bill of exceptions has been ordered according to law by the timely filing of a praecipe, and the court reporter fails to prepare and file the bill of exceptions with the clerk of the district court within the time fixed by Rule 7d, the Supreme Court may, on the motion of any party accompanied by a proper showing, grant

additional time for the preparation and filing of the bill of exceptions under such conditions as the court may require." The filing of a praecipe is therefore a condition precedent to the grant of such extension.

We point out that the filing of a bill of exceptions determines the brief day of the parties under Rule 11a (1). When there is no bill of exceptions, brief days are otherwise fixed by Rule 11a (1). The expedition of litigation in this court requires compliance with the rules. The act of filing a praecipe for a bill of exceptions is a simple one. It works no hardship upon a litigant to determine if he desires a bill of exceptions during the same period of time that he must give his notice of appeal.

We conclude that the filing of a praecipe is essential to the procuring of a bill of exceptions and to the grant of an extension of time for its preparation and filing. No praecipe for a bill of exceptions having been filed in the instant case within the prescribed time, the right to the bill has been lost and an extension of time for its preparation and filing is not authorized. The motion must therefore be denied.

MOTION TO EXTEND TIME FOR PREPARATION AND FILING OF BILL OF EXCEPTIONS DENIED.

GLEN A. GILLASPIE, APPELLANT, V. NEBRASKA TRACTOR & EQUIPMENT COMPANY, A CORPORATION, ET AL., APPELLEES.
124 N. W. 2d 198

Filed November 1, 1963. No. 35357.

SUPPLEMENTAL OPINION

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. On motion for rehearing. See *ante* p. 401, 122 N. W. 2d 17, for original opinion. Former opinion modified. Motion for rehearing overruled.

Young, Holm, Miller & McEachen, for appellant.

Kennedy, Holland, DeLacy & Svoboda, William P. Mueller, and Robert A. Skochdopole, for appellees.

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

MESSMORE, J.

The opinion made reference to the history given by the plaintiff to the defendants' medical examiner and concluded that such evidence was hearsay evidence. No objection was made to the admissibility of such evidence.

The conclusion reached in the opinion that such evidence constituted hearsay evidence should be deleted therefrom, and it is so deleted. The motion for rehearing is overruled.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

PRICE REALTY CO., APPELLANT, V. AIRPORT AUTHORITY OF THE CITY OF LINCOLN ET AL., APPELLEES.
124 N. W. 2d 207

Filed November 1, 1963. No. 35433.

1. **Easements.** Under the laws of this state an easement for use and occupancy of land may be created by implication.
2. ———. Under particular facts and circumstances an easement by implication may flow from and be created by the existence of an element of necessity for use and occupancy.
3. ———. An easement by implication may flow from and be created by an implied grant from what has been said or done by the parties involved.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Davis, Thone, Bailey & Polsky, for appellant.

Barney, Carter & Buchholz, Healey & Healey, Harvey L. Goth, Ralph D. Nelson, Henry L. Holst, and Hal Hasselbalch, for appellees.

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

YEAGER, J.

This is an action instituted by Price Realty, Inc., true name found by the judgment to be Price Realty Co., a Nebraska corporation, plaintiff and appellant, against Airport Authority of the City of Lincoln, Nebraska, Airport Parking Company, and the City of Lincoln, Nebraska, defendants and appellees, in which the plaintiff prayed for judgment against the defendants and each of them adjudging that the plaintiff have an easement for parking in an area of ground adjacent to and located west, southwest, and northwest of the Terminal Building belonging to the defendant City of Lincoln and operated for parking purposes by the defendant Airport Authority and the defendant Airport Parking Company; that the defendants be prohibited from making charges for parking in the area; and for damages on account of failure to allow use of the area without charge to the plaintiff and its customers of an eating place or restaurant for service to the public which was at a location in the Terminal Building leased and used by the plaintiff for the operation of the restaurant.

There was a joinder of issue on the matters tendered by the petition, a trial was had to the court, and judgment was rendered against the plaintiff and in favor of the defendants. Specifically it was adjudicated that there was no basis in fact or law for injunction; that there was no right to a recovery of damages against any of the defendants; that the parking lot was not an appurtenance to the plaintiff's leasehold; and that its use was not so necessary to the beneficial enjoyment of plaintiff's leasehold interest as to constitute an implied easement therein.

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

The lease in question was one in which the defendant Airport Authority was lessor and the plaintiff Price Realty Co. was lessee. In the language of the plaintiff in its brief the matter involved in the case is stated as follows: "The question involved was whether the lease between the Plaintiff, Price Realty Co., and the Defendant, Airport Authority, passed with it as incident thereto an easement in the adjacent parking lot for customer use." The brief also points out that this issue and the matter of damages, if it had been deprived of this right, were the only two issues tried.

As grounds for reversal the plaintiff asserted by assignments of error (1) that the court erred in finding for the defendants and against the plaintiff; (2) that the court erred in entering judgment for the defendants and against the plaintiff; and (3) that the court erred in finding and deciding that the plaintiff had no easement by necessity in the parking lot.

From the full purport of these assignments of error and the declaration of issues it becomes clear that but one question is presented for consideration. The question is that of whether or not the plaintiff had an easement by necessity in the parking lot.

The facts upon which the determination in this case must be made are not in dispute. They are, to the extent necessary to set them out here, that the plaintiff is a corporation engaged in the ownership and leasing of premises wherein, among other things, it operates places of business to furnish foods and refreshment for purchase by people who desire these services. The business engaged in is commonly referred to as restaurant business.

The defendant Airport Authority is an entity created under authority of law to control the property and facilities of what is commonly known as the Lincoln, Nebraska, Municipal Airport. The title to this municipal airport is in the defendant City of Lincoln, Nebraska, but sole control thereof is in the Airport Authority.

The defendant Airport Parking Company is a corporation which has a lease from the Airport Authority which permits it to use a portion of the land area owned by the City of Lincoln and controlled by the Airport Authority as a parking lot for automobiles and to charge fees therefor.

On the land area controlled by the Airport Authority are structures including what is commonly known as the Airport Terminal Building. The purpose of this building is to provide facilities for the operation of the airport and the welfare of the employees and of the traveling public. Portions of the building are allocated to particular functions and purposes, some of which are allocated under lease to the occupants. Some of the occupants, under right of occupancy in the building, have special rights in the area outside the building for the parking of their motor vehicles, but none, including the plaintiff, have any other or additional parking rights.

On June 23, 1960, the plaintiff became an occupant of a particular portion of the building under a written lease from the Airport Authority. The lease was entered into pursuant to an offer or bid made by the plaintiff. The lease was of a specifically described area and appurtenances within the building. No reference was contained to any appurtenance or right outside and beyond the building except the rights of ingress and egress to the leased area. There was evidence however of right of the placement of vehicles of the plaintiff, its employees, and those furnishing service to and for it beyond the leased area.

There are land areas to the east, south, southwest, and northwest of the Terminal Building. The main entrance to this building is on the south side. This provides the ingress and egress for the public to the building and for the plaintiff and its patrons to the area leased.

In this case there is no contention that there has been any interference with the ingress or egress facilities or with vehicular approach or departure or the parking

of automobiles used in connection with operation under the lease by plaintiff.

Within these areas is an area which is not described in or generally referred to in the lease and which is separated from the described leased premises, the dimensions of which are approximately 325 feet east and west and 200 feet north and south which had been used and occupied by officers, employees, agents, and patrons of the lessee of the leased area and which belonged to the defendant City of Lincoln and had been used by the defendant Airport Authority for the purpose of parking automobiles. It is this described area that is of concern in this case. It appears that in this described area there was space for the parking of approximately 85 automobiles.

On June 29, 1960, this area was leased to the Airport Parking Company with permission to it to make charges for parking therein, the effect of which was to prohibit its use free to customers of the plaintiff at its leased facility in the Terminal Building.

Before and for a short time after the lease to plaintiff was entered into the area was without restriction or restraint used by the customers of this lessee and previous lessees for the parking of automobiles, but without a grant or declaration of authority from any source.

The lease makes no mention of this area as an appurtenance of any kind or character of the leased premises, and also and in particular, it is not mentioned as an area for the use of the customers of the plaintiff.

At no time prior to the execution of the lease, nor at the time, nor at any time thereafter, was there any representation that the area was subject to use for a fee until after the lease to the Airport Parking Company pursuant to which it took steps to exact a charge for the parking of automobiles thereon. In fact according to the testimony of the chief officer and representative of the plaintiff the lease was signed without reading and without any conversation with anyone representing

any of the defendants with reference to this subject, and further, no representation was ever made from which any reasonable inference could flow that this area was an appurtenance of the lease for use as a parking lot. Further the plaintiff does not claim that there was any fraud, misrepresentation, or overreaching in anything that was said by anyone representing any of the defendants as an inducement to the execution of the lease.

The claim of right to an easement and damages is predicated on the knowledge that customers of this lessee and previous lessees of the premises leased had been permitted to park automobiles without charge in this area, and after the Airport Parking Company started operation they were not allowed to do so, in consequence of which the business of the plaintiff was reduced to below what it otherwise would have been, and on account thereof the plaintiff suffered damage. Thus what the plaintiff is claiming here is an implied easement.

That an easement may be created by implication there is no question. The parties are agreed on this question. They cite some of the same Nebraska cases to support this and also to support their conflicting views as to whether or not there was created here an easement by implication. Cases cited are Miller v. Fitz Gerald Dry Goods Co., 62 Neb. 270, 86 N. W. 1078; Herpolsheimer v. Funke, 1 Neb. (Unoff.) 471, 95 N. W. 688; Kitchen Bros. Hotel Co. v. Philbin, 2 Neb. (Unoff.) 340, 96 N. W. 487; Hansen v. Smikahl, 173 Neb. 309, 113 N. W. 2d 210. Another Nebraska case having a bearing on the matter is Bee Building Co. v. Peters Trust Co., 106 Neb. 294, 183 N. W. 302. In Restatement, Property, § 474, p. 2972 et seq., is an exhaustive discussion of the subject of creation of implied easements and the essential elements and incidents necessary to their creation.

It appears from a consideration of these cases and the discussion to which reference is made that many things may and should be considered in the determination of

whether or not the right to an easement has been established in any particular case.

From all of this it must appear either that there is an element of necessity, or an implication of grant must be shown to flow from what has been said or done, or both, in order that there may be awarded an easement by implication.

In this instance there is no evidence of an act of any party from which an implication of grant could flow. If therefore the observations contained in the cases and commentaries are to be accepted then the right of plaintiff, if it is entitled to an easement, must flow from some legally recognizable necessity under the circumstances.

From the commentaries it appears that desirability, value, or benefit, alone or all of them together, are not sufficient to justify a grant of an easement flowing from implication. The evidence indicates that an easement in this instance would be desirable, of probable value, and beneficial to the plaintiff in the operation of its business on the leased premises. This however does not, in the application of the inferences flowing from the observations which are made in the commentaries to which reference has been made, bring the situation here within the purview of necessity.

The necessity in such an instance as this has reference to operation relating directly to the functions to be performed on the premises. In this instance necessity relates only to operation of the restaurant as such. Something outside and in no way connected with operation, but which, as is true here, may reasonably be regarded only as an attraction of customers or patrons, may not be declared in the sense involved here a necessity.

This being true the plaintiff is not entitled to an easement for use of the area in question. The judgment of the district court is therefore affirmed.

AFFIRMED.

SPENCER, J., dissenting.

It seems to me that under the evidence herein, a parking facility is essential to the successful operation of plaintiff's restaurant at the particular location involved. In that respect, I would hold the parking facility to be appurtenant to the restaurant facility. The parking facility in question had been used by customers of plaintiff's predecessor without charge. This fact was generally known. The president of the plaintiff was negligent in not reading the lease before he signed it, and in not insisting that a parking facility be specifically included. In plaintiff's defense it might be said it would not expect a governmental agency to divide the facilities under the peculiar facts in this case and not inform the bidders on the restaurant facility that free parking would no longer be available in the only parking space which could be used by restaurant customers.

Plaintiff's lease was executed June 23, 1960. The parking lease was executed June 29, 1960. While defendants did not misrepresent the lease in any way, it seems to me that a measure of sharp practice is involved in not disclosing the fact that the parking facility was to be separately leased. It is very possible this would have made it more difficult to lease the restaurant facility, or at the very best would have resulted in a less favorable lease. Defendants could not help but know that plaintiff's bid was based on the premise that the parking lot was included.

I feel there was a duty to make this disclosure.

STATE OF NEBRASKA, APPELLEE, V. DENNIS O'KELLY, APPELLANT.

124 N. W. 2d 211

Filed November 1, 1963. No. 35443.

1. **Arrest.** A police officer may arrest without a warrant when it appears that a felony has been committed and that there are

reasonable grounds to believe that the person arrested is guilty of the offense.

2. **Constitutional Law.** The protections of the Fourth Amendment to the Constitution of the United States and the holdings of the United States Supreme Court in construing such protections are binding upon the courts of this state.
3. **Constitutional Law: Searches and Seizures.** Evidence obtained as the fruit of an illegal search or arrest, in violation of the Fourth Amendment to the Constitution of the United States and the provisions of Article I, section 7, of the Constitution of Nebraska, is inadmissible in a prosecution in this state and must be excluded.
4. **Constitutional Law: Arrest.** The applicable standard for an arrest without warrant is that there is reasonable ground to believe that a felony has been committed and to believe the person arrested is guilty of such offense. This standard, under our statutory and case law, is the same standard as that of the Fourth Amendment to the Constitution of the United States protecting persons against unreasonable seizures.
5. **Arrest.** When a police officer acts upon information furnished him in making an arrest, there is no precise formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.
6. **Constitutional Law: Searches and Seizures.** The reasonableness of a search or seizure in the first instance is a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the fundamental criteria laid down by the Fourth Amendment to the Constitution of the United States and in the opinions of the United States Supreme Court.
7. **Arrest.** Facts and circumstances within an officer's knowledge must be sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed.
8. **Searches and Seizures.** The practicability of obtaining a search warrant is not the controlling factor when a search is sought to be justified as incident to arrest. Each case must be determined from the particular circumstances present.
9. **Criminal Law.** An accused must be brought before a magistrate in the first instance only as soon as is practical under the existing circumstances.
10. ———. When the accused is in fact present before the magistrate at the time the complaint is filed, the court may proceed with the examination of the defendant on preliminary hearing to determine probable cause without the issuance of a warrant.
11. **Constitutional Law: Criminal Law.** A preliminary hearing is not a trial within the meaning of Article I, section 11, of the

Constitution of Nebraska, and there is no requirement that counsel be furnished an accused prior to that time.

12. ———: ———. Investigation and examination of an accused after a proper legal arrest and before a preliminary hearing is not in violation of the United States or Nebraska Constitutions and is consistent with due process.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

Philip C. Sorensen and John C. Gourlay, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

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

WHITE, C. J.

The defendant, by information, was prosecuted in Lancaster County for second degree murder. From the conviction and sentence of life imprisonment for the crime of second degree murder, the defendant appeals.

The questions involved in this case turn upon the determination of the admissibility in evidence of written and oral confessions and admissions of the defendant to the police. Summarizing the specific contentions made by the defendant from the assignments of error argued, they are:

1. The admissions and confessions of the defendant, both written and oral, are inadmissible because they were the fruits of an illegal arrest made without a warrant and without probable cause in violation of the Fourth Amendment to the Constitution of the United States.

2. A warrant for the arrest of the defendant was required even though probable cause for his arrest existed.

3. The admissions and confessions were the fruits of an illegal detention of the defendant, without counsel, because of failure to take the accused before a magistrate within the proper permissible time.

We review the evidence as it relates to these questions. Shortly after 1:30 p.m. on August 4, 1962, the body of Barbara Eastman, a young Indian girl, was discovered in the water at Oak Lake in Lancaster County, Nebraska. The police were notified and the body was taken immediately to the morgue room in the Lincoln General Hospital. An autopsy was performed which revealed that the immediate cause of death was drowning, but that severe blows which had been administered to the head, resulting in major fractures to the skull and jaw and damage to the brain, would probably have resulted in death without drowning. The evidence fixed the time of death at least 6 hours before 3:45 p.m. on August 4, 1962, when the doctor first saw the body, and at least 4 hours after the deceased, Barbara Eastman, had last eaten.

About an hour and a half after the discovery, around 3 o'clock in the afternoon of August 4, 1962, the body was definitely identified as that of Barbara Eastman by her sister, Charlene Williams, and her brother, Alvin Eastman. This identification was made at the morgue of the Lincoln General Hospital and present there at that time was a Lincoln police officer, Robert Sawdon. Immediately after this identification, Sawdon had a conversation with both the sister and the brother. The exact information conveyed by Charlene Williams and Alvin Eastman to the police officer at that time is set out as follows: "* * * and at that time I asked both Mrs. Williams and Alvin Eastman if they had any idea of who Barbara had been with the night before. Both Alvin Eastman and Mrs. Williams stated that there was only one person she could be with and that was Dennis O'Kelly. We pursued the questioning as to what they based their statements on and both Mrs. Williams singly and Alvin Eastman individually stated that Dennis O'Kelly was the only boy or the only man that she went with or had any dates with and both stated that Dennis O'Kelly had brought her to her home, which

was their home, 110 North 28th, the night previously, and that he made arrangements to pick her up later."

Both of these witnesses told Sawdon, the police officer, that the defendant had brought Barbara Eastman home the night previously and that she (Barbara Eastman) had told them that she had a date with the defendant later that night.

Barbara Eastman, the deceased; Charlene Williams, her sister; and Alvin Eastman, her brother, had been living together at their home at 110 North Twenty-eighth Street. The deceased had been dating one man and one man only, the defendant, Dennis O'Kelly. The testimony discloses that on the evening before the discovery of the body, August 3, 1962, the defendant brought Barbara Eastman home in his car. This was witnessed by both Charlene and Alvin. The deceased and the defendant were engaged in a conversation at the time he let her out of the car in front of their home. She got out of the car when it was still moving. She told them that she had a date to meet the defendant later on that evening and during the course of the evening kept watching out of the window for the approach of the car. She left about 10:30 p.m., and the next time that Charlene Williams saw her was at the morgue the next afternoon. The brother and sister testified in substance that the deceased had been going steady with O'Kelly since February, that he and he alone was the only man that she went with, that O'Kelly was a married man, that the deceased and O'Kelly were in love with each other, and that they had made plans to get married and live in Lincoln. Referring to the information furnished Sawdon at the hospital immediately after the identification, Charlene Williams, the sister, testified as follows: "Q- And did you tell them with whom your sister had gone out on the night of August 3, 1962? * * * A- I told them she had gone out with Dennis O'Kelly."

Both Charlene Williams and Alvin Eastman knew

where the defendant lived. Immediately after talking with them at the hospital, Sawdon, Alvin Eastman, and two other officers proceeded to the defendant's residence. The defendant arrived in a car, he was asked to step out of his car, he was then searched, and he was told that he was under arrest and would have to accompany Sawdon to the police headquarters. This arrest took place between 5:20 and 5:30 p.m. on Saturday, August 4, 1962. There was no conversation concerning the purpose for the arrest at the time it took place. After the arrest took place, and in the cruiser car on the way to headquarters, the defendant asked why he was being taken in and was informed he was being taken in for investigation regarding the death of Barbara Eastman. It is undisputed that no warrant had been issued for his arrest. Thereafter, on Saturday afternoon and evening, August 4, 1962, and on the Sunday following, numerous conversations and interrogations were had with the defendant, Dennis O'Kelly. For the purposes of this opinion, we will only briefly review the extent and nature of the defendant's confessions and admissions, both oral and written. The substance of them was that the defendant had been on a date with another girl on the evening of August 3, 1962, and on impulse, drove over to Barbara Eastman's house and picked her up, drove out to Oak Lake, and parked. He told Barbara Eastman he was going to break up with her, she started crying, the defendant pushed her, and Barbara Eastman kept crying and saying, "No." She tried to come back over and put her arms around him, and then he hit her. She became hysterical, got out of the car, and ran away crying, "No, no." He, the defendant, chased her, caught her, and stated that he slapped her to try to bring her back to her senses, and as she tried to break away from him and run, he hit her again. She started to fall down and the defendant hit her with his fist and with some other object but couldn't recall what the object was. The deceased fell to the ground,

and after hitting her further, the defendant shook her, picked her up, and carried her over to the lake. At that time, she didn't move, and the defendant took her and held her in his arms. Then he dragged her over closer to the lake, rolled her into the water, and left, going home.

Other than the contention that these confessions and admissions were the fruits of an illegal arrest and detention, the defendant does not contend that the said confessions and admissions were not properly admitted in evidence or that the jury was not properly instructed as to the different elements necessary for their consideration in this respect. We turn now to the basic question raised in this case. It may be stated simply: Were the oral confessions and admissions of the defendant the fruits of an illegal arrest of the defendant? The defendant urges recent United States Supreme Court decisions applicable to this situation. We recognize and follow the holding of the United States Supreme Court that the protections of the Fourth Amendment to the Constitution of the United States against unreasonable seizures are now made binding upon the states through the due process clause of the Fourteenth Amendment. Wolf v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782. Evidence obtained as the fruit of an illegal search or seizure, in violation of the Fourth Amendment to the Constitution of the United States and the same provision in Article I, section 7, of the Constitution of Nebraska, is inadmissible in a state prosecution and must be excluded. Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 84 A. L. R. 2d 933; followed by our court in State v. Easter, 174 Neb. 412, 118 N. W. 2d 515, and State v. Goff, 174 Neb. 548, 118 N. W. 2d 625. This rule is called the "exclusionary rule." Following the recent holding by the United States Supreme Court in Wong Sun v. United States, 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441, and also in United States v. Meachum, 197 F. Supp. 803 (1961), both to the effect

that the exclusionary rule embraces intangible evidence, including written and oral confessions and admissions, the defendant argues the inadmissibility of this evidence because it was the fruit of an arrest made without warrant and without probable cause.

It has long been established in Nebraska that a police officer may arrest without a warrant when it appears that a felony has been committed and that there are reasonable grounds to believe that the person arrested is guilty of the offense. § 29-402, R. R. S. 1943; Halsey v. Phillips, 104 Neb. 648, 178 N. W. 218; Nelson v. State, 33 Neb. 528, 50 N. W. 679. We first examine this standard which constitutes the basic law of the state to determine whether it meets the criteria required under the decisions of the United States Supreme Court. The Supreme Court of the United States in a long line of decisions, the latest being Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726, has held that the lawfulness of arrest is to be determined by reference to state law insofar as it is not violative of the Constitution of the United States. In the Ker case, *supra*, it was said as follows: "This Court, in cases under the Fourth Amendment, has long recognized that the lawfulness of arrest for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution. Miller v. United States, supra; United States v. Di Re, 332 U. S. 581 (1948); Johnson v. United States, 333 U. S. 10, 15, n. 5 (1948). A fortiori, the lawfulness of these arrests by state officers for state offenses is to be determined by California law." Turning now to the standard set out in our statute and case law that there must be "* * * reasonable ground to believe the person arrested is guilty of such offense," it is clear that this is also the same standard of the Fourth Amendment to the United States Constitution protecting persons against unreasonable seizures. Henry v. United States, 361 U. S. 98, 80 S. Ct. 168, 4 L. Ed. 2d

134. That the standards are the same is conceded by the defendant.

The applicable rule in applying these standards to a particular case is stated in the latest pronouncement of the Supreme Court of the United States in Ker v. California, *supra,* wherein it is stated: "* * * 'there is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.' Ibid.; see United States v. Rabinowitz, 339 U. S. 56, 63 (1950); Rios v. United States, 364 U. S. 253, 255 (1960). * * * This Court's long-established recognization that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. And, although the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution. *We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment.* Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. * * * The lawfulness of the arrest without warrant, in turn, must be based upon probable cause, which exists 'where "the facts and circumstances within their (the officer's) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense had been or is being committed.' Brinegar v. United States, 338 U. S. 160, 175-176 (1949), quoting from Carroll v. United

States, 267 U. S. 132, 162 (1925); accord, People v. Fischer, 49 Cal. 2d 442, 317 P. 2d 967 (1957); Bompensiero v. Superior Court, 44 Cal. 2d 178, 281 P. 2d 250 (1955)." (Emphasis supplied.)

We, therefore, review the trial court's "substantive determination," "from the facts and circumstances of the case," as to the "reasonableness" of the arrest.

This was a brutal and violent murder of a young Indian woman suggesting the necessity and urgency of immediate pursuit, and the imperative necessity of identification information. The commission of a brutal and violent murder had definitely been established. The very nature of the crime of murder is such that it does not lend itself to the production of eyewitness testimony, and common sense tells us that essential testimony in such a case many times must come from the lips of the accused. Crucial to the investigation and the apprehension of the murderer, as well as the protection of society from further violence, is the urgency of law enforcement officers being able to secure information concerning people who were with the deceased in the time period in which the offense was committed, and thereupon acting on it. The brother and sister witnesses who conveyed the identification information to officer Sawdon were not mere informers acting upon a naked suspicion. They lived with the deceased. They knew the defendant. They knew in fact that this Indian girl had been dating one man and one man only, the defendant, and they conveyed the information to Sawdon that they knew that Barbara Eastman was with the defendant, and no one else, on the night of August 3 or the morning of August 4, 1962, during the exact period within which the officer knew this brutal crime had been committed. We feel that the police acted reasonably and with probable cause to immediately arrest the accused under the circumstances of this case. The record also shows that the police officer did inquire, and we think reasonably so, as to the basis for the information that the two witnesses

furnished him. He discovered at that time (at the hospital), before the arrest, that they had been living with the deceased, that the only man she had associated with was the defendant, that he had brought her home the evening before, and that they knew that the defendant had made arrangements to pick her up later. They both knew the location of the defendant's home. At that time and under those circumstances, the police officer responded to this information by taking the brother, Alvin Eastman, with him and arresting the defendant near his home. The defendant argues that some of the information furnished by the brother and sister was based on hearsay. As far as we can gather from the record, the information furnished to Sawdon at the hospital was based upon direct information and upon personal knowledge known by the brother and sister themselves. Even if it were based on hearsay, the valuation from the standpoint of probable cause is not destroyed thereby. In Ker v. California, *supra,* it is said: "That this information was hearsay does not destroy its role in establishing probable cause."

Further, it seems that it was a reasonable conclusion for the police officer to draw from what was told him that there was at least a reasonable probability that no one else was known who might have been with the victim at the time of her murder. At that time, and at no later time, was there other information or circumstances which would suggest that any other person had the motivation or opportunity to commit this violent crime. The necessity for the police officer to act immediately was clear. Any other reasoning under the circumstances of this case would reach the result that it would be difficult to see where an arrest could be made without warrant for murder, except upon the basis of an eyewitness report or some other equally convincing evidence of such a probative quality that it would fit the final test on trial of proof of guilt beyond a reasonable doubt. Such a requirement or such an interpretation of the facts to

establish reasonable grounds for arrest would place an element in the interpretation of the protections of the Fourth Amendment to the Constitution of the United States that would render the criminal law unenforceable and self defeating. In making a "substantive determination" of reasonable grounds for arrest in a case like this, we recognize the compelling urgency of the circumstances. Ordinarily, on the spur of the moment, the officer under circumstances such as these must decide these questions in the first instance and must decide them quickly, else law enforcement and the apprehension of serious criminal offenders be for naught. The defendant argues that the fact that the police officer advised the defendant, after the arrest and while taking him to the police station, that he was "being taken in for investigation regarding the circumstances around the death of Barbara Eastman," is an admission on the part of the police officer himself that he did not have reasonable and probable cause and that he was merely acting on suspicion. We point out that this statement was made not at the time of the arrest or preceding it, but sometime after the arrest had taken place. The motivations for the subjective feelings of the police officer are not the criteria. The real question is whether or not the information and the situation existing at the time of the arrest constituted reasonable grounds and probable cause for the belief that a crime was committed and that the defendant was guilty. The defendant cites and argues the applicability of the decisions in Day v. United States, 37 F. 2d 80 (Eighth Circuit 1929); Halsey v. Phillips, *supra;* Cochran v. United States, 291 F. 2d 633 (Eighth Circuit 1961); United States v. Clark, 29 F. Supp. 138; and Hanna v. United States, 260 F. 2d 723. It appears that these cases are distinguishable either because the arresting officer acted without having even reasonable ground to believe that a crime had been committed by anyone or that the arresting officer was acting upon a third party informant's suspicion of guilt of

the person arrested as distinguished from factual information furnished by such an informant. Further we are warned by the criteria set out by the United States Supreme Court itself as late as in the Ker case, *supra,* that a rigid formula ("Procrustean") developed from analogy is not the true test. The determination of the question of "reasonable" and "probable" cause must rest upon an examination of the particular facts and circumstances of the case and the evidence in that case as it relates to the particular crime charged and the circumstances surrounding it.

The defendant now argues that even though probable cause existed for the arrest, that there was time available and a warrant should have been obtained, citing Johnson v. United States, 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436, and Wong Sun v. United States, *supra.* The same contention was made in Ker v. California, *supra,* and the court held: "Petitioners contend that the search was unreasonable in that the officers could practicably have obtained a search warrant. The practicability of obtaining a warrant is not the controlling factor when a search is sought to be justified as incident to arrest, United States v. Rabinowitz, supra; but we need not rest the validity of the search here on Rabinowitz, *since we agree with the California court that time clearly was of the essence. The officers' observations and their corroboration, which furnished probable cause for George Ker's arrest, occurred at about 9 p.m., approximately one hour before the time of arrest.* The officers had reason to act quickly because of Ker's furtive conduct and the likelihood that the marijuana would be distributed or hidden before a warrant could be obtained at that time of night." (Emphasis supplied.) A brutal and violent murder, the necessity to protect society, and the commission of possible violence during escape surely do not lessen the applicability of the above reasoning in this case.

The defendant, in order to overcome the force of the

argument arising from the emergency of the situation present, argues that the defendant could easily have been spotted and kept under surveillance while the police officer went to a magistrate and secured a warrant. This ignores the very real probability of an escape of a defendant under these circumstances. It is self evident that time was of the essence. The arrest took place within 2 hours after the identification of the body in this case. Just how the police officers would have accomplished a nebulous plan to actually keep the defendant under surveillance and control, so that he could be arrested, while the process of getting a warrant was accomplished and without sacrificing the real possibility of his escape, is not pointed out. As a practical matter, how could the defendant be positively identified and kept under surveillance without tipping him off. When there is reasonable cause to suspect that a given defendant has committed a murder, it surely must be true that such suspect has no constitutional right to have further time to escape the consequences of his acts. We know of no basic constitutional guarantees that could be violated because an officer succeeds in getting to a place where he can arrest a person whom he has probable cause to suspect of murder, more quickly than he would have had he complied with the requirements of getting a search warrant. Certainly, when the circumstances are of such an emergency nature and time demands it, there could be no requirement under the command of the Fourth Amendment that law enforcement increase the possibility of an officer's peril in the apprehension of an accused or increase the real risk of the arrest being frustrated. There is no merit in this contention.

The defendant further argues that irrespective of the legality of his initial arrest, that his subsequent detention was illegal because of the period of time elapsing between the arrest and the time he was brought before the magistrate. The defendant was arrested after 5 p.m. on Saturday, August 4, 1962, and he was taken

before the county judge in the morning of the following Monday, August 6, 1962. A complaint was filed on August 6, 1962. The defendant's constitutional rights were explained to him by the county judge, and the defendant waived his right to a preliminary hearing at that time. A period of approximately 40 hours from Saturday night to Monday morning elapsed between the time of the arrest and the time of the hearing before the magistrate.

The defendant argues to the effect that no warrant was ever issued and that the detention was illegal. However, when the defendant is in fact present before the magistrate at the time the complaint is filed, the court may proceed with the examination of the defendant on preliminary hearing to determine probable cause without the issuance of a warrant. Cohoe v. State, 79 Neb. 811, 113 N. W. 532. When the defendant is in fact present, the issuance of a warrant for his arrest would be a superfluous and useless act.

We hold that the period of time elapsing between the time of the arrest and the preliminary hearing before the magistrate, approximately 40 hours, was reasonable under the circumstances in this case. Section 29-504, R. R. S. 1943, requires that a person charged with a felony shall be brought before a magistrate and that the magistrate "shall proceed as soon as may be," to inquire into the complaint. This and other statutory provisions have been interpreted by our decisions to mean that the accused must be brought before the magistrate in the first instance only as soon as is practical under the existing circumstances. Maher v. State, 144 Neb. 463, 13 N. W. 2d 641; Gallegos v. State, 152 Neb. 831, 43 N. W. 2d 1. In the Maher case, *supra,* the elapsed time between the arrest and the hearing before the magistrate on preliminary hearing was approximately 8 days, and in the Gallegos case, *supra,* the defendant raised the precise question of the legality of his confessions taken during a period of 25 days detention before being brought

before the magistrate. The United States Supreme Court affirmed the holding by our court in the Gallegos case that under the circumstances this period of detention was not violative of section 29-504, R. R. S. 1943, nor of constitutional guarantees of due process. Gallegos v. Nebraska, 342 U. S. 55, 72 S. Ct. 141, 96 L. Ed. 86. It also appears, although not decisive of the question, that the brief period of detention of the defendant in this case was during a period of time when the offices of the magistrate were not open or available. We have said that the theory of the law is that the defendant must be given a hearing as soon as possible, as soon as the nature and circumstances of the case will permit. Maher v. State, *supra*. There can be no precise length of time after a legal arrest of a person charged with a crime in which he must be given a hearing. The defendant's constitutional right to not be imprisoned without probable cause is fundamental, but there must be a recognition of the principle that the practical necessities of criminal prosecution require that a state be given a reasonable opportunity to arrange for the presence of witnesses and to marshal testimony pertinent to the issue of probable cause. Nor do we find, as the defendant contends in effect, that the interrogation and the taking of oral confessions and admissions during the period of detention before hearing significantly establishes that the purpose of the detention is illegal. The fallacy of this argument is refuted when we consider that the very essence of criminal law enforcement depends upon further investigation and interrogation of witnesses and suspects after a proper legal arrest for probable cause in the first instance. The requirement for a speedy preliminary hearing, "as soon as may be," and the urgent necessity for law enforcement to pursue its investigation of the crime and to interrogate the witnesses are not alternatives of which the state must make a critical choice. The performance of both of these functions is consistent with the constitutional rights of a defendant,

and the vital and urgent necessity of the exercise of the state's powers and duties in the detention, apprehension, and conviction of criminals.

The defendant's last contention is that his constitutional rights were violated because of failure to furnish counsel during the period of interrogation before the preliminary hearing on Monday, August 6, 1962. A preliminary hearing is not a trial within the meaning of Article I, section 11, of our Constitution, and there is no requirement that counsel be furnished an accused up to this time. Roberts v. State, 145 Neb. 658, 17 N. W. 2d 666; Latimer v. State, 55 Neb. 609, 76 N. W. 207, 70 Am. S. R. 403; Van Buren v. State, 65 Neb. 223, 91 N. W. 201; Adams v. State, 138 Neb. 613, 294 N. W. 396.

Counsel for defendant urges a departure from the doctrine set out in the Roberts case, *supra,* and cites several United States Supreme Court decisions. None of the cases cited hold that counsel must be furnished during this period of time. On the contrary, in Crooker v. California, 357 U. S. 433, 78 S. Ct. 1287, 2 L. Ed. 2d 1448, and Cicenia v. La Gay, 357 U. S. 504, 78 S. Ct. 1297, 2 L. Ed. 2d 1523, the Supreme Court of the United States held that there was no due process violation when confessions were taken after a legal arrest even though the state police officers had obtained the confessions from persons under arrest who had previously requested but were denied the benefit of legal counsel. In the Crooker case, *supra,* at page 441, it is said: "On the other hand, where an event has occurred while the accused was without his counsel which fairly promises to adversely affect his chances, the doctrine suggested by petitioner would have a lesser but still devastating effect on enforcement of criminal law, for it would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney. Due process, a concept 'less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights,' Betts

v. Brady, 316 U. S. 455, 462 (1942), demands no such rule." In the Cicenia case, *supra,* with respect to this contention, the court said at page 509: "On the other hand, it can hardly be denied that adoption of petitioner's position would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases."

The force of this language as applied to defendant's argument regarding interrogation during investigation is also noted here. The contention of the defendant as to the right to counsel during the period of time before preliminary hearing in this case is without merit.

We have reviewed the record in this case. It is not contended there was error in the instructions or that the evidence, assuming the confessions and admissions of the defendant were admissible, is insufficient to support the verdict. No challenge is made to the sentence imposed. We find no prejudicial error in the trial of this case. The judgment and sentence of the trial court should be and are hereby affirmed.

AFFIRMED.

GRANT L. MARTIN, APPELLEE, V. NORRIS PUBLIC POWER DISTRICT, APPELLANT.

124 N. W. 2d 221

Filed November 1, 1963. No. 35466.

1. **Easements: Trespass.** The defense of a prescriptive easement is available in a trespass action under a general denial.
2. **Easements.** Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid acquisition of easement by prescription, has the burden of rebutting the presumption by showing the use to be permissive.
3. ———. The existence of a prescriptive easement and the nature of the improvement which the defendant would be per-

mitted to make under it were questions of fact which should have been submitted to the jury under proper instructions.

4. **Homesteads.** The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife.
5. ———. When plaintiff, to avoid the effect of an instrument executed by him, claims a homestead, he has the burden of proving that claim by a preponderance of the evidence, and in a jury trial the jury would need to be so instructed.
6. **Easements: Husband and Wife.** An easement encumbering the homestead of the grantor is void unless executed and acknowledged by both husband and wife.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and remanded.

Crosby, Pansing, Guenzel & Binning and Donn E. Davis, for appellant.

Merril R. Reller, for appellee.

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

SPENCER, J.

This is an action for trespass brought by Grant L. Martin, hereinafter referred to as plaintiff, against Norris Public Power District, hereinafter referred to as defendant. Plaintiff secured a jury verdict for $1,500. Motion for new trial was overruled, and the defendant perfected its appeal to this court.

Plaintiff, who is a married man but did not join his wife with him in the action, is the owner of 959 acres of Lancaster County land, consisting of Section 21 and approximately one-half of Section 20, all in Township 12, Range 6, Lancaster County, Nebraska.

Generally, plaintiff alleges trespass by the defendant in the placing of a wooden pole power line without his consent for a mile along the east edge of Section 21 and a quarter of a mile along the north edge. There are further allegations of repeated and continuous trespass between the dates of January 1, 1958, and June 3, 1961.

These include the cutting of fences and trees; the killing of crops by chemical sprays; and improper installation, resulting in loss of livestock during electrical storms. It is not necessary for a decision herein to be more specific in the itemization of plaintiff's claims. Defendant's answer was a general denial.

Plaintiff purchased the property in question in 1949. At that time, there was a two-wire pole power line along the east edge of Section 21. It was stipulated by the parties during the course of the trial that the defendant originally placed a two-wire power line somewhere along the location of the existing line in 1938, or 11 years before the plaintiff acquired any interest in the property. In 1958, the defendant changed the line from a two-wire to a three-wire line.

It was plaintiff's contention that the defendant materially changed the extent and use of the line and that on at least three occasions it moved some of its poles further onto the plaintiff's property so that at the time of the trial all of the poles were from 14.5 to 24.2 feet inside the property line. The testimony for the defendant is that the only changes made, other than adding a wire to the line, were to straighten the line because the road was straightened, and to remove trees which interfered with the line. Defendant's testimony was to the effect that only three poles were changed and that the other power poles remained in the same position where they were placed in 1938.

Defendant produced a tree-cutting agreement dated January 29, 1958, which plaintiff admitted executing and under which plaintiff was paid $300 for clearing trees and underbrush along a part of the line. The defendant also produced a right-of-way easement dated the same day, January 29, 1958, covering the east half of Section 21, which defendant alleged was signed and acknowledged by the plaintiff, but which the plaintiff denied signing. Defendant produced an examiner of questioned documents, who testified that in his opinion

the signature on the exhibit was the plaintiffs. The acknowledgement was taken by defendant's superintendent, who testified it was signed by the plaintiff in his presence. Plaintiff called two bankers with whom he did business, who testified it was their opinion the signature was not the plaintiffs.

The plaintiff further claimed that the east quarter of Section 21 on which the power line was located constituted his homestead and that the easement, even if executed by him, was not executed by his wife and was void for every purpose. The evidence on the homestead character of the property was conflicting. There were three sets of improvements on the 959 acres. Only one of them was on Section 21. The other two were located on Section 20. There is no serious dispute that, although the plaintiff lived in the improvements on Section 21 off and on since 1949, for several years they were used for hired help, and that since the plaintiff's son returned from the service the son and his family have resided in those improvements. The plaintiff has actually lived for several years in the improvements on Section 20. He testified, however, that he considered the east quarter of Section 21 as his homestead, and that he had modernized the improvements thereon with the expectation of moving to those premises.

The defendant alleges four assignments of error. We deem it necessary to discuss only the first two, which are as follows: (1) The district court erred in failing to submit the question of fact as to defendant's prescriptive easement to the jury; and (2) the district court erred in failing to instruct the jury that the burden of proof was on the plaintiff to establish by a preponderance of the evidence that the land in question was the plaintiff's homestead.

The instructions given by the trial court did not submit in any manner the question of a prescriptive easement. The evidence was undisputed that the original power line had been in existence since 1938, or 11 years

before plaintiff acquired any interest in the property. A taking of land for public use without authorization is a trespass. Here, however, the admission of the plaintiff that the defendant's line had been in existence for 11 years before he acquired any right in the property, was sufficient to suggest the possibility of a prescriptive easement. The trespass, if a prescriptive easement be found, would be only for any unauthorized or wrongful use of the right-of-way as it existed when the plaintiff acquired the property.

The plaintiff urges that the defendant, by filing a general denial, has not raised the issue of a prescriptive easement; that the issue was merely an incidental one; and, inasmuch as the defendant did not tender a proper instruction, there was no duty on the part of the court to instruct on it.

Was it necessary that the claim of a prescriptive easement be specifically pleaded in the defendant's answer to be available as a defense? There is no Nebraska case exactly in point. This court has often held, however, that the defense of adverse possession is available in an ejectment action under a general denial. See Oldig v. Fisk, 53 Neb. 156, 73 N. W. 661. The reasoning in those cases is clearly applicable herein. The nature of a trespass action is a claim for an unauthorized entry or a wrongful use. Clearly, a prescriptive right in the defendant goes directly to disprove plaintiff's claim of title, and should be admissible under a general denial.

In Jurgensen v. Ainscow, 155 Neb. 701, 53 N. W. 2d 196, we said: "Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid acquisition of easement by prescription, has the burden of rebutting the prescription (presumption) by showing the use to be permissive."

Was this merely an incidental issue? We think not.

If a prescriptive easement existed, at least some of the alleged damages would not have been recoverable. Certainly defendant would have the right to make necessary repairs, and the question could arise as to its right to improve the line. The general rule is stated in Restatement, Property, § 480, p. 3004, as follows: "Unless the burden upon the servient tenement is thereby unreasonably increased, one who has an easement created by prescription has the privilege to do such acts as are necessary to make effective the enjoyment thereof."

The existence of a prescriptive easement and the nature of the improvement which the defendant would be permitted to make under it were questions of fact which should have been submitted to the jury under proper instructions.

The parties spent considerable time on the homestead character of the property. Our law is clear. The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife. § 40-104, R. R. S. 1943. If homestead became an issue, the plaintiff had the burden of proving his claim of homestead by a preponderance of the evidence, and the jury would need to be so instructed. The instructions did not place this burden on the plaintiff.

If the defendant has a prescriptive easement and if the land is actually the homestead of the plaintiff, the homestead would be subject to the easement to the extent that the easement existed when the homestead accrued. In that event, defendant would have a right of entry to maintain the line to the extent of the prescriptive easement.

On a retrial of this case, the validity of the purported easement executed by the plaintiff will again be in issue. We suggest that if the land in question is found to be the plaintiff's homestead, it is immaterial whether the plaintiff signed and acknowledged the disputed right-of-way easement dated January 29, 1958. If the

easement is across homestead property, the easement is void. In Eng v. Olsen, 99 Neb. 183, 155 N. W. 796, this court said: "* * * a right of way for a road across the homestead of a married person is void unless executed and acknowledged by both husband and wife." We hold that an easement encumbering the homestead of the grantor is void unless executed and acknowledged by both husband and wife.

For the reasons given, we conclude that the judgment of the district court should be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

MARVIN KRAFT, APPELLANT, V. ERNEST E. FUNDUM, APPELLEE.

124 N. W. 2d 225

Filed November 1, 1963. No. 35477.

1. **Trial.** A party to an action is entitled to have the jury instructed with reference to his theory of the case when the pleadings present the theory as an issue and it is supported by competent evidence, whether or not the court is requested to do so.
2. **Automobiles: Trial.** An instruction that a plaintiff may not recover if the jury finds defendant's motor vehicle was stopped in the street when the collision occurred, and had been so stopped before it came into plaintiff's vision, is a correct statement of the law where there is no evidence sustaining recognized exceptions to the rule.
3. **Automobiles.** The sudden emergency rule applies only when the evidence discloses that one became aware of an emergency and was put to an immediate choice of alternative courses of action in order to avoid accident and injury and, because of stress and want of time, an unwise or wrong alternative was selected.
4. **Trial.** Although a jury should be instructed without undue repetition, it is not reversible error unless the court singles out a particular part of the evidence and refers unduly to its weight, strength, or probative force.
5. **Evidence.** An objection to evidence as being self-serving is not

good when the evidence is explanatory or in rebuttal of evidence offered by the opposing party.

Appeal from the district court for Madison County: GEORGE W. DITTRICK, Judge. Affirmed.

James F. Brogan, for appellant.

Frederick M. Deutsch, William I. Hagen, and James P. Monen, for appellee.

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

CARTER, J.

The plaintiff brought this action to recover for personal injuries and property damage resulting from a collision between his automobile and a truck belonging to the defendant. The defendant denied generally and cross-petitioned for the damage to his truck. The jury found against the plaintiff and against the defendant on his cross-petition. The plaintiff has appealed.

The accident occurred about 3 a.m. on April 29, 1960, on Madison Avenue in Norfolk, Nebraska. Intermittent rains had been falling throughout the night. The weather was described as hazy, misting, wet, and possibly a little foggy. The street was paved and wet.

Plaintiff testified that he was traveling west on Madison Avenue prior to the accident at a speed of 15 miles an hour. He was returning home from work and was alone in his car. In the middle of the block between Third and Fourth Streets he collided head-on with a truck owned and operated by the defendant. Plaintiff sustained personal injuries and his car was damaged.

Plaintiff testified that after crossing Third Street, traveling on the north side of Madison Avenue, he first saw defendant's truck. The truck at that time was headed east and making a left turn across Madison Avenue into the dock area of the Norfolk post office. Plaintiff testified that he released his accelerator when he saw the truck, but instead of driving into the dock area defend-

ant turned east in plaintiff's driving lane. Plaintiff was 30 to 40 feet from the truck when he first observed the truck headed toward him. He applied his brakes and attempted to turn left to avoid the collision but was unable to do so because of the wet pavement. Plaintiff said that defendant's truck, after the collision, was immediately north of the centerline of the street, headed directly east. Two members of the Norfolk police department, who investigated the accident before the car and truck were moved, corroborated plaintiff's evidence as to the location of the vehicles immediately following the accident. The lights on plaintiff's car were on at the time of the collision. The parking and clearance lights on defendant's truck were burning but the headlights were off. There were three lighted street lights, one at each end of the block and one in the center of the block. One of the police officers testified that defendant stated that he swung into the west-bound lane in order to back into the post-office dock.

The defendant testified that he was a mail-hauling contractor. At the time of the accident he was proceeding to the post office to obtain a load of mail according to his usual daily schedule. He drove east on Madison Avenue on his right-hand side until he was opposite the dock area of the post office. He saw no traffic coming from the east and turned his truck to the left across the street. The stalls in the dock area were occupied by other trucks. He testified that he pulled into the driveway area, turned the front of his truck a little to the right, stopped, and shut off his motor. He testified that he was out of his truck, opening its rear doors preparatory to backing into the dock after it was cleared of other trucks, when plaintiff's car struck his truck. He testified that the front of his truck was about 2 feet beyond the parking lane and 14 feet south of the north curb line of Madison Avenue. His evidence as to the place of impact and the location of the vehicles after the accident, as well as the fact that defendant

was out of the cab and at the rear of his truck, is corroborated by the post-office foreman, a post-office clerk, and a dock hand working on the post-office dock.

The evidence of the parties is in conflict. The evidence of one or the other cannot be true. The jury found against plaintiff on his petition and against defendant on his cross-petition. It is evident that the jury found that neither party established his claim by a preponderance of the evidence. The questions of fact in the case were for the jury. The jury's findings have support in the evidence and, if the conduct of the trial and the instructions of the court were proper, its findings will not be disturbed.

Plaintiff assigns as error the giving of instruction No. 15. It states: "The driver of an automobile must keep such a lookout ahead that he may see an obstruction or vehicle as soon as it is illuminated by his lights, and he must have his car under such control under driving conditions then existing that he can stop it in time to avoid a collision with a stationary object in the area lighted by his lights. If you find that the truck of the defendant was stopped in the street at the point it was located when the collision between plaintiff's motor vehicle and defendant's truck occurred, and that defendant's truck had been so stopped before said truck came within the range of plaintiff's vision, then you are instructed that in such case the plaintiff cannot recover."

Plaintiff contends that by this instruction the court directed a verdict for the defendant in the event defendant's truck was stopped at the time of the accident. The instruction is not subject to such a construction. It tells the jury that if defendant's truck was stopped at the time of the collision and had been so stopped before said truck came within the range of plaintiff's vision, the plaintiff cannot recover. The rule is correctly stated under the facts of this case. It is consistent with defendant's theory of the case. Under the applicable rule as

stated in O'Neill v. Henke, 167 Neb. 631, 94 N. W. 2d 322, there are exceptions to the general rule. But none of the exceptions are brought into play by the evidence in this case and, consequently, the trial court was under no duty to instruct as to them.

It is also asserted that the instruction removes from the jury's consideration the question of whether or not it was negligence on the part of the defendant in parking his truck in the traveled portion of the west-bound traffic lane at a time when plaintiff was rightfully using it. These questions were covered by other instructions and it was not necessary to repeat them in instruction No. 15. Instruction No. 15 is correct, even if defendant's truck was wrongfully or negligently parked on the highway. If the truck was standing on the highway at the time it came within the range of plaintiff's lights, it in effect created a condition which plaintiff could and should have avoided if he had had such control of his car as to be able to stop within the range of his lights. The failure to stop, if the jury found the necessary facts set out in the instruction to be true, was such negligence on the part of plaintiff as would defeat his recovery as a matter of law. We find no error in instruction No. 15 under the facts disclosed by the evidence in this case.

Plaintiff argues that instructions Nos. 9 and 10 are inconsistent with instruction No. 15. Instruction No. 9 advises the jury of the statutory rules of the road and the requirements as to the use of lights. Instruction No. 10 tells the jury that a violation of statutes is not of itself negligence, but that it is evidence of negligence to be considered by it, as this court has many times declared. Instructions Nos. 9 and 10 are not inconsistent with instruction No. 15. They were for the jury's consideration if instruction No. 15 did not control the result.

It is contended that the trial court unduly emphasized and gave undue prominence to the duty of plaintiff to keep a lookout ahead of him prior to the accident by referring to it in each of instructions Nos. 12, 13, and

15. Plaintiff cites Kleutsch v. Security Mutual Life Ins. Co., 72 Neb. 75, 100 N. W. 139, in support of his contention. In the cited case it is said: "It thus appears that we are fully committed to the rule that it is error to single out a particular part of the evidence and express an opinion as to its weight, its strength or its probative force." An examination of the questioned instructions does not indicate that they gave any undue prominence to a portion of the testimony, or amount to a comment on its weight, strength, or probative force within the meaning of the rule. While it is true that a jury should be instructed without undue repetition, we cannot say that plaintiff was prejudiced by the giving of these instructions as plaintiff contends.

The plaintiff complains of the refusal of the trial court to give certain requested instructions. The only one discussed in the brief is plaintiff's requested instruction No. 12. This instruction was the sudden emergency rule as announced in Watson Bros. Transp. Co. v. Jacobson, 168 Neb. 862, 97 N. W. 2d 521. It is the contention that plaintiff was confronted with a sudden emergency immediately prior to the collision. The evidence shows that three motor vehicles were parked immediately north of the point of impact testified to by the plaintiff which precluded his turning to the right to avoid the accident. In other words, the only movement open to him to avoid the collision was to the left which he unsuccessfully took. This affords no basis for the sudden emergency rule, as otherwise the rule would have to be given in every such case. The Kentucky court in Feck's Adm'r v. Bell Line, Inc., 284 Ky. 288, 144 S. W. 2d 483, analyzed the rule correctly when it stated: "The 'sudden emergency rule' applies only where the evidence discloses that one became aware of an emergency and was put to a rapid choice of alternative courses of action in order to avoid accident and the jury, in the state of the evidence and in light of subsequent events, might reach the conclusion that the course of action adopted

was an unwise one, in which event an instruction defining the right of one confronted by such an emergency is required." We find no evidence in this record that plaintiff made a wrong choice because of the stress of the occasion. To require the submission of the sudden emergency rule to the jury there must be evidence that a wrong course of action was pursued, from the results of which the party is to be excused because of the stress and shortness of time under which it was made. No such evidence appears in this record and, consequently, the giving of plaintiff's requested instruction No. 12 was properly denied.

Plaintiff complains of the failure of the trial court to sustain objections to certain evidence on the ground that it was self-serving. The record shows that a police officer called by the plaintiff testified that defendant requested him to change the report of the accident filed with the Norfolk police department. There was a veiled insinuation that defendant was attempting to get the officer to falsify the record to the advantage of the defendant. The defendant was questioned by his counsel as to the defendant's version of the incident, which was to the effect that in the officer's report defendant's truck was not properly located at the time of the accident, and that he wanted it corrected to show the true facts. The contention of plaintiff is that defendant's testimony was self-serving and should have been excluded. Since the issue was first put in evidence by the plaintiff, it was proper for the defendant to explain the incident and disavow the inferences being drawn from it. Under the situation existing, the trial court did not err in overruling the objection that the evidence was self-serving.

We have found no error in the record prejudicial to the rights of the plaintiff. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HARRY I. HYLTON, APPELLANT.

124 N. W. 2d 230

Filed November 1, 1963. No. 35513.

1. **Criminal Law.** The effect of a plea of nolo contendere to a charge of a criminal offense contained in an information is the same as that of a plea of guilty.
2. ———. For the offense to which the defendant pleaded nolo contendere the court was not required to impose a sentence but was empowered to suspend proceedings and place him on probation.
3. ———. Where the punishment of an offense created by statute is left to the discretion of a court to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of discretion.
4. ———. Under the laws of this state where the court, after conviction of a criminal offense, is empowered to exercise a discretion as to the imposition of sentence and the term thereof, it is empowered to examine reports made by probation officers as to the character and qualities of the defendant.

Appeal from the district court for York County: ELMER M. SCHEELE, Judge. Affirmed.

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

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

YEAGER, J.

This is a criminal action in which, in the district court for York County, Nebraska, Harry I. Hylton was charged in two counts of an information with two separate offenses of willfully and knowingly subscribing to false statements of a corporation transacting a banking business, with intent to deceive.

On November 20, 1962, the defendant appeared personally and with counsel in open court, waived the

reading of the information, and pleaded nolo contendere to each count of the information. The effect of this plea was the same as that of a plea of guilty. State ex rel. Nebraska State Bar Assn. v. Stanosheck, 167 Neb. 192, 92 N. W. 2d 194; § 29-1819, R. R. S. 1943. The plea was accepted.

Thereupon, on that date the defendant was by the court found guilty on both counts and sentence was deferred pending an investigation by and a report from the adult probation officer for the district. The statutory penalty subject to imposition by the court was imprisonment for not less than 1 year and not more than 10 years on each count. § 8-135, R. R. S. 1943. The court was not required to sentence the defendant under the terms of this provision but was empowered to suspend proceedings and place the defendant on probation. § 29-2218, R. R. S. 1943.

On March 12, 1963, a hearing was had with the attorney for the defendant present, the purpose of which, according to the bill of exceptions, was to present evidence as to the matter of imposition of sentence. The defendant adduced evidence but none was adduced by the State. The proceedings were adjourned to March 21, 1963.

On March 21, 1963, the matter of imposition of sentence came finally before the court and after due and proper admonition to the defendant and his attorney, the defendant was sentenced to serve a term of from 3 to 7 years in the State Penitentiary at Lincoln, Nebraska, on each of the two counts, the two sentences to run concurrently.

Prior to the imposition of sentence, reports were made to the court the purpose of which was to aid the court in determining what sentence, if any, should be imposed and whether or not, instead of imposition of sentence, the defendant should be placed on probation.

After sentence and on the same day the defendant filed a motion for new trial. This motion was on the

same day overruled. Following this ruling on motion of the State made at the suggestion of the court the report or reports bearing on the question of probation were filed in order that they might be considered on appeal. The counsel for defendant at the time declared an intention to appeal.

The motion for new trial contains nine assignments of error. In the brief on appeal there are 11 assignments of error. In the light of the argument contained in the defendant's brief only two of those appearing in the motion for new trial require consideration here. One is that the sentence is excessive and the other that the court erred in denying probation. One assignment of error made in the brief in addition to these requires consideration here.

As to two assignments of error the rule applicable is the following: "Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion." Bright v. State, 125 Neb. 817, 252 N. W. 386. See, also, Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380. There is no contention to the contrary.

By the substantial contention of the defendant the third assignment of error is that there was what amounted to an abuse of discretion the effect of which was to deprive him of constitutional rights. This contention flows from the use of the reports made by the probation officers as an incident to the fixation of sentence which brought about an abuse of discretion.

There can be no doubt that these reports were examined and considered by the court and it is likely that statements therein had an effect upon the discretion exercised. This was not improper, but is specifically authorized and directed by statute. § 29-2217, R. R. S. 1943. See, also, Carr v. State, 152 Neb. 248, 40 N. W. 2d 677.

It appears that primarily the contention of the de-

fendant is that these reports contained false information which he was not afforded an opportunity to meet and thus his constitutional rights were denied and discretion was abused.

There is no information the effect of which is to say that he or his counsel was offered an opportunity to examine these reports before sentencing, but from the record it becomes clear that his counsel knew of the reports, but did not read them. It is not contended that he requested an opportunity to read and acquaint himself with the contents.

In the light of what followed the sentencing it is reasonably inferable that such a request would not have been denied. After sentencing, and on the same day, as has been pointed out, a motion for new trial was filed and overruled. At this time, as the record discloses, the court of its own volition initiated the introduction of the reports in evidence so that on appeal this court would have the opportunity to consider them.

If the defendant had no opportunity theretofore to know and counter or offer to counter the contents of these reports, he had the opportunity thereafter, which he did not exercise or ask leave to exercise. In particular he offered no evidence after the filing of the motion for new trial and made no request to make any such offer.

In the light of the record here it may not well be said that the court abused its discretion in imposing sentence rather than placing the defendant on probation, or in fixing the term of imprisonment in the State Penitentiary.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARSHALL JAMES NEUMAN, APPELLANT.

125 N. W. 2d 5

Filed November 15, 1963. No. 35416.

1. **Criminal Law.** The effect of a plea of nolo contendere is the same as a plea of guilty.
2. ———. Section 29-2308, R. R. S. 1943, authorizes this court to reduce a sentence when in its opinion the sentence is excessive, and makes it the duty of this court to render such sentence as in its opinion may be warranted by the evidence.
3. ———. The statute makes it the duty of this court, when the proper proceedings are had, to review the evidence and prevent the imposition of punishment which the evidence will not warrant.
4. ———. Where the punishment of an offense created by the statute is left to the discretion of a court within prescribed limits, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion.
5. **Appeal and Error.** Where the record contains no bill of exceptions or the bill of exceptions has been quashed, no question will be considered, the determination of which necessarily involves an examination of the evidence adduced in the trial court. In such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed.
6. ———. One appealing to this court cannot complain of the absence of a bill of exceptions without showing by the transcript or a supplement thereto that one was timely requested in the trial court.
7. ———. Where a bill of exceptions cannot be prepared within the 2 months allowed for that purpose, an appellant who has made no request for an extension of time for its preparation cannot complain of its not being furnished at the trial of the cause on its merits long after the time in which such application should have been made.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Affirmed.

Paul E. Galter, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

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

BROWER, J.

The defendant Marshall James Neuman was accused of the crime of motor vehicle homicide by information filed in the district court for Douglas County, Nebraska. Being present in open court with counsel, he entered a plea of nolo contendere. Thereafter the trial court, on October 25, 1962, sentenced him to imprisonment for the term of 2 years in the State Penitentiary from which sentence he has appealed.

Defendant contends in his assignments of error that the sentence imposed by the trial court was excessive and that the court erred in not making the presentence report of the probation officer a part of the bill of exceptions.

The effect of a plea of nolo contendere is the same as a plea of guilty. State ex rel. Nebraska State Bar Assn. v. Stanosheck, 167 Neb. 192, 92 N. W. 2d 194; § 29-1819, R. R. S. 1943.

The statute with respect to motor vehicle homicide to which defendant pleaded nolo contendere, section 28-403.01, R. R. S. 1943, permits the trial court to impose a sentence in the penitentiary of from 1 to 10 years. The sentence was within those limits.

In Guedea v. State, 162 Neb. 680, 77 N. W. 2d 166, this court held: "Section 29-2308, R. R. S. 1943, authorizes this court to reduce a sentence when in its opinion the sentence is excessive, and makes it the duty of this court to render such sentence as in its opinion may be warranted by the evidence.

"The statute makes it the duty of this court, when the proper proceedings are had, to review the evidence and prevent the imposition of punishment which the evidence will not warrant.

"A substantial reason for the reduction of the sentence must be warranted by the evidence.

"Where the punishment of an offense created by statute is left to the discretion of a court within prescribed limits, a sentence prescribed within such limits will

not be disturbed unless there appears to be an abuse of such discretion."

In this case the defendant's plea of nolo contendere dispensed with the necessity of a trial of the cause in the district court. The report of the probation officer mentioned in section 29-2217, R. R. S. 1943, is to be used in those cases where it is practicable to do so. For the reasons later discussed there is no bill of exceptions containing the evidence before the court at the time of sentencing if there was any evidence received. "Where the record contains no bill of exceptions or the bill of exceptions has been quashed, no question will be considered, the determination of which necessarily involves an examination of the evidence adduced in the trial court. In such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed." Lawson v. State, 154 Neb. 847, 50 N. W. 2d 99. Without a bill of exceptions before us it cannot be said the trial court erred in imposing the sentence.

With respect to the contention that the court erred in failing to make the presentence report a part of the bill of exceptions, there is nothing before us because of the complete lack of such a bill.

The defendant filed notice of appeal in the district court on October 26, 1962, the day after the sentence. It contained no request for a bill of exceptions. He paid the docketing fee required by this court in the district court on November 5, 1962. The transcript of the proceedings in the district court was thereupon prepared and certified by its clerk on November 9, 1962, and filed with the clerk of this court on November 13, 1962. All of this occurred before the time had expired in which a bill of exceptions might be requested.

On December 28, 1962, a motion and stipulation to extend brief day to March 5, 1963, were filed by the defendant. They say nothing concerning a bill of exceptions. On January 11, 1963, a purported copy of a praecipe of defendant's attorney for a bill of exceptions

was filed with this court. It has an unsigned and unauthenticated notation thereon, "Filed Nov. 23, 1962." On February 20, 1963, another motion to extend defendant's brief day from March 5, 1963, to April 5, 1963, was filed on his behalf. The affidavit of defendant's counsel in support thereof contains averments that a praecipe for a bill of exceptions was filed in district court on November 23, 1962; and that affiant had considerable correspondence and telephone calls with the clerk of the district court and the Clerk of the Supreme Court requesting information as to whether such bill of exceptions had been prepared. The affidavit states that on January 10, 1963, affiant and the Clerk of the Supreme Court were informed by telephone from the clerk of the district court for Douglas County, that a delay had been occasioned because the praecipe for bill of exceptions had been mislaid; and that a copy of the praecipe was received by the Clerk of the Supreme Court on January 11, 1963. It stated that as of the date of the affidavit affiant had received no word from the clerk of the district court as to whether or not the bill of exceptions had been prepared and the affiant was unable to complete his brief without it. The motion however merely sought to extend the time in which to file a brief. The defendant's brief was filed herein on April 3, 1963, and after briefing by the State the cause was submitted to this court for final determination on September 17, 1963. No motion to extend the time to prepare a bill of exceptions, as provided by Rule 7f, Revised Rules of the Supreme Court, was ever presented to this court. So far as the transcript herein is concerned it is not shown that a request was made for a bill of exceptions in the district court. No supplementary transcript of the proceedings in the trial court was ever presented by the defendant under Rule 4c, showing a request for a bill of exceptions had ever been filed with the trial court. This court cannot accept a date written on a copy of a purported request for a bill of exceptions

filed in this court as to its being filed or the correct date of its filing in district court in the absence of a certificate of the clerk of the trial court, showing it to be part of the record therein and to have been timely filed.

One appealing to this court cannot complain of the absence of a bill of exceptions without showing by the transcript or a supplement thereto that one was timely requested in the trial court.

Where a bill of exceptions cannot be prepared within the 2 months allowed for that purpose, an appellant who has made no request for an extention of time for its preparation cannot complain of its not being furnished at the trial of the cause on its merits long after the time in which such application should have been made.

The errors complained of cannot be sustained and the judgment of the trial court is affirmed.

AFFIRMED.

VIVIAN M. COOPER, APPELLANT, V. ROMAN EUGENE HASTERT, APPELLEE.
124 N. W. 2d 387

Filed November 15, 1963. No. 35474.

1. **Negligence: Trial.** Ordinarily, when the issues are properly presented by the pleadings, the plaintiff is required to prove by a preponderance of the evidence that his damages were proximately caused by the negligence of a defendant, and also the amount of such damages.
2. ———: ———. An admission of liability for an accident by a defendant does not thereby constitute an admission that all damages claimed by a plaintiff were the proximate result of the accident.
3. **Trial: Damages.** A verdict and judgment will not be set aside as inadequate unless they are clearly wrong and so against the weight and reasonableness of the evidence as to indicate that they were the result of passion, prejudice, or mistake.
4. **Trial.** Instructions to a jury should be considered as a whole, and the meaning of an instruction or instructions when taken

as a whole, and not the phraseology of any particular portion, is the important consideration.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Haney, Walsh & Wall, for appellant.

Eisenstatt, Lay, Higgins & Miller, for appellee.

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

WHITE, C. J.

From a jury verdict and judgment for the plaintiff on two causes of action arising out of an automobile accident, the plaintiff appeals, asserting inadequacy of the damages awarded and error in an instruction on damages.

Plaintiff's first cause of action is for personal injuries, and her second is by way of assignment from her husband for medical expenses and loss of services. Defendant's answer admits the collision of September 17, 1960, and admits that the collision was caused by negligence of the defendant, but denies each and every other allegation of the plaintiff's petition. On trial of the case, a jury verdict and judgment were rendered for $737.47 on plaintiff's first cause of action for injuries, and $762.53 on the second cause for medical expenses and loss of services, or a total sum of $1,500.

Negligence of the defendant in causing the accident being admitted, the trial court submitted the two remaining issues to the jury: First, whether all or any part of the injuries and expenses claimed by the plaintiff were the proximate result of the admitted negligence of the defendant in causing the accident; and second, a determination of the extent of such injuries and expenses, and the amount of money to be awarded for them.

The medical testimony in this case is in dispute. The injuries claimed by the plaintiff centered around the

neck and adjacent areas of the back. Plaintiff worked half days for a short period of time after the accident and then returned to full-time work. Examination, including X-ray, revealed an existing arthritic condition and that there were no dislocations or fractures. Whether the plaintiff suffered any limitation of motion in the affected areas, or if any motion caused her pain, were issues upon which the evidence was conflicting. The jury could have found widely varying answers to these questions from the plaintiff's own medical witnesses. On the other hand, the defendant's medical testimony negatived any finding of limitation of motion, muscle spasm, permanent disability, or loss of function. It also was to the effect that she was consciously controlling her reactions to the different tests that were given and that her complaints were of an emotional origin and not related to trauma. The testimony, both as to the extent of, and the causes of her condition, was in conflict and susceptible to widely varying inferences.

As to the second cause of action, medical bills incurred by plaintiff were in the sum of $870 and she estimates a loss of earnings of $123.50. It is asserted that the fact that this evidence was undisputed binds the jury to return a larger verdict on the second cause of action. But, the jury had a right to determine what portion of her treated injuries and complaints was proximately caused by the accident. It had a right to determine what portion of her calls, examinations, and the charges incident thereto, was reasonably required on account of any injury received due to the defendant's negligence. It might have been significant to the jury that one of the two doctors employed by the plaintiff was consulted almost two years after the accident.

An admission of liability for an accident does not constitute an admission that all damages claimed by the plaintiff, even though undisputed in the record, were the proximate result of the accident. A verdict and judgment will not be set aside as inadequate unless

they are clearly wrong and so against the weight and reasonableness of the evidence as to indicate they were the result of passion, prejudice, or mistake. Cover v. Platte Valley Public Power & Irr. Dist., 173 Neb. 751, 115 N. W. 2d 133. Plaintiff cites and argues Ellsworth v. City of Fairbury, 41 Neb. 881, 60 N. W. 336; Dolen v. Beatrice Restaurant Co., 137 Neb. 247, 289 N. W. 336; Schumacher v. Lang, 160 Neb. 43, 68 N. W. 2d 892; and Gross v. Johnson, 174 Neb. 273, 117 N. W. 2d 534. Brevity forbids a detailed review of these cases. We have examined them and find nothing therein controlling of this case. Each case must be examined on its own particular facts and circumstances in the light of the applicable rule as to inadequacy. In all of these cases the court found that there was undisputed evidence which would require the jury, if it found for the plaintiff, to return a larger verdict than that which it did.

Plaintiff contends there was error in instruction No. 4 given by the trial court on its own motion. In this instruction, the court submitted, as to both causes of action, the issues of whether the plaintiff sustained injuries as a proximate result of the accident, and "the amount in money" of the loss thus sustained. The instruction requires the plaintiff to establish these elements by a preponderance of the evidence, and requires a verdict for the defendant in the event of failure to meet the stated burden of proof. The plaintiff argues prejudicial error in permitting the jury to return a verdict for the defendant. Both proximate cause and the amount and nature of the damages were issues in this case. Failure to meet the requisite burden of proof would require a verdict for the defendant. In a similar situation in Cover v. Platte Valley Public Power & Irr. Dist., *supra*, the negligence of the defendant was determined as a matter of law. In response to a contention that the defendant was liable as a matter of law, the court said as follows: "But, contrary to the plaintiff's present contention, the plaintiff was not relieved from

the burden of proving that his damages were proximately caused by the negligence of the defendant, and the amount of the damages." We note further that there was a verdict for the plaintiff here in this case on both causes of action. Implicit in the verdict on the separate causes of action was a finding that the burden of proof as to proximate cause had been met as to some of the damages claimed by the plaintiff, but not as to all of the damages which the testimony supported. The contention as to adequacy is without merit.

Plaintiff contends error in the court's instruction No. 4 by putting the burden on the plaintiff to prove "*the amount in money* of the loss and damage thus sustained by the plaintiff." It is asserted there is no burden to prove in money, or in dollars and cents, the value of her pain and suffering. Such a fragmentary and literal interpretation of "amount in money" is not permissible. Instructions to a jury should be considered as a whole, and the meaning of an instruction or instructions when taken as a whole, and not the phraseology of any particular portion, is the important consideration. Hiner v. Nelson, 174 Neb. 725, 119 N. W. 2d 288; Bryant v. Greene, 166 Neb. 520, 89 N. W. 2d 579; Brown v. Hyslop, 153 Neb. 669, 45 N. W. 2d 743. In the following instruction, No. 5, the court fully instructed as to all of the factors to be taken into consideration in arriving at the amount of any damages and stated that the law has not established any fixed rules by which to assess damages and leaves "the amount of damages to the sound judgment of the jury." The language used was, therefore, neither misleading nor did it impose an additional burden upon the plaintiff.

The assigned errors of inadequacy of the verdict and error in instruction No. 4 are without merit. The judgment of the trial court is affirmed.

AFFIRMED.

CLIFFORD WHEELER, APPELLANT AND CROSS-APPELLEE, V. NORTHWESTERN METAL COMPANY, APPELLEE AND CROSS-APPELLANT.

124 N. W. 2d 377

Filed November 15, 1963. No. 35480.

1. **Workmen's Compensation.** Section 48-151, R. R. S. 1943, provides in part: "The word accident as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury."
2. ———. In an action under the Workmen's Compensation Act the burden is on the claimant to establish by a preponderance of the evidence that he sustained a personal injury by an accident arising out of and in the course of his employment.
3. ———. Such facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that such an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and the cause of his disability.
4. ———. The applicable rule of construction of the Workmen's Compensation Act is that it be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation.
5. ———. In considering the sufficiency of the proof, the rule of liberal construction, as it relates to the Workmen's Compensation Act, applies to the law and not to the evidence offered to support a claim by virtue of the law.
6. ———. For workmen's compensation purposes, "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.
7. ———. An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted.
8. **Workmen's Compensation: Attorney and Client.** Where reasonable controversy exists between an employer and an employee

as to the employer's liability, the employer is not liable for the penalty for waiting time or for allowance of attorney's fees.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Norman Langemach and Kier, Cobb & Luedtke, for appellant.

Cline, Williams, Wright, Johnson, Oldfather & Thompson and Charles E. Wright, for appellee.

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

MESSMORE, J.

This is an action arising under the provisions of the Nebraska Workmen's Compensation Act. The case was tried before one of the judges of the Nebraska Workmen's Compensation Court who rendered an award finding, insofar as necessary to consider here, that at the time of the plaintiff's accidents and injuries he was receiving an average weekly wage of $62, being sufficient to entitle him to benefits in the amount of $37 a week from and after February 26, 1962, for so long as his total disability remained, not to exceed 300 weeks; that if the plaintiff's total disability continued beyond the period of 300 weeks then, from and after such period of 300 weeks, he was entitled to compensation from the defendant at the rate of $27.50 a week so long thereafter as he remained totally disabled for the remainder of his life; and that if prior to 300 weeks the plaintiff's total disability ceased, he would be entitled to statutory amounts of compensation for any residual permanent partial disability due to the accidents and injuries involved. The award further provided that the defendant pay the medical and hospitalization expenses. Thereafter the defendant filed, in the Workmen's Compensation Court, a waiver of rehearing and notice of appeal, and subsequently filed a peti-

tion on appeal in the district court for Lancaster County. The plaintiff filed an answer to the defendant's petition on appeal. The defendant filed a reply to the plaintiff's answer in the form of a general denial. The district court found that the award of the Nebraska Workmen's Compensation Court should be set aside and vacated; that the plaintiff sustained a 35 percent permanent partial disability; that the defendant should pay the medical expenses of the plaintiff resulting from his accident and loss of earning power to his body as a whole as a result of an injury received by the plaintiff on February 22, 1962; and that the plaintiff was not entitled to any penalty nor the allowance of attorney's fees. The award further vacated and set aside the award entered by the Nebraska Workmen's Compensation Court, and allowed the plaintiff benefits in the amount of $1,205.16 as compensation for temporary total disability for the period from February 26, 1962, until October 12, 1962; that the plaintiff recover from the defendant for permanent partial disability $14.47 a week from October 12, 1962, to the time of trial and thereafter and in addition thereto the sum of $14.47 a week so long as the plaintiff should live, not, however, to exceed 267 3/7 weeks from and after October 12, 1962; and that the defendant pay for and on behalf of the plaintiff the designated medical expense and hospital expenses which need not be set forth.

The plaintiff's petition, filed in the Nebraska Workmen's Compensation Court, alleged injuries arising out of and in the course of his employment on October 27, 1961, February 14, 1962, and February 22, 1962; that he was employed as a laborer receiving wages of about $75 a week; that the nature and extent of his injury was a crushing of two vertebrae in his back; that the defendant had notice of such injury on October 27, 1961, and on February 26, 1962; that he had been totally disabled since February 22, 1962, and had been hospitalized for over 30 days commencing March 3, 1962, and was under constant medical attention; and that the defend-

ant failed and refused to pay any benefits to the plaintiff under the Nebraska Workmen's Compensation Act. The petition further alleged that on February 14, and February 22, 1962, the plaintiff fell from a ladder a distance of 5 feet, and from and after February 22, 1962, he had been totally disabled.

The defendant's answer admitted that the plaintiff was employed by the defendant on the dates specified; denied that the plaintiff suffered an accident arising out of and in the course of his employment on the dates specified; alleged that any disability the plaintiff suffered was the result of causes congenital or otherwise and in no way caused by his employment; and denied all other allegations of the plaintiff's petition not admitted in the defendant's answer.

The defendant filed its petition in the district court alleging that the Nebraska Workmen's Compensation Court erred in finding that the plaintiff sustained injuries arising out of and in the course of his employment by the defendant on the dates specified; in finding that the plaintiff was totally disabled; and in allowing plaintiff benefits under the Nebraska Workmen's Compensation Act. The prayer was for dismissal of the plaintiff's alleged cause of action.

The plaintiff's answer to the defendant's petition on appeal alleged that the award of the Nebraska Workmen's Compensation Court was correct and that the plaintiff was entitled to penalties and attorney's fees by reason of the unreasonableness of the defendant in withholding benefits due the plaintiff after demands made upon the defendant for payments of such benefits under the Nebraska Workmen's Compensation Act.

The defendant, in reply to the plaintiff's answer on appeal, denied all allegations contained therein save those as were consistent with the defendant's petition on appeal.

The principal assignments of error are as follows: That the district court erred in finding that the plaintiff

sustained a 35 percent permanent partial disability for the period following October 12, 1962, instead of finding that the plaintiff was entitled to permanent total disability; that the district court erred in finding that the plaintiff was not entitled to any penalty payments; and that the judgment is contrary to the evidence and the law.

We deem the following authorities pertinent to a determination of this appeal.

Section 48-151, R. R. S. 1943, provides in part: "The word accident as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." See, also, Mook v. City of Lincoln, 143 Neb. 254, 9 N. W. 2d 184; Tilghman v. Mills, 169 Neb. 665, 100 N. W. 2d 739.

In an action under the Workmen's Compensation Act the burden is on the claimant to establish by a preponderance of the evidence that he sustained a personal injury by an accident arising out of and in the course of his employment. See Pittenger v. Safeway Stores, Inc., 166 Neb. 858, 91 N. W. 2d 31.

Such facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that such an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and the cause of his disability. Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51.

The applicable rule of construction of the Workmen's Compensation Act is that it be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation. Haler v. Gering Bean Co., 163 Neb. 748, 81 N. W. 2d 152.

In considering the sufficiency of the proof, the rule

of liberal construction, as it relates to the Workmen's Compensation Act, applies to the law and not to the evidence offered to support a claim by virtue of the law. Anderson v. Cowger, *supra*.

On an appeal to this court in a workmen's compensation case the cause will be considered de novo upon the record before us. Anderson v. Cowger, *supra*.

With the foregoing authorities in mind, we come to a summary of the evidence.

For convenience we will refer to the parties as they were designated in the district court.

The plaintiff testified that he was 57 years of age and could neither read nor write, not having completed the third grade. He had not learned a special trade of any type. His employment record is one of heavy type of labor, that is, mining and construction labor including moving concrete. It appears from the record that in the summer of 1959, in McDermitt, Nevada, the plaintiff, while engaged in mining, was hit on the small of the back by a falling rock. He was treated by Dr. Rueckl of Winnemucca, Nevada, and later hospitalized and subjected to surgery in February 1960. After 3 or 4 months, he was released from further medical care to return to heavy lifting and labor. On cross-examination the plaintiff testified that after he was released he did not return to work at the mine in McDermitt for the reason that he was not permitted to go back to heavy work. On June 27, 1960, the plaintiff entered into a settlement agreement with the Nevada Industrial Commission whereunder he received an award of $1,500, based upon a 10 percent permanent partial disability on a body basis, and a 5 percent permanent partial disability for other considerations. This settlement agreement places the date of the injury as July 2, 1959.

Dr. Rueckl saw the plaintiff off and on until August 24, 1959, at which time the plaintiff complained of pain in the lower back. The only positive finding at the time was tenderness and spasm bilaterally in the lower

back area. The plaintiff was hospitalized immediately and placed in pelvic traction until August 31, 1959. The plaintiff returned on September 2, 1959, with back spasm and pain and was readmitted to the hospital where a body cast was applied and left on for 4 to 6 weeks. The plaintiff showed some improvement and returned to work on September 28, 1959. Certain exhibits were received in evidence. These exhibits were X-ray pictures which were explained by Dr. Rueckl, with the conclusion that the amount of reaction that was evident in the lower dorsal and upper lumbar vertebrae could be sufficient to give the plaintiff back symptoms; and that there was spasm in the lumbar muscle which involved pain from the lower dorsal vertebra all the way down to the first sacral vertebra. The doctor felt that the cause of the plaintiff's difficulties was the changes that were evident in the X-rays of his upper lumbar region, being the hypertrophic bone and the narrowing of the disc interspaces, which are found in a person who has performed a lot of traumas on his back and who has worked hard most of his life. On October 31, 1959, Dr. Rueckl gave as his opinion that the plaintiff would probably be an individual who would have recurrent discomforts with his back irrespective of the employment he followed. It was his opinion that the plaintiff would be a chronic back complainer; that he had justifiable grounds for the complaints referable to his back; and that the least amount of overindulgence in work or back motion could precipitate a problem in connection with his back in the way of muscle spasms and discomfort. At the time he saw the plaintiff on June 24, 1960, the plaintiff had between 10 and 15 percent partial disability which was permanent. On cross-examination this doctor stated that in June 1960, if the plaintiff had chosen to work at his previous mining job he would have found the physical strength to do it.

In response to the plaintiff's cross-interrogatories, Dr. Rueckl stated that the plaintiff's subjective complaints

and the objective findings, which were free of neurological involvements, were compatible with his basic condition which was hypotrophic arthritis; and that the plaintiff made a good, uneventful recovery from the effects of the surgery.

The plaintiff was referred to Doctors Rosenauer and Mack. Dr. Rosenauer testified that he specialized in the practice of neurological surgery; and that he performed a lumbar myelogram on the plaintiff on December 29, 1959. The plaintiff complained of pain in the lower back and at times in the left hip and leg. There was marked muscle spasm in the low back on the right side, complaints of tenderness on the left side, and a 15 degree limitation in straight leg raising on the left side. He next saw the plaintiff on February 17, 1960, at which time the plaintiff continued to have pain in his low back and left hip and was unable to work. There was pressure tenderness in the low left lumbar region and pain on straight leg raising but no definite location at which the pain became unbearable. On February 26, 1960, this doctor operated on the plaintiff, performing a partial laminectomy. The plaintiff's condition became stationary following the operation, and there were no specific complaints apart from occasional discomfort in the low back. The plaintiff desired to return to work and was advised to wait 1 month before starting. On cross-examination this doctor stated that he thought the plaintiff could return to work at heavy duty labor with 1 month's lay-off.

Dr. Mack, a former associate of Dr. Rosenauer, in response to certain interrogatories from the plaintiff, testified that he examined the plaintiff on June 27, 1960, and found the plaintiff to have a good range of back motion, the wound well healed from the operation, and no subjective complaints. He further found that the plaintiff should wait 2 months before undertaking any heavy work. In response to cross-interrogatories of the defendant, this doctor stated that he examined the plain-

tiff on four separate occasions from December 1959, through June 1960; that based upon the examinations that were carried out by Dr. Rosenauer and his examination of the plaintiff, it was his opinion that the plaintiff had a ruptured lumbosacral disc which difficulty did not antedate the traumatic occurrence in July 1959; that on June 27, 1960, he considered that the plaintiff had recovered from his injury and estimated his return to full duty in 2 months; and that he found osteophyte formations in the plaintiff's lumbar spine which were probably of long standing and in his opinion were caused by wear and tear in an individual who did hard work.

After the doctors released the plaintiff in Nevada, he took a job as a farmhand in Idaho, where he lifted bales of hay weighing 100 to 125 pounds, and which caused him no back trouble. He did mining work in Idaho, Oregon, and Colorado, drove a truck in Oregon and a truck and bulldozer in California, did common farm work, dug ditches, scooped gravel, and worked on a ranch. Later he returned to Nebraska where he drove a water truck on the interstate highway construction for the Abel Construction Company, helped tear down a building in Lincoln, and washed dishes at a cafe before he commenced working for the defendant in June 1961. While working for the defendant his wages were $1.55 an hour for a 40-hour week. He worked as a burner. As a burner his job involved twisting and turning, lifting 100-foot lengths of hose and gas tanks, and climbing up and down ladders carrying a torch and a hose. No complaint was made by the defendant that the plaintiff did not do his work satisfactorily. On February 14, 1962, the plaintiff was working at the defendant's yard on Tenth Street in Lincoln, taking down a fence which was made of railroad rails for posts and crossbars of old pipe. The fence was 12 feet high. He was working on the south side of the fence using a cutting torch. The fence was interlined with corrugated steel which had to be burned off where it was welded

to the pipe. The plaintiff was on a ladder 6 feet off the ground, standing on the ladder and the center crossbar of the fence. The crossbar on the fence broke and the plaintiff fell in a twisting motion onto his hips. He sat in this position for a few minutes and then returned to work. He returned to work the following day. He was stiff and sore, but continued to work several days. On February 22, 1962, while the plaintiff was doing the same type of work, he sustained a similar accident resulting in injuries. At that time he was about 6 feet above the ground cutting the upper pipe off of the fence. The pipe broke in identically the same way as it did before. There was snow on the ground. The ladder slipped off the end of the pipe. His left leg went between the rungs of the ladder. He fell onto the small of his back across the pipe, a distance of 6 feet. He was badly hurt at the time, and laid in the snow approximately 15 minutes. He was helped up by his coworker, Clarence Kinnison. From that time on, Clarence Kinnison did the cutting. The plaintiff worked the next day as much as he could, but was stiff and sore. He did not work the day after, which was Saturday. On Monday he was unable to get out of bed. The plaintiff was sent to St. Elizabeth's Hospital on March 3, 1962, by ambulance, where he was examined by Dr. Goetowski.

Clarence Kinnison testified that he was a coworker with the plaintiff and worked for the defendant; that he did not actually see the plaintiff fall on February 14, 1962; that on February 22, 1962, he observed that when the pipe broke the plaintiff fell backwards on the middle crossbar of the fence and the ladder; that the plaintiff remained on the ground about 2 minutes, then this witness assisted the plaintiff to get up; that this witness took over the cutting torch and proceeded to complete the work; and that there was about 1½ hour's work left on that day.

Dr. Goetowski, an orthopedic surgeon, testified that he examined the plaintiff on March 3, 1962, in the emer-

gency room at St. Elizabeth's Hospital, at which time the plaintiff was in severe pain and was given an opiate to relieve the pain. The plaintiff complained of pain in his low back and was unable to lift his left leg. There was weakness in his left foot. Even after the opiate was administered, the plaintiff was in such pain that the doctor could not turn him over, but had to examine him by feeling underneath him. The plaintiff's reflexes were tested and he failed to react, which indicated an interruption of the normal neurological pathway. After the examination the plaintiff was given heavy doses of opiates and muscle relaxants in an effort to control his acute muscle spasms and pain. The plaintiff was put in pelvic traction aggregating 30 to 40 pounds of traction, while the normal traction is 20 to 25 pounds. The plaintiff was hospitalized from March 3, 1962, until March 30, 1962. When he left the hospital he was required to wear a brace. This doctor further testified that there were arthritic changes in the plaintiff's spine which were revealed by X-rays. This doctor further testified that it was his experience that many people with such a condition as the plaintiff had might carry on for an indefinite period of time until some unusual or sudden force projects itself and at once it becomes symptomatic. In his opinion the plaintiff's back condition was the result of the accident, plus a preexisting condition. The detailed findings of this doctor as late as October 12, 1962, indicated severe restriction of motion, muscle spasm, objective neurological findings of depressed sensation, left knee and ankle jerk absent, and right ankle jerk absent. This doctor testified that the plaintiff had a 25 to 35 percent permanent partial disability of the body, and in his opinion the plaintiff would continue to suffer pain in the future by reason of the aggravation of the preexisting condition.

On cross-examination this doctor testified that the plaintiff would be able to operate an elevator, and he could work as a doorman at a hotel, provided he had

periods of rest; that he would not be able to work as a busboy in a restaurant due to having to carry heavy trays and other types of work connected therewith; that gardening would be a problem for the plaintiff because he would have to hoe and dig, and the doctor did not encourage that; and that the plaintiff could not do work requiring walking up and down steps. The doctor further testified that even if the plaintiff's present subjective complaints would subside completely, he would not certify the plaintiff back to heavy labor. On redirect examination this doctor testified that the plaintiff could not operate heavy equipment; and that in his opinion, because of the combination of the preexisting factors plus the plaintiff's trauma, he has a complex aggravation which will persist and remain in the future.

Dr. Goetowski suspected that the plaintiff had an ulcer and asked Dr. Maxwell, an internist, to examine the plaintiff. Dr. Maxwell did not find anything in the course of his examination to indicate that the plaintiff was faking or malingering, or anything other than what was genuine. He testified that the plaintiff tried to minimize his particular complaints. This doctor found no evidence of heart trouble or kidney disease, nor infection of the veins or arteries of the leg, and stated that there was no indication of gout.

Dr. McGreer, a roentgenologist, a witness for the defendant, took X-rays of the plaintiff on March 3, 1962. The X-rays disclosed no fracture or dislocation, but revealed narrowing of intervening disc spaces of the lumbar spine and osteophytic lipping of numerous bodies consistent with degenerative arthritis of the lumbar spine, which is degenerative arthritic change, the exact cause of which is indeterminate and which may be the result of an old trauma as well as degenerative changes. This doctor testified on cross-examination that he could not see any evidence of the effect of trauma on any of the X-rays that he took. This doctor testified that all structures are subject to trauma.

Dr. Horn, an orthopedic surgeon, testified on behalf of the defendant that he examined the plaintiff on September 24, 1962, at the request of the defendant. The plaintiff gave the doctor a history of two falls from a ladder in February 1962. He further testified that the plaintiff complained of a recent attack of pain which was constant. This doctor's physical examination revealed that the plaintiff reacted as if tender all over the lumbar and lower dorsal area, however, he was able to sit up sharply when his hip was rotated; and that rotation of the hips was painful and there was no hypalgesia noted in the lower extremities. The plaintiff stood straight without list or lordosis. When asked to bend forward he did so very slowly. With urging he was able to bend quite a way down. Palpation of the hips produced considerable grimacing. There was no atrophy of his calves; and his knee jerks were brisk and active but there were no ankle jerks. The plaintiff walked freely and briskly as he left the clinic building. This witness did not see any significant changes in the X-rays taken in September 1962, and the ones taken in November 1961. This doctor testified that the plaintiff had 5 or 10 percent residual permanent disability after the disc surgery. The doctor concluded that the plaintiff was malingering. This doctor further testified that the plaintiff could return to heavy labor and various other jobs; and that the plaintiff would be able to undertake janitorial or custodial work, dishwashing, driving a truck, would be able to change a truck tire or operate a truck jack, or would be able to do work in a filling station.

On cross-examination Dr. Horn testified that an osteoarthitic process could produce considerable pain; that a trauma such as a fall could aggravate osteoarthritis and probably does in many cases; that the fact that there was no X-ray change in this particular arthritis did not necessarily mean that it was not aggravated; and that occasionally, in cases such as that of the plaintiff where there is osteoarthritis and lipping which has

been present for a period of years and a person suffers a trauma, he is unable to work following the trauma whereas he had been able to work before without complaint. This doctor was not acquainted with the plaintiff's condition before September 24, 1962, and did not read the hospital records. He further testified that he would not recommend that an employer hire a man with the condition of which the plaintiff complained. He formed no opinion as to whether the falling episodes aggravated the preexisting condition shown by the X-rays. He would not say that the treatment by Dr. Goetowski was not necessary, and he had no opinion as to whether or not the hospitalization was necessary. He further testified that trauma could aggravate the type of condition which the plaintiff had, and that if the plaintiff was working and doing heavy manual work daily before the second fall, it would be his opinion that the arthritis might have been aggravated by the falls. This doctor made no diagnosis of the plaintiff's condition, and he had no opinion as to whether or not the two falls aggravated the preexisting condition which the plaintiff had.

A witness connected with the employment service of the Lincoln office of the Nebraska Department of Labor, division of employment, testified that during the 6 months prior to the trial there had been job availabilities for porters and janitors, and for jobs which would not call for heavy lifting; that two or three of such jobs were available at the time of trial; that the pay scale for this type of work runs from $1 an hour up as high as $250 a month on a monthly scale; that during the month prior to trial there had been three job availabilities for elevator operators paying $1 an hour; that an elevator operator would not require the ability to read or write or do any heavy lifting, and the operator could be seated while working; that there was available at the time of trial a porter or custodial job requiring no heavy lifting, merely sweeping floors and waxing and dusting

furniture, requiring a man over 30 years of age and offering a salary of $257 a month; and that in his opinion a man 58 years of age with a third-grade education, whose doctor had advised him not to do any heavy lifting and who could not read or write, could find employment. On cross-examination this witness testified that it was harder to find work for a disabled person; and that he did not know the plaintiff's qualifications, and therefore his answers were general.

The defendant called an investigator for the Pinkerton Detective Agency who testified that he observed the plaintiff on the dates of October 9 through October 12, 1962, and on October 14, 1962. On October 9, 1962, he observed the plaintiff driving his automobile and walking around his automobile and home, and his movements appeared fluid. On October 10, 1962, he observed the plaintiff operating his automobile and bending over into the rear window of his automobile. On October 11, 1962, he observed the plaintiff walking out of his house, working on and washing his station wagon, crawling in and out of the back end of his station wagon, and leaning into the front seat area bending over the back of the front seat into the rear area with no noticeable brace or support. On October 12, 1962, he observed the plaintiff walk from his home, wipe off his automobile, walk from the house carrying a sack of garbage about 250 feet to a trash burner, walk from there approximately 300 feet to a mailbox, thereafter get in his automobile in company with his brother, and drive to the offices of the Lincoln Orthopedic Clinic, park his automobile in the parking lot, walk into the clinic, leave the clinic, enter his automobile, and drive off. Certain motion pictures were taken of the plaintiff which this witness explained and which have been observed. He further testified on cross-examination that he never observed the plaintiff pick up an object that weighed 30, 40, or 50 pounds, and had no knowledge of the plaintiff's ability to pick up as much as 50 pounds; that he

knew nothing about the plaintiff's ability to bend and stoop as a normal person does; and that he did not watch the plaintiff with fieldglasses and was unable to tell if the plaintiff was wearing a back brace from a block away with the naked eye.

We conclude that the plaintiff has established by a preponderance of the evidence that he sustained an injury by an accident arising out of and in the course of his employment.

The question arises, what was the extent of the disability the plaintiff suffered?

For workmen's compensation purposes, "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. See, Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262; Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561.

"An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted." Sporcic v. Swift & Co., 149 Neb. 246, 30 N. W. 2d 891. See, also, Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262; Crable v. Great Western Sugar Co., 166 Neb. 795, 90 N. W. 2d 805.

In Pavel v. Hughes Brothers, Inc., 167 Neb. 727, 94 N. W. 2d 492, this court held: "Disability under section 48-121, R. S. Supp., 1957 (now R. R. S. 1943), subdivisions (1) and (2), is defined by our statute in terms of employability and earning capacity rather than in terms of loss of bodily function." And, referring to Miller v.

Peterson, 165 Neb. 344, 85 N. W. 2d 700, this court said: "* * * we had occasion to examine a contention that a court should hesitate to refuse to accept the findings of the medical experts as to the extent of the disability. We held that: 'There seems to be an assumption that the ratio of functional loss, or loss from the medical viewpoint, is the same as loss of earning capacity or wage loss. If this were so it would be quite immaterial in what occupation an injured workman was engaged and to what extent he was unable to perform it or similar work because of his injury. Disability under subdivisions (1) and (2) of section 48-121, R. S. Supp., 1953, refers to loss of earning capacity and not to functional or medical loss alone.' By quotation from Castle v. City of Stillwater, 235 Minn. 502, 51 N. W. 2d 370, we approved this language: 'Thus, in defining total disability, losses in bodily function are not important in themselves, but are only important insofar as they relate to ability to earn an income.' "

The evidence discloses that the plaintiff in the instant case is an unskilled or common laborer, and discloses that he cannot engage in doing heavy lifting. He is, therefore, what is referred to as an "odd job" man, the nondescript in the labor market, with which industry has little patience, and rarely hires. Work, if he finds any that he can do, is casual and intermittent. He is unable to work as he did before this accident. Under these facts, we think we are justified in finding that in his present handicapped condition he is entitled to an award for permanent total disability under the Nebraska Workmen's Compensation Act.

The plaintiff makes reference to section 48-125, R. R. S. 1943, to the effect that in the event an employer fails to pay compensation within 30 days of notice of disability, the employee is entitled to an additional 50 percent of compensation for all delinquent payments, and attorney's fees. We have examined the evidence re-

lating to this phase of the case. The following rule is applicable.

Where a reasonable controversy exists between an employer and an employee as to the employer's liability, the employer is not liable for the penalty for waiting time or for allowance of attorney's fees. See Redfern v. Safeway Stores, Inc., 145 Neb. 288, 16 N. W. 2d 196.

The defendant cross-appealed, contending that the trial court erred in finding that the plaintiff sustained personal injuries by accidents arising out of and in the course of his employment on the dates heretofore mentioned; in allowing the plaintiff any benefits under the Nebraska Workmen's Compensation Act; and in failing to dismiss the plaintiff's petition and causes of action in accordance with the evidence and the law.

In the light of what has heretofore been said relating to the evidence and the law applicable thereto, we find that the defendant's cross-appeal is without merit and cannot be sustained.

As we view the record, the plaintiff is entitled to recover from the defendant for permanent total disability the sum of $37 a week from and after February 26, 1962, for the first 300 weeks of such disability, and the sum of $27.50 a week for the remainder of his life as provided for in section 48-121, R. R. S. 1943. In addition, the plaintiff is entitled to recover for medical expenses and hospitalization furnished the plaintiff as shown by the record.

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

JOHNSTON GRAIN COMPANY, A CORPORATION, APPELLANT, V. JOSEPH TRIDLE AND DELMAR MORFITT, DOING BUSINESS AS T. & M. CONSTRUCTION COMPANY, A PARTNERSHIP, APPELLEES.

124 N. W. 2d 463

Filed November 15, 1963. No. 35487.

1. **Judgments: New Trial.** A court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are pronounced, and such power exists entirely independent of any statute.
2. ———: ———. A court has no discretionary power or authority to vacate a judgment on application made within the judgment term but considered and ruled on at a subsequent term.
3. **New Trial.** A motion for a new trial which has been duly and timely filed may be heard at a subsequent term and the court may then pass upon the motion and enter its judgment on the motion for new trial.
4. **Judgments: New Trial.** The question of the courtesy which should prevail among members of the bar is a proper matter to be considered by the trial court in exercising its discretion to set aside a judgment in term time.
5. **New Trial.** The lack of diligence of a party or his attorney is not an unavoidable casualty or misfortune under section 25-2001, R. R. S. 1943.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded with directions.

C. Morris Gillespie and Andrew J. McMullen, for appellant.

Tye, Worlock, Knapp & Tye and Munro, Parker & Munro, for appellees.

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

SPENCER, J.

This is an appeal by Johnston Grain Company, a corporation, hereinafter referred to as plaintiff, from an order of the district court for Buffalo County vacating and setting aside a default judgment entered against

Delmar Morfitt and T. & M. Construction Company, a partnership, hereinafter referred to as defendants.

T. & M. Consruction Company, a partnership composed of Joseph Tridle and Delmar Morfitt, had a contract with the plaintiff for the erection of 10 grain bins for which plaintiff was to furnish the steel. They had partially erected one of the bins but were delayed because plaintiff had not been able to furnish all of the necessary steel. While so delayed, on May 4, 1959, a severe windstorm wrecked the partially completed bin. C. Morris Gillespie, plaintiff's attorney in the instant case, adjusted the loss for plaintiff's insurance carrier. He secured an estimate of the damage from the T. & M. Construction Company which was given the job of making the necessary repairs. On November 24, 1959, plaintiff paid the balance due on the contract with T. & M. Construction Company as well as the amount due on the repairs. This payment was made to F. M. Parker, the attorney for T. & M. Construction Company. On March 7, 1960, the partnership and the individual partners were adjudicated bankrupt. F. M. Parker, who had been the sole attorney for the partnership during 1959 and 1960, was the attorney in the bankruptcy proceedings. It is undisputed that plaintiff and its attorneys were fully aware of the bankruptcy proceedings, and that Parker was attorney for the partnership when plaintiff filed suit June 13, 1960, against the partnership for damages for alleged negligence in going ahead with construction when sufficient steel was not on hand to complete the job.

No service was had on Joseph Tridle, who had left the state. Service was had on Delmar Morfitt on June 13, 1960. He took the summons to his attorney's office, and, when he found the attorney was on a vacation, left the summons with the attorney's secretary. Morfitt paid no more attention to the matter. Answer day was July 18, 1960. On August 4, 1960, one of plaintiff's attorneys, in the absence of Judge E. G. Reed, the local district

judge, had a default judgment entered against Delmar Morfitt and T. & M. Construction Company, a partnership, by Judge Norris Chadderdon, who was temporarily in Buffalo County. Parker, defendants' attorney, did not return to his office until August 2, 1960, and did not see the summons left by Morfitt until after the default judgment was entered. However, he was in the courthouse at the time of its entry and knew that it had been entered immediately thereafter and while Judge Chadderdon was still at the courthouse.

On August 12, 1960, Parker filed an application for an order vacating the judgment and for 10 days to file an answer. A letter was directed to Judge Reed calling the matter to his attention and asking that the application be heard. Parker was never able to obtain a hearing on the application. Judge Reed passed away between Christmas Day and New Year's Day, and no judge was appointed to fill out his term. The 1961 spring term was opened January 5, 1961. On March 24, 1961, defendants' application came on for hearing and the trial court ordered the default judgment set aside and permitted defendants to file an answer.

On February 20, 1962, defendants filed a petition after term to set aside the default judgment and for a new trial. Trial was had on January 9, 1963. The court specifically held that if the application was not properly sustained on March 24, 1961, the court again finds that the default judgment should be set aside. The trial court made no finding of fraud, but found the fact that the matter was not disposed of during term was the fault of the court and not the moving party.

The plaintiff alleges nine assignments of error. We will consider only two of them. The first one we consider is that the trial court erred in abusing its discretionary powers in ordering the default judgment set aside in its order of March 24, 1961, when there were no affidavits, documents, or other supporting evidence. Certainly the trial court was without power to enter the

order of March 24, 1961. Our law is well settled that a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are pronounced, and such power exists entirely independent of any statute. See Bradley v. Slater, 58 Neb. 554, 78 N. W. 1059.

Here, however, defendants' application, while filed in term time, was not heard until March 24, 1961, which was after the judgment term had ended. Our law is equally clear that a court has no discretionary power or authority to vacate a judgment on application made within the judgment term but considered and ruled on at a subsequent term. See Lyman v. Dunn, 125 Neb. 770, 252 N. W. 197. Defendants' present counsel recognized this lack of jurisdiction on the part of the court, and filed a petition after term to set aside the judgment and for a new trial.

The order of March 24, 1961, setting aside the default, was clearly erroneous unless defendants' application can be construed as a motion for a new trial. Can defendants' application be construed as a motion for a new trial? There is no question that a motion for a new trial timely filed may be heard at a subsequent term. In Workman v. Workman, 174 Neb. 471, 118 N. W. 2d 764, we said: "A motion for new trial which has been duly and timely filed may be heard at a subsequent term and the court may then pass upon the motion and enter its judgment on the motion for new trial." The application herein was timely filed. However, the motion must allege grounds for a new trial at the very least in the language of the statute. See § 25-1144, R. R. S. 1943. The most that can be said of defendants' application is that defendants' attorney had no knowledge of the action until after the default had been entered, and that neither plaintiff nor its attorneys notified defendants' counsel that default would be entered when they knew that defendants had counsel and had taken bankruptcy. This clearly is not sufficient to be

construed as a motion for a new trial within the statute.

The second assignment which we consider is that the trial court erred in overruling plaintiff's motion for a directed verdict at the close of defendants' evidence on the hearing on the petition filed after term to set aside judgment and for a new trial. After the adjournment of the term at which a judgment was rendered, the trial court has authority to grant a new trial for any of the grounds stated in section 25-2001, R. R. S. 1943, which includes a motion for a new trial in accordance with sections 25-1143 and 25-1145, R. R. S. 1943. See Harman v. Swanson, 169 Neb. 452, 100 N. W. 2d 33.

As suggested, the application herein cannot be construed as a motion for a new trial in accordance with section 25-1143, R. R. S. 1943. The question then is, can the petition filed February 20, 1962, be sustained under any of the other provisions of section 25-2001, R. R. S. 1943? There are only two provisions which it might be argued are applicable. They are as follows: "* * * (4) for fraud practiced by the successful party in obtaining the judgment or order; * * * (7) for unavoidable casualty or misfortune, preventing the party from prosecuting or defending; * * *."

Defendants' evidence, viewed in its most favorable light, establishes that plaintiff and plaintiff's counsel knew that Parker was defendants' counsel and had their records; had visited with him before the action was filed about defendants' business affairs and financial circumstances; knew that defendants had been adjudicated bankrupt; and knew that defendants had a valid and justiciable defense to the original petition. There is no dispute but that plaintiff's chief counsel told Morfitt after the default was entered that he was attempting to recover from the insurance company and did not intend to make any recovery against him personally. There is no evidence, however, that plaintiff's counsel ever agreed to set the judgment aside or inferred that he would do so or did anything after the default was en-

tered which prevented the defendant from having the application heard. Plaintiff's counsel did write Judge Reed a letter requesting that the matter be set for hearing, and testified that he orally requested a hearing from the judge on other occasions but was never able to get one. This, however, cannot be charged in any way to the plaintiff.

It is defendants' position that the common courtesy which should prevail among members of the bar in any locality dictates that the default should have been set aside by agreement. It is true that in Barney v. Platte Valley Public Power & Irr. Dist., 147 Neb. 375, 23 N. W. 2d 335, we said as follows: " 'The courtesy that should prevail between opposing counsel to a cause ordinarily requires that counsel for one party should, before taking a default, give notice to counsel for the other side of his intention so to do.' " This was quoted from Lacey v. Citizens Lumber & Supply Co., 124 Neb. 813, 248 N. W. 378, which was a case in which counsel had appeared of record. In the Barney case, while counsel had not appeared, prior actions had been filed arising out of the same subject of action, were tried and appealed to this court, where they were dismissed because of a failure to properly lodge the appeals. Further, the application was heard in the judgment term.

The question of the courtesy which should prevail among members of the bar is a proper matter to be considered by the trial court in exercising its discretion to set aside a judgment in term time. Here, however, the court lost its right to set aside the default because the term at which it was entered had expired.

Bankruptcy is an affirmative defense and must be pleaded. Even though plaintiff's counsel may have believed counsel who had been representing the defendants would appear for them, he was under no legal obligation to call his attention to the action. This was the responsibility of the defendants. If counsel had appeared of record in this case, that would be a different

matter. Defendants' counsel was not without fault. He was present in the courthouse when the default was entered, and learned of it before Judge Chadderdon left the courthouse. Prompt action at that moment would have avoided the present situation. Further, defendants' counsel was a member of a firm of attorneys. There is no showing in this record that the matter could not have been handled by one of his two associates during his absence from the city. The fault and the oversight it seems was in his own office. When answer day passed without any appearance, plaintiff was entitled to a default judgment. There is no sufficient showing of fraud or misconduct to permit the setting aside of the judgment on that ground.

In Lyman v. Dunn, 125 Neb. 770, 252 N. W. 197, we held that lack of diligence of a party or his attorneys is not an unavoidable casualty or misfortune under section 25-2001, R. R. S. 1943. The trial court found that if the fact that the application was not heard during the term was the fault of anyone, it was the fault of the resident judge. We do not find sufficient evidence in the record herein to sustain this conclusion, but do suggest that if the defendants had been more diligent in attempting to get the matter heard, this might have been considered an unavoidable casualty or misfortune. There is no sufficient showing that Judge Reed was too ill to hold court, or that the defendants made any attempt to have him request another judge to hear the matter. The record does show that Judge Chadderdon did hold court in Kearney during December 1960, which was still within term time. It is unfortunate that the application was permitted to pend until the term ended, but on the record presented we must find that the defendants did not exhaust their remedies to have the matter heard. It is our conclusion that there is no sufficient showing that the judgment should be set aside for unavoidable casualty or misfortune preventing the defendants from pros-

ecuting or defending within the limits of section 25-2001, R. R. S. 1943.

For the reasons given, the order of the trial court vacating the default judgment is hereby vacated and set aside, and the cause is remanded with directions to reinstate the judgment of August 4, 1960.

REVERSED AND REMANDED WITH DIRECTIONS.

TONY A. ZAGER, APPELLANT, V. JANETTE JOHNSON, APPELLEE.
124 N. W. 2d 390

Filed November 15, 1963. No. 35491.

1. **Trial.** The trial court is required to submit to the jury the issues raised by the pleadings which are supported by the evidence.
2. **Automobiles: Trial.** Circumstantial evidence may be sufficient to support a finding as to the rate of speed at which a motor vehicle was operated, and may be sufficient to overcome direct evidence as to that fact.
3. **Trial.** The meaning of an instruction, and not its phraseology, is the important consideration. Where the meaning of an instruction is reasonably clear it is not prejudicially erroneous.
4. **Appeal and Error.** A judgment will not be reversed because of an inadvertent substitution of words in an instruction if the jury could not reasonably have been misled thereby.
5. ———. An assignment of error relating to an instruction to the jury will not be considered by this court unless it was included in the motion for new trial.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Haney, Walsh & Wall, for appellant.

Fraser, Stryker, Marshall & Veach, for appellee.

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

BOSLAUGH, J.

This is an action to recover damages arising out of an automobile accident in which Tony A. Zager is the

plaintiff and Janette Johnson is the defendant. The jury returned a verdict for the defendant. The plaintiff's motion for new trial was overruled and he has appealed.

The accident occurred when the front of the defendant's automobile collided with the right side of the plaintiff's truck at the intersection of Thirty-ninth and Washington Streets in Omaha, Nebraska. A more complete statement of the facts may be found in our first opinion in this case in 174 Neb. 106, 116 N. W. 2d 1.

The plaintiff's assignments of error all relate to the instructions given by the trial court. The plaintiff's principal contention is that instructions Nos. 1 and 5, when considered together, placed an improper burden of proof upon the plaintiff.

Instruction No. 1 was a summary of the allegations of the petition. Instruction No. 5 related to the matters which the plaintiff was required to prove in order to recover judgment.

Instruction No. 1 provided in part as follows:

"Plaintiff further alleges that his injury and damage to his property was the direct and proximate result of the negligence of the defendant as follows:

"(a) In failing to keep a proper lookout for vehicles traveling on 39th Street and particularly plaintiff's truck.

"(b) In failing to yield the right of way to plaintiff's truck, which had entered the intersection before the defendant's automobile.

"(c) In operating her automobile at a high and dangerous rate of speed, to wit: 40 miles per hour.

"(d) In failing to have her automobile under proper control.

"(e) In failing to swerve or stop her automobile or to do any other thing reasonably in her power and control to avoid a collision with the side of plaintiffs' truck."

Instruction No. 5 was as follows:

"The burden is upon the plaintiff to establish by a preponderance of the evidence the *following propositions:*

"1. That the defendant was negligent in one or more

of the respects charged against the defendant in the *numbered parts* of Instruction No. 1.

"2. That any such negligence was the proximate cause of the resultant injury to plaintiff and damage to the truck and other personal property of the plaintiff.

"If the plaintiff has so proved all of the *foregoing numbered propositions* your verdict will be for the plaintiff, unless you find the plaintiff himself to have been negligent proximately contributing to cause the accident and to an extent to defeat his recovery as herein elsewhere stated. If the plaintiff has failed to prove any one of the *foregoing numbered propositions* by a preponderance of the evidence your verdict will be for the defendant." (Emphasis supplied.)

The plaintiff complains that the effect of instruction No. 1 was to require the plaintiff to prove that the defendant was operating her automobile at a rate of speed of 40 miles per hour in order to recover on the allegation of negligence relating to speed. The plaintiff points out that the speed limit at the intersection where the accident occurred is 25 miles per hour and that according to the direct evidence the maximum speed of the defendant's automobile was 35 miles per hour.

If the plaintiff was not satisfied with the allegations of his petition, the remedy was an application for leave to amend. In the absence of such an application, the trial court was required to submit the allegation of the petition concerning speed to the jury if there was sufficient evidence to sustain it. In determining whether there was sufficient evidence to sustain the plaintiff's allegation as to the defendant's speed, the trial court was required to consider the circumstantial evidence as well as the direct evidence. Circumstantial evidence may be sufficient to support a finding as to the rate of speed at which a motor vehicle was operated, and may be sufficient to overcome direct evidence as to that fact. Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

There was evidence in this case as to the weight of

the plaintiff's truck and its contents, the relative distances of the vehicles from the point of impact before the collision, the skid marks left by the defendant's automobile, and the damage to the vehicles in the collision. There was evidence that the plaintiff's truck was forced into and against another automobile which was proceeding north on Thirty-ninth Street, that the equipment and material in the plaintiff's truck were thrown out of it by the impact, and that the defendant's automobile became attached to the plaintiff's truck and was dragged to the south after the impact. The plaintiff testified that the hot pot or cooker, which weighed 250 or 350 pounds, was thrown out of the truck by the impact and that it landed about 30 feet into some property. We think that the circumstantial evidence in this case, particularly that relating to the force of the impact, was sufficient to require the trial court to submit the plaintiff's allegation concerning speed to the jury.

The plaintiff further complains of the reference in instruction No. 5 to "the numbered parts" of instruction No. 1. There were no "numbered parts" in instruction No. 1 and the plaintiff argues that the jury may have been confused and believed that the plaintiff was required to prove all of the specifications of negligence alleged in order to recover.

It is unfortunate that the trial court referred to the "numbered" parts of instruction No. 1 instead of the "lettered" parts. However, in order to misunderstand instruction No. 5, as the plaintiff contends, it would have been necessary for the jury to have confused the "numbered parts" of instruction No. 1 with the "foregoing numbered propositions" which were set out in instruction No. 5 and denominated as such.

The meaning of an instruction, and not its phraseology, is the important consideration. Where the meaning of an instruction is reasonably clear it is not prejudicially erroneous. Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913. A judgment will not be reversed because

of an inadvertent substitution of words in an instruction if the jury could not reasonably have been misled thereby. Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462. See, also, Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217; Tidd v. Stull, 128 Neb. 506, 259 N. W. 369; Zelenka v. Union Stock Yards Co., 82 Neb. 511, 118 N. W. 103. We think that the jury in this case was able to ascertain the meaning of instruction No. 5 and to understand it correctly notwithstanding the inadvertent substitution of "numbered parts" for "lettered parts."

The plaintiff complains that it was error for the trial court to give instructions Nos. 7, 8, 9, and 14 which related to the rules of the road and right-of-way at intersections. These instructions, or parts of them, were requested by the defendant. The plaintiff does not contend that any of the instructions contained erroneous statements of law. The plaintiff argues that the instructions were repetitious and gave undue emphasis to the defendant's theory of the case.

The accident involved in this case occurred at an intersection where there was no traffic control. The defendant was to the right, but the plaintiff claimed that he entered the intersection first. Right-of-way was an important issue. It was necessary that the jury be instructed fully as to the relative rights and responsibilities of the drivers involved in the accident. See Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496. From our examination of the record, we conclude that it was proper for the trial court to give the instructions in question.

The plaintiff assigns error with respect to instruction No. 12. No objection was made to this instruction in the motion for new trial. An assignment of error relating to an instruction to the jury will not be considered by this court unless it was included in the motion for new trial. Jensen v. Priebe, 163 Neb. 481, 80 N. W. 2d 127. Accordingly, we do not consider this assignment of error.

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

AFFIRMED.

ELVIN E. HILLS ET AL., APPELLEES, V. EARLE M. BURNETT, SR., DOING BUSINESS AS BURNETT'S HOME TRAILER SALES, ET AL., APPELLEES, IMPLEADED WITH THE MICHIGAN NATIONAL BANK, A CORPORATION, APPELLANT.

125 N. W. 2d 66

Filed November 22, 1963. No. 34923.

1. **Appearances.** Where the defect does not appear upon the face of the record, a defendant who is privileged from suit in the county where the action is brought is not required to make the objection by special appearance but may raise the defense by answer.
2. **Contracts: Actions.** A provision in a contract that all matters relating to the execution, interpretation, validity, and performance of it shall be governed by the laws of Nebraska is not a waiver of privilege from suit in Nebraska by an assignee of the contract.

Appeal from the district court for Lancaster County: HARRY A. SPENCER, Judge. Affirmed in part, and in part reversed and remanded with directions.

Wilson & Barlow, for appellant.

Nelson, Harding & Acklie and Charles J. Kimball, for appellees Hills.

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

BOSLAUGH, J.

This action was brought in the district court for Lancaster County, Nebraska, by Elvin E. Hills and Margie Hills, the plaintiffs, to cancel a contract of conditional sale for the purchase of a house trailer and to recover the payments made upon the contract. After the contract had been executed it was assigned by the defendant,

Earle M. Burnett, Sr., to the defendant, Michigan National Bank.

The trial court found that the contract was void and entered judgment for the plaintiffs. Upon appeal to this court, that judgment was affirmed. Hills v. Burnett, 172 Neb. 370, 109 N. W. 2d 739. Thereafter, the Supreme Court of the United States granted certiorari, vacated the judgment, and remanded the cause for further proceedings not inconsistent with its opinion filed March 25, 1963. Michigan Nat. Bank v. Hills, 372 U. S. 591, 83 S. Ct. 914, 9 L. Ed. 2d 961. Upon the motion of the plaintiffs, this court then granted reargument upon the issues presented by the mandate of the Supreme Court of the United States.

By special appearance, and later by answer, the Michigan National Bank objected to the venue of the action. The bank contended that, pursuant to the terms of a federal statute, the action against it could be brought only in the district court of the United States held within the district in which it was established, or in any state, county, or municipal court in the county or city in which it was located having jurisdiction in similar cases. 12 U. S. C. A., § 94, p. 442. This court held that the federal statute was permissive rather than mandatory and that the bank was subject to suit in Nebraska.

The Supreme Court of the United States has now held that the federal statute is controlling, and that a national bank may be sued only in those state courts in the county where the bank is located unless the bank has waived its privilege. Mercantile Nat. Bank at Dallas v. Langdeau, 371 U. S. 555, 83 S. Ct. 520, 9 L. Ed. 2d 523. Thus, the only question which remains at this time is whether the Michigan National Bank has waived its privilege of immunity from suit in the district court for Lancaster County, Nebraska.

The plaintiffs contend that the Michigan National Bank did not make timely objection to the venue of the action in the trial court. A similar contention was

made by the plaintiffs at the time the appeal was heard in this court, but we determined that the question of venue was presented. Hills v. Burnett, *supra*. If the special appearance of the Michigan National Bank had made no objection to the venue of the action, the objection made in the answer was sufficient. Where the defect does not appear upon the face of the record, a defendant who is privileged from suit in the county where the action is brought is not required to make that objection by special appearance but may raise that defense by answer. Baker v. Union Stock Yards Nat. Bank, 63 Neb. 801, 89 N. W. 269, 93 Am. S. R. 484; Stelling v. Peddicord, 78 Neb. 779, 111 N. W. 793; Peters v. Pothast, 120 Neb. 208, 231 N. W. 805; Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236.

The plaintiffs further contend that a provision in the contract is a waiver of any privilege from suit in Lancaster County, Nebraska, that the seller or any assignee of the seller might have. The contract provided in part as follows: "It is the intention of the parties hereto that all matters relating to the execution, interpretation, validity and performance of this contract shall be governed by the laws of the state in which the Buyer now resides, which is the state indicated below." The contract shows the residence of the plaintiffs, who were the "buyers," to be Lincoln, Nebraska. We do not think that the above provision of the contract was intended to relate to the venue of an action brought upon the contract. Consequently, this provision of the contract did not waive the privilege of the Michigan National Bank from suit in Lancaster County, Nebraska.

The judgment of the district court as to all defendants except the Michigan National Bank is affirmed; as to the Michigan National Bank, the judgment is reversed and the cause remanded with directions to dismiss the action as to the Michigan National Bank.

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

MAURICE BERG ET AL., APPELLANTS AND CROSS-APPELLEES, v. MIDWEST LAUNDRY EQUIPMENT CORP., A CORPORATION, APPELLEE AND CROSS-APPELLEE, INDUSTRIAL CREDIT COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT.

124 N. W. 2d 699

Filed November 22, 1963. No. 35409.

SUPPLEMENTAL OPINION

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. On motion for rehearing. See *ante* p. 423, 122 N. W. 2d 250, for original opinion. Original opinion modified. Motion for rehearing overruled.

Ginsburg, Rosenberg & Ginsburg and Norman Krivosha, for appellants.

Young, Denenberg & Mullery, for appellee Midwest Laundry Equipment Corp.

Perry & Perry and James V. Risser, for appellee Industrial Credit Co.

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

BOSLAUGH, J.

The appellee, Midwest Laundry Equipment Corp., has filed a motion for rehearing in which it contends that the appellants are not entitled to recover the amounts paid to it upon the contract for the purchase of the laundry equipment even though the contract is void. This question was not raised in the briefs or argument in this court until the motion for rehearing was filed.

Upon further consideration of the matter, we are now of the opinion that the cause should be remanded to the district court with directions to determine the amount of the payments made by the appellants to the Midwest Laundry Equipment Corp. and whether the appellants

should recover this amount from the Midwest Laundry Equipment Corp. in view of our determination concerning the validity of that contract.

Our opinion in this case filed on June 14, 1963, is modified accordingly. The motion for rehearing is overruled.

ORIGINAL OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

CHARLIE F. BAIR ET AL., APPELLEES, V. MICHIGAN NATIONAL BANK, A CORPORATION, APPELLANT.
124 N. W. 2d 926

Filed November 22, 1963. No. 35439.

Contracts: Actions. A provision in a contract that all matters relating to the execution, interpretation, validity, and performance of it shall be governed by the laws of Nebraska is not a waiver of privilege from suit in Nebraska by an assignee of the contract.

Appeal from the district court for Lancaster County: PAUL W. WHITE, Judge. Reversed and remanded with directions.

Wilson & Barlow, for appellant.

E. D. Warnsholz, for appellees.

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

BOSLAUGH, J.

This action was brought by Charlie F. Bair and Linnie Bair, the plaintiffs, to declare void a loan made to the plaintiffs by the Michigan National Bank, the defendant, and to recover the payments made on the loan. The district court found that the loan was in violation of the Installment Loan Act and entered judgment for the plaintiffs. The bank's motion for new trial was overruled and it has appealed.

The bank filed a special appearance objecting to the jurisdiction of the court over the person of the defendant, which was overruled. The bank then filed a special demurrer, which recited that it reserved and preserved its special appearance, and objected to the venue of the action. The special demurrer was overruled. The bank then filed an answer, reserving and preserving its special appearance, and alleging that the venue of the action was improper. The bank relies on a federal statute which provides that an action against a national bank can be brought only in the district court of the United States held within the district in which it is established, or in any state, county, or municipal court in the county or city in which it is located having jurisdiction in similar cases. 12 U. S. C. A., § 94, p. 442. The Supreme Court of the United States has held that this statute is controlling in this type of action and that a national bank may be sued only in those state courts in the county where the bank is located unless the bank has waived its privilege. Mercantile Nat. Bank at Dallas v. Langdeau, 371 U. S. 555, 83 S. Ct. 520, 9 L. Ed. 2d 523. See, also, Michigan Nat. Bank v. Hills, 372 U. S. 591, 83 S. Ct. 914, 9 L. Ed. 2d 961; Hills v. Burnett, *ante* p. 871, 125 N. W. 2d 66.

The evidence shows that the Michigan National Bank is established and located in Lansing, Ingham County, Michigan. Therefore, in this action the bank is privileged from suit in the district court for Lancaster County, Nebraska, unless it has waived its privilege.

The loan which the bank made to the plaintiffs was evidenced by a promissory note and a contract of conditional sale for the purchase of a house trailer. The loan represented the unpaid balance of the contract for the purchase of the trailer. After the note and contract had been executed, they were endorsed and assigned to the bank.

The contract contained a provision which recited that all matters relating to the execution, interpretation,

validity, and performance of the contract should be governed by the laws of the state of the residence of the buyer which was shown to be Nebraska. The plaintiffs contend that this provision in the contract is a waiver of the privilege of the bank from suit in Lancaster County, Nebraska. We hold to the contrary. Hills v. Burnett, *supra*.

The judgment of the district court is reversed and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD BIERMAN ET AL., APPELLEES, V. ANNE CAMPBELL, APPELLANT.

124 N. W. 2d 918

Filed November 22, 1963. No. 35470.

1. **Schools and School Districts.** The waiver of the requirement of subsection (4) of section 79-486, R. S. Supp., 1961, requiring the county superintendent to dissolve a school district which for five consecutive years contracts for the instruction of its pupils, restricts the right of the county superintendent to dissolve the school district during the school year covered by the waiver.
2. ———. The waiver, having been granted for the sixth year, has exactly the same effect as if the sixth year were the fifth year of the contract instruction.
3. **Schools and School Districts: Injunction.** Injunctive relief will not, in the absence of an abuse of discretion, issue to control the acts of school boards and county superintendents within the limits of the powers conferred on them.
4. ———: ———. Unlawful acts or acts beyond the scope of the powers of such officers may be enjoined where there is no other adequate remedy available on the complaint of one whose property rights will be irreparably injured thereby.

Appeal from the district court for Madison County: GEORGE W. DITTRICK, Judge. Affirmed.

McFadden & Kirby, for appellant.

Bernard Ptak, for appellees.

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

SPENCER, J.

This is an appeal from an order of the district court for Madison County enjoining the dissolution of School District No. 14 of Madison County and its attachment to School District No. 5 of Madison County. The action was brought by Richard Bierman and School District No. 14 of Madison County, Nebraska, who will hereinafter be designated either as plaintiffs or as school district No. 14. The defendant, Anne Campbell, county superintendent of schools of Madison County, who will hereinafter be referred to as county superintendent, perfected the appeal to this court.

For the school year 1962-1963, and for the 5 preceding years, school district No. 14 contracted with school district No. 5 for the education and instruction of pupils of school district No. 14.

Subsection (4) of section 79-486, R. S. Supp., 1961, provides in part as follows: "All the contracts, referred to in subsections (1), (2), and (3) of this section, shall be in writing and copies of all such contracts must be filed in the office of the county superintendent on or before August 15 of each year. The form of such contracts shall be prescribed by the Commissioner of Education. School districts, thus providing instruction for their children in neighboring districts, shall be considered as maintaining a school as required by law. * * * Provided, that the county superintendent shall dissolve and attach to a neighboring district or districts any school district which, for five consecutive years contracts for the instruction of its pupils, except that in instances where such dissolution shall create extreme hardships on the pupils or the district affected, the State Board of Education may, on application by the school board of the district and the recommendation of the county superintendent of the county in which the district is located,

annually waive the requirements of this subsection; * * *."

Pursuant to subsection (4) of section 79-486, R. S. Supp., 1961, the State Board of Education, on application of the school board of school district No. 14 and the recommendation of the county superintendent, waived in writing the requirements for the school year 1962-1963.

On November 30, 1962, the county superintendent caused notice to be given to all the legal voters of school district No. 14 of a hearing to be held December 22, 1962, the purpose and intent of which was the dissolution of school district No. 14 and its attachment to school district No. 5.

On December 19, 1962, petitions filed by 79 percent of the legal voters of School District No. 31 of Madison County, Nebraska, and 78 percent of the legal voters of school district No. 14, were submitted to the county committee for school district reorganization of Madison County pursuant to section 79-402, R. S. Supp., 1961. These petitions called for a change of the boundaries of school district No. 31 so as to annex and include in school district No. 31 the area of school district No. 14.

On December 21, 1962, on petition of the plaintiffs, the county superintendent was enjoined from holding the hearing scheduled for December 22, 1962.

On January 4, 1963, the county superintendent caused another notice to be given to the legal voters of school district No. 14 of a hearing to be held January 26, 1963, the purpose and intent of which hearing was the dissolution of school district No. 14 and its attachment to school district No. 5.

A supplemental petition for an injunction was filed by school district No. 14 on January 22, 1963. The county superintendent filed an answer the same day. Hearing was had January 22, 1963, on a written stipulation of facts. The court found for the plaintiffs and entered a decree permanently enjoining Anne Campbell, county

superintendent of schools, and her successors in office, from proceeding according to the provisions of section 79-486, R. S. Supp., 1961, until and unless it was finally determined that the petitions referred to in the stipulation of facts executed by the purported legal voters of school district No. 14 and school district No. 31 do not as a matter of fact constitute at least 55 percent of the legal voters of each district.

The issue actually tried was whether or not the county superintendent could be enjoined from dissolving school district No. 14 according to the provisions of subsection (4) of section 79-486, R. S. Supp., 1961, after the State Board of Education, on application of school district No. 14 and the recommendation of the county superintendent, waived the requirements for the school year 1962-1963, until such time as the taxpayers of said school district had been given an opportunity to exhaust their rights under section 79-402, R. S. Supp., 1961.

Section 79-402, R. S. Supp., 1961, provides for the change of boundaries of any district upon petitions signed by 55 percent of the legal voters of each district affected. The stipulation of facts states that 79 percent of the legal voters of school district No. 31 and 78 percent of the legal voters of school district No. 14 signed the petitions, so for the purpose of this discussion the petitions must be considered as in full compliance with the statute.

Under section 79-402, R. S. Supp., 1961, the county committee for school district reorganization is required to submit the proposal embraced in the petitions within 40 days to the state committee for school district reorganization for review. The state committee must, within 40 days, review the proposal and return it with any recommendations deemed advisable to the county committee. The county committee is then required to conduct a proper hearing at which the recommendations of the state committee are presented to the legal voters in attendance. Thereafter, the county superintendent

shall then hold a hearing to determine the validity and sufficiency of the petitions, and, if found sufficient, the county superintendent is required to proceed to effect the changes in the district boundary lines as set forth in the petitions.

The waiver of the requirement of subsection (4) of section 79-486, R. S. Supp., 1961, is not made by the county superintendent but by the State Board of Education. The State Board of Education acts on the application of the school district and the recommendation of the county superintendent. This waiver, when once granted, restricts the right of the county superintendent to dissolve the school district under subsection (4) of section 79-486, R. S. Supp., 1961, during the school year covered by the waiver.

The county superintendent argues that the powers and duties of the county superintendent conferred by subsection (4) of section 79-486, R. S. Supp., 1961, insofar as it applies to this case, are mandatory and dependent upon a situation where the district has contracted at least 5 years for the education of its pupils. We have no quarrel with this statement if a waiver is not involved. However, the waiver, having been granted for the 1962-1963 school year, had exactly the same effect as if the 1962-1963 school year were the fifth rather than the sixth consecutive year of contract instruction. The county superintendent could not have taken action in the fifth year. The waiver having been granted for the school year of 1962-1963, the county superintendent had no right to dissolve the district under subsection (4) of section 79-486, R. S. Supp., 1961, during the year covered by the waiver.

Defendant argues that the act of a county superintendent in dissolving a school district is legislative in character and not subject to injunctive relief. The obvious answer is that whatever authority a county superintendent may have must be exercised strictly within the terms and conditions of the law. The Legislature

cannot delegate legislative authority to an individual. It can prescribe the terms and conditions which may bring into operation a dissolution or consolidation of school districts. This is the legislative act. It then can authorize the county superintendent to determine if the facts exist which call the law into operation. See, Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A. L. R. 1056; Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 102 N. W. 2d 599.

It is true that injunctive relief will not, in the absence of an abuse of discretion, issue to control the acts of school boards and county superintendents within the limits of the powers conferred on them. However, unlawful acts or acts beyond the scope of the powers of such officers may be enjoined where there is no other adequate remedy available, on the complaint of one whose property rights will be irreparably injured thereby.

Here, the waiver having been granted for the school year 1962-1963, there was no authority for the county superintendent to proceed under section 79-486, R. S. Supp., 1961. Consequently, she was attempting to exercise authority she did not possess to deprive the vast majority of the voters of school district No. 14 of their legal right to proceed under section 79-402, R. S. Supp., 1961. Plaintiffs were entitled to injunctive relief.

The judgment of the trial court in enjoining the county superintendent from proceeding under section 79-486, R. S. Supp., 1961, is correct and should be and hereby is affirmed.

AFFIRMED.

IN RE ESTATE OF RAYMON A. OGIER, DECEASED. J. M. WHITE, EXECUTOR OF THE LAST WILL AND TESTAMENT OF RAYMON A. OGIER, DECEASED, APPELLEE, V. RAY E. OGIER AND JOANNE K. OGIER, MINORS, BY JAMES E. SCHNEIDER, GUARDIAN AD LITEM, ET AL., APPELLANTS.

125 N. W. 2d 68

Filed November 22, 1963. No. 35471.

1. **Joint Tenancy.** A joint tenancy may be created in real estate and in any kind of personal property that may be held in severalty.
2. ———. In order to create a joint tenancy the purpose must be clearly expressed, otherwise the tenancy will be held to be in common.
3. **Joint Tenancy: Tenancy in Common.** Joint tenancies are not favored in the law, and if not expressly created by statute, contract, conveyance, grant, or devise, the law presumes the existence of a tenancy in common in jointly owned property.
4. **Joint Tenancy.** A joint tenancy in personal property may be created by oral agreement if it is established by a preponderance of the evidence the quality of which is clear, satisfactory, and convincing in character.
5. ———. A joint tenancy is destroyed by any act of one joint tenant which is inconsistent with joint tenancy and such an act has the effect of destroying the right of survivorship incidental to it.
6. ———. Where there is a joint tenancy created in a bank account and one joint tenant withdraws the whole or a part thereof, with or without the consent of the other joint tenant, and the character of the funds withdrawn is thus changed, there has been a severance of the joint tenancy as to the funds withdrawn and an extinguishment of the right of survivorship as to such funds.
7. ———. The holding in the case of Crowell v. Milligan, 157 Neb. 127, 59 N. W. 2d 346, to the effect that a withdrawal of funds from a joint tenancy account does not divest the right of survivorship as to such funds is overruled whether the joint tenancy is created by statute, contract, conveyance, grant, or devise.
8. **Joint Tenancy: Tenancy in Common.** When the evidence is insufficient to create a joint tenancy in jointly owned property, the presumption is that it is held as a tenancy in common.
9. **Costs.** The provisions of section 25-308, R. R. S. 1943, providing that the guardian or next friend is liable for costs of an

action brought by him, has no application to a case brought by another against minors or incompetents he has been appointed to defend.

10. ———. The fee of a guardian ad litem for services rendered should be fixed by the court in which such services were rendered and taxed as costs in such action or proceeding.

11. ———. The circumstances of each case are to be considered in determining to whom the fees of a guardian ad litem are to be taxed or from what source they are to be paid.

12. ———. In determining the value of services rendered by a guardian ad litem the court will consider the nature of the litigation, the amount involved, the result of the suit, the length of time spent on the case, the care and diligence exhibited, and the character and standing of the guardian ad litem as a lawyer.

Appeal from the district court for Lincoln County: CLARENCE S. BECK, Judge. Affirmed in part, and in part reversed and remanded with directions.

James E. Schneider, for appellants.

Maupin, Dent, Kay & Satterfield, Clinton J. Gatz, and Donald E. Girard, for appellee.

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

CARTER, J.

This is an action under the Declaratory Judgments Act to determine the ownership of certain personal property listed in the executor's inventory in the estate of Raymon A. Ogier, deceased. The trial court found for the executor and the guardian ad litem of Ray E. Ogier and Joanne K. Ogier, minor defendants, has appealed.

Raymon A. Ogier died testate on April 25, 1960. He left surviving his widow, Irene Ogier, and two adopted children, Ray E. Ogier and Joanne K. Ogier, twins of the age of 16 years. By the terms of the will of the deceased, Irene Ogier was the legatee and devisee of personal and real property inventoried at approximately $175,000 about which there appears to be no dispute. The testator also conveyed certain described business properties

and all interest in two partnerships known as Ogier's of Wallace and Ogier's of Stratton in trust for the benefit of Irene Ogier during her lifetime, with the power of appointment, the remainder otherwise to become a part of the corpus of trusts set up for Ray E. Ogier and Joanne K. Ogier. The residue of the estate was set up in the form of trusts with Ray E. Ogier and Joanne K. Ogier as the beneficiaries. The issues in this case are whether or not certain securities hereafter described were held in joint tenancy with Irene Ogier and became her property as survivor, or whether or not they, or some part of them, are a part of the residue of the estate and therefore a part of the corpus of the trusts established for the benefit of Ray E. Ogier and Joanne K. Ogier. Specific legacies were given to Margaret White, a cousin of the deceased, and her husband, J. M. White. The latter was the assistant manager of Ogier's of North Platte and a faithful employee of the deceased and his business enterprises. J. M. White was the named executor in the will of the deceased and the designated trustee of the trusts established by the will with full and complete discretion in their handling.

The deceased was an equal partner with Irene Ogier in businesses designated as Ogier's of Wallace, and Ogier's of Stratton. The deceased and Irene Ogier each owned a 26 percent interest in the partnership designated as Ogier's of North Platte. Other interests were owned by the trustees of trusts in favor of Ray E. Ogier and Joanne K. Ogier established by the will of Nicholas E. Ogier, the father of the deceased. Margaret White and J. M. White were also partners to the extent of 4 percent each. The deceased and Irene Ogier each owned a 30 percent interest in Ogier's of McCook. The record does not reveal the owners of the interest in Ogier's of McCook other than that of the deceased and Irene Ogier.

The personal property involved in this litigation consists of municipal bonds of the face value of $91,000, General Motors Acceptance Corporation notes of the

face value of $275,000, and United States government bonds of the face value of $25,000.

The will was admitted to probate and J. M. White was appointed the executor of the estate. The executor proceeded immediately to inventory the assets of the estate. The executor's original inventory was filed in the county court of Lincoln County on December 12, 1960. The municipal bonds were listed as the property of the deceased. The government bonds and General Motors Acceptance Corporation notes were not listed, they evidently being included in the provision of the inventory stating that property held in joint tenancy with Irene Ogier was not included. The executor asked and was granted leave to amend his inventory by showing that the City of Cambridge bonds in the amount of $5,000 were the property of Irene Ogier and erroneously included, and that a bank account in the McDonald State Bank in the amount of $2,050.96 shown as belonging to the deceased was in fact a joint tenancy account with Irene Ogier and should not have been listed as an asset of the estate.

On or about November 23, 1960, the executor filed an inventory of assets in which he stated that from an examination of books and records he had determined that the listed property was owned by the deceased and Irene Ogier in joint tenancy at the time of the death of the deceased. Among the assets so listed as being held in joint tenancy at the time of the death of the deceased are $200,000 of General Motors Acceptance Corporation notes, $5,000 of Mutual Building and Loan Association certificates, government bonds in the amount of $32,100 which includes the $25,000 in bonds here in dispute, and $37,290.57 in bank accounts. The appellee asserts in his brief that the $75,000 in notes over and above the $200,000 of General Motors Acceptance Corporation notes were in fact joint tenancy notes owned by the deceased and Irene Ogier.

On August 22, 1962, the executor filed his petition for

the final settlement of his account in the county court of Lincoln County. On the same day the executor filed a petition in the county court of Lincoln County for a declaration and determination of ownership of the property in question in this appeal. Ray E. Ogier and Joanne K. Ogier, minors, and James E. Schneider, guardian ad litem, were made defendants in this action. On September 10, 1962, James E. Schneider, the guardian ad litem of Ray E. Ogier and Joanne K. Ogier, filed his objection denying the allegations of the petition asserting that the questioned property was held in joint tenancy and demanding that the executor account for the property described in his petition. The county court, after a hearing, held for the executor and the guardian ad litem appealed to the district court.

In the district court the parties stipulated that the case be tired on the pleadings made up in the county court. It was also stipulated that the evidence taken in the county court could be used as evidence in the district court, subject to the objection of the guardian ad litem that the evidence of Irene Ogier was incompetent under the dead man's statute, section 25-1202, R. R. S. 1943, and subject to objection as to any and all conclusions and opinions of the witnesses contained in the evidence taken in the county court. It was further stipulated that the witnesses testifying in the county court could be further examined in the district court and that additional evidence might be adduced by either party in the district court. The evidence taken in the county court was offered in evidence in the district court and additional evidence was adduced in that court. The trial court found for the executor and against the guardian ad litem. The latter has appealed to this court.

The guardian ad litem insists that Irene Ogier is an incompetent witness under the dead man's statute, section 25-1202, R. R. S. 1943. An examination of her evidence, in the light of the conclusion that we have reached, reveals that it does not tend to support a finding that

a joint tenancy was created. Her evidence was just as consistent with the establishment of a tenancy in common, if not more so, as with a joint tenancy. We do not deem it necessary, therefore, to pass upon or discuss her competency as a witness.

The executor asserts that the $275,000 in General Motors Acceptance Corporation notes were held in joint tenancy by the deceased and Irene Ogier. The situation as to $200,000 of the notes is identical, while as to the remaining $75,000 in notes the situation is somewhat different. We shall deal with them in the above order.

The evidence shows that deceased and Irene Ogier each had a 50 percent interest in the partnerships designated as Ogier's of Wallace and Ogier's of Stratton. They each had lesser but equal interests in Ogier's of North Platte and Ogier's of McCook. Distributions of profits from these partnerships were ordinarily made by a single check to the deceased for the profits distributed to deceased and Irene Ogier. These checks were deposited in bank accounts carried in North Platte and McCook. The account in the McDonald State Bank, North Platte, Nebraska, was in the name of Mr. or Mrs. Ray Ogier and was a joint tenancy account payable to either or the survivor. The account in the First National Bank of McCook, Nebraska, was an account in the name of Ray Ogier with a joint tenancy agreement attached, signed by the deceased and Irene Ogier. The account in The McCook National Bank, McCook, Nebraska, was also an account in the name of the deceased with a joint tenancy agreement attached, signed by the deceased and Irene Ogier. The account in the First National Bank, North Platte, Nebraska, appears to be a joint tenancy account carried in the name of Ray Ogier or Irene Ogier. Some of the checks written on these accounts in payment for notes of the General Motors Acceptance Corporation appear to have been written before the joint tenancies were created. We do not deem this of significance in the disposition of the case for the reason that all of such

notes were renewed, endorsed, controlled, and possessed in the same manner and under the same conditions as those purchased from the joint tenancy bank accounts.

The evidence shows the deceased as a dealer in motor vehicles was eligible to purchase short time notes from the General Motors Acceptance Corporation. On April 11, 1951, the deceased first purchased notes of the corporation in the amount of $40,000. He paid for them with three checks signed by himself, drawn on bank accounts held in joint tenancy by himself and Irene Ogier. The notes issued by the corporation were made payable to bearer and contained no evidence of ownership or special interest in any person. Upon the receipt of the notes, deceased caused the following unsigned endorsement to be typed on them: "Pay to the order of Ray or Irene Ogier." When the notes became due, deceased caused a further endorsement to be placed on them, making the notes payable to the order of General Motors Acceptance Corporation, which endorsements were signed by Ray Ogier.

The handling of the General Motors Acceptance Corporation notes is described in the evidence substantially as follows: On March 20, 1951, the deceased inquired of General Motors Acceptance Corporation about investing in the notes of the corporation. On March 23, 1951, the corporation advised the deceased of the method of handling. On April 11, 1951, deceased purchased $40,000 of the corporation notes with three checks signed by Ray Ogier as follows: A check for $14,000 drawn on the McCook National Bank, a check for $18,000 drawn on the First National Bank of North Platte, and a check for $8,000 drawn on the First National Bank of McCook. On receipt of the checks the corporation issued its notes in the amount of $40,000 payable to bearer and issued its check for interest for the term of the notes at 2½ percent per annum. Upon receipt of the notes deceased endorsed them as hereinbefore stated and placed them in a locked box in the safe of Ogier's of North Platte.

The interest was deposited in the joint tenancy account in the McCook National Bank.

Shortly before the notes became due they were endorsed by deceased to the order of General Motors Acceptance Corporation and returned for renewal. Additional funds were enclosed from time to time for the purchase of additional notes. No notes were ever paid. The deceased requested and obtained renewal of old notes and invested in new ones until they totalled the sum of $145,000, all of which were purchased from the joint tenancy accounts in the First National Bank of McCook, the McCook National Bank, and the First National Bank of North Platte.

The evidence shows that the partnerships in McCook and North Platte, in which deceased and Irene Ogier were partners, purchased notes of General Motors Acceptance Corporation in the amount of $130,000, which were distributed to deceased and Irene Ogier as profits in lieu of money. They were purchased and handled the same way as all other notes of the corporation. They were made payable to bearer and were found in the "Green Box" in the safe of Ogier's of North Platte. Notes in the amount of $75,000 were found in the "Green Box" in an envelope marked "Irene." These notes were first inventoried as property of Irene Ogier but after further examination of the records they were found by the executor to have the same ownership status as the remainder of the notes.

The deceased retained the general control and custody of these bearer notes. When deceased was absent or ill, Irene Ogier had the keys to his desk and the boxes in the safe. She on occasion entered the box and on occasion had typed the endorsement on new notes at the direction of the deceased. J. M. White also placed the typewritten unsigned endorsements on newly received notes and placed them in the safe of Ogier's of North Platte. The evidence is clear that deceased controlled the handling of the notes, although White and

Irene Ogier did participate in their handling at his direction during his absence or illness. It is on these facts that the executor urges that the $275,000 of General Motors Acceptance Corporation notes were held in joint tenancy by Raymon and Irene Ogier at the time of the death of Raymon A. Ogier.

We point out that there is nothing in writing on the notes, or in any instrument pertaining to them, that in any manner refers to a joint tenancy or a right of survivorship. The unsigned endorsement, "Pay to the order of Ray or Irene Ogier," placed on the back of the notes by the deceased is evidence that Irene Ogier has some interest in them, but it is not sufficient to show a joint tenancy or a contractual right of survivorship. J. M. White testified that the purpose of the endorsement as told to him by the deceased was two-fold: First, to make it more difficult for a thief or wrongdoer to negotiate these bearer notes, and second, to indicate that they belonged to both the deceased and Irene Ogier.

This court has recognized common-law joint tenancies and the right to provide for survivorship in a tenancy in common by contract. Such estates may be created in real estate and in any kind of personal property that may be held in severalty. It is fundamental that in order to create a joint tenancy the purpose must be clearly expressed, otherwise the tenancy will be held to be in common. Joint tenancies are not favored in the law, and if not expressly created by statute, contract, conveyance, grant, or devise, the law presumes the existence of a tenancy in common. A joint tenancy in personal property may be created by oral agreement if it is established by a preponderance of the evidence, the quality of which is clear, satisfactory, and convincing in character. As we have indicated, there is no such evidence contained in the record before us. The foregoing principles of law have been announced by this court in numerous cases, to wit: Sanderson v. Everson, 93 Neb. 606, 141 N. W. 1025; In re Estate of Vance, 149

Neb. 220, 30 N. W. 2d 677; Buford v. Dahlke, 158 Neb. 39, 62 N. W. 2d 252; Whiteside v. Whiteside, 159 Neb. 362, 67 N. W. 2d 141.

It is fundamental that an existing estate in joint tenancy can be destroyed by an act of one joint tenant which is inconsistent with joint tenancy and such an act has the effect of destroying the right of survivorship incidental to it. The creation, as well as the continued existence, of an estate in joint tenancy under the common law, which is recognized in this state, subject to the right of the Legislature to modify the common-law rule which it has done by section 76-118, R. R. S. 1943, requires a unity of possession, a unity of interest, a unity of time, and a unity of title in all holding an interest in such estate. Any act of a joint tenant which destroys any one or more of its necessarily coexistent unities operates as a severance of the joint tenancy and extinguishes the right of survivorship. Stuehm v. Mikulski, 139 Neb. 374, 297 N. W. 595, 137 A. L. R. 327; Anson v. Murphy, 149 Neb. 716, 32 N. W. 2d 271; Buford v. Dahlke, *supra;* Whiteside v. Whiteside, *supra;* DeForge v. Patrick, 162 Neb. 568, 76 N. W. 2d 733.

It is also the rule of this state that when there is a joint tenancy created in a bank account and one joint tenant withdraws the whole or any part thereof, and the character of the fund is thus changed, as to the funds withdrawn there has been a severance of the joint tenancy and the extinguishment of the right of survivorship. Whiteside v. Whiteside, *supra;* Buford v. Dahlke, *supra;* DeForge v. Patrick, *supra.*

The executor contends, however, that where one joint tenant withdraws funds held in a bank in joint tenancy, the joint interest of the depositors follows the funds withdrawn by either and negatives the idea that such withdrawals were severed from the joint tenancy for his own use and that other joint tenants may trace and be awarded that which has retained the joint ownership character. The executor relies on Crowell v. Milligan,

157 Neb. 127, 59 N. W. 2d 346, and cases therein cited, which so hold. In Rose v. Hooper, *ante* p. 645, 122 N. W. 2d 753, the case of Crowell v. Milligan, *supra,* was expressly overruled on the point in support of which it was cited in this case. This court in Rose v. Hooper, *supra,* said: "Our decision in this case does not agree with the citations of law herein quoted from Crowell v. Milligan, *supra,* if they were meant to apply to joint certificates in building and loan associations or joint bank accounts. Therefore, the case of Crowell v. Milligan, *supra,* insofar as it conflicts with this opinion, is hereby overruled." We go further and hold that it is wrong in principle and should not be applied to any joint tenancy created by statute, contract, conveyance, grant, or devise.

For the foregoing reasons we hold that the withdrawal of the joint tenancy funds by the deceased for the purchase of bearer notes of the General Motors Acceptance Corporation amounts to a severance of the joint tenancy as to the funds withdrawn and the consequent extinguishment of the right of survivorship in the notes purchased therewith.

The executor put in issue the ownership of school district, city, and village bonds in the amount of $91,000. We exclude from this discussion bonds of the City of Cambridge in the amount of $5,000 which we will discuss separately. The remaining $86,000 in municipal bonds were purchased by the deceased from joint tenancy funds in the same manner as the General Motors Acceptance Corporation notes. They were all bearer bonds. On the death of the deceased the bonds were found in a small box in the safe of Ogier's of North Platte. The safe was in the office of the deceased. The deceased, Irene Ogier, J. M. White, and a bookkeeper knew the combination to the safe. The small box had a lock and key. The key was kept in the desk drawer of the deceased, which was usually locked. White testified that deceased told him he was buying the bonds as

an investment "for my wife and myself." There is no writing of any kind indicating any intent that the bonds were to be held in joint tenancy. There is not, in fact, any oral evidence indicating any intent to create such an estate in these bonds. The executor relies, as he did in the case of the General Motors Acceptance Corporation notes, on the source of the funds used to purchase the bonds and the circumstances surrounding their possession and custody as establishing the joint tenancy. Their status is subject to the rules applied to the General Motors Acceptance Corporation notes and lead to the same result. The money withdrawn from the joint tenancy bank accounts and used for the purchase of the foregoing municipal bonds was thereby severed from the joint tenancy. The bonds were not held in joint tenancy and the right of survivorship incidental to the joint tenancy bank accounts was estinguished when the purchase money for the bonds was severed from the joint tenancy accounts.

As to the City of Cambridge bonds in the amount of $5,000, the evidence shows that Irene Ogier had a personal account in the First National Bank of North Platte. On June 20, 1958, she issued her personal check in the amount of $5,009.93 to the Wachob-Bender Corporation in payment for the City of Cambridge bonds. On June 24, 1958, the check was charged to her personal account in the First National Bank of North Platte. The evidence clearly shows that Irene Ogier was at all times the owner of the Cambridge bonds and that they should not have been listed as an asset of the estate of Raymon A. Ogier.

The ownership of five United States government bearer bonds, each in the amount of $5,000, is also involved in this appeal. On the death of the deceased, three of the bonds were found in a safety deposit box in the First National Bank, North Platte, Nebraska. The safety deposit box lease in which they were found showed Ray Ogier as renter and Irene Ogier and J. M.

White as co-renters. They were in an envelope in the safety deposit box. On the outside of the envelope were the words "Ray Ogier." It was stipulated that Irene Ogier never signed to enter this safety deposit box or that she ever did enter it. These three bonds were paid for by a check for $14,963.95 signed by Ray Ogier and paid from an account in the First National Bank, North Platte, Nebraska, designated "Mr. or Mrs. Ray Ogier (Irene)." The signature card for this account shows a joint tenancy agreement. In other words, these three bonds were purchased with joint tenancy funds.

The other two government bonds were found in a safety deposit box in the First National Bank, McCook, Nebraska. The rental agreement for this safety deposit box was signed by Irene Ogier and Ray Ogier. These two bonds were in an envelope marked "Ray and Irene Ogier." It was stipulated that Irene Ogier never signed to enter or ever did enter the deposit box in the First National Bank of McCook. The bonds were paid for by a check in the amount of $9,985.85 signed by Ray Ogier, drawn on the McCook National Bank. The check was paid from an account designated "Ray Ogier, Personal." Attached to the signature card for this account is a joint tenancy agreement signed by Ray Ogier and Irene Ogier. The evidence shows, therefore, that these two bonds were paid from joint tenancy funds.

There is no evidence, oral or written, indicating the existence of a joint tenancy ownership of these government bonds payable to bearer. As in the cases of the General Motors Acceptance Corporation notes and the municipal bonds, the executor relies upon the fact that the bonds were purchased with money from joint tenancy accounts and the circumstances surrounding their possession and control after their purchase. The same rules apply to these bonds as was hereinbefore applied to the General Motors Acceptance Corporation notes and the municipal bonds involved in this litigation. The govern-

ment bonds were not held in joint tenancy and a right of survivorship does not exist.

We think the evidence shows that the General Motors Acceptance Corporation notes in the amount of $275,000, the municipal bonds in the amount of $86,000, and the United States government bonds in the amount of $25,000 were owned by Irene Ogier and Raymon A. Ogier at the time of the latter's death as tenants in common. This means that Irene Ogier is entitled to $193,000 thereof as her one-half of the common property and that the remaining $193,000 is a part of the residue of the estate of Raymon A. Ogier, deceased, which, under the terms of the will, becomes a part of the corpus of the trusts set up therein for the benefit of the minor children, Ray E. Ogier and Joanne K. Ogier. We hold, also, that the City of Cambridge bonds in the amount of $5,000 are the property of Irene Ogier and no part of the assets of the estate of Raymon A. Ogier, deceased.

Complaint is here made of the action of the trial court in assessing the costs of the action in the district court to the guardian ad litem. The executor relies in part on section 25-308, R. R. S. 1943, which provides: "The guardian or the next friend is liable for the costs of the action brought by him, and, when he is insolvent, the court may require security for them. Either may be a witness in an action brought by him." This section of the statutes has no application in the instant case. The present action was brought by the executor, not the guardian ad litem. The guardian ad litem as well as the minor children he was appointed to represent were made defendants in the action. The resulting costs were the result of action by the executor and not the guardian ad litem.

In view of the reversal of the judgment of the district court, we hold that the costs should be taxed against J. M. White as executor of the estate of Raymon A. Ogier, deceased. The costs of this appeal are likewise taxed to

J. M. White, executor of the estate of Raymon A. Ogier, deceased.

The guardian ad litem also complains of the failure of the trial court to allow an attorney's fee to him for services rendered in that court. The judgment of the district court provided that the guardian ad litem's fees for services rendered in the county and district courts should be first passed upon by the county court of Lincoln County. It further provided that the district court retained jurisdiction for the allowance of a guardian ad litem's fee for services rendered in the district court if subsequent application be made therefore in the district court.

The duty of a guardian ad litem toward the minors or incompetents he represents is a responsible one which has been commented on many times by this court and will not be reviewed here. If the action of a guardian ad litem is reasonable, and within the duties of a guardian ad litem in protecting the best interests of the minors or incompetents whom he was appointed to represent, he is entitled to reimbursement for expenses and to an allowance of fees for services rendered. A guardian ad litem who acts in good faith in the performance of his duty will not ordinarily be hindered by the fear that he will be charged with expenses and nonpayment for services rendered. The result obtained in this court by the guardian ad litem in the present case is proof enough of the good faith exercised in appealing the case to the district court, and then to this court. See, Boden v. Mier, 71 Neb. 191, 98 N. W. 701; Hunter v. Buchanan, 87 Neb 277, 127 N. W. 166, 29 L. R. A. N. S. 147, Ann. Cas. 1912A 1072.

The basic question posed is, in what court should the fees of the guardian ad litem be allowed. The fund out of which they are to be paid is of little concern. If chargeable to the executor they would be paid from the residuary estate which is given to the trusts set up for these minor defendants. If charged to the funds recov-

ered for the minor defendants, the end result would be the same.

The proper court from which to secure an allowance of attorney's fees for a guardian ad litem is raised by this appeal. The fees of a guardian ad litem are chargeable as costs in cases which involve minors or incompetents in litigation. It would seem, therefore, that the fees of a guardian ad litem should be taxed as costs in the court or courts in which his services were rendered. See Wood Realty Co. v. Wood, 132 Neb. 817, 273 N. W. 493. This has been the practice followed in this court from its earliest decisions. The circumstances of each case are to be considered in determining to whom the fees of a guardian ad litem are to be taxed or from what source they are to be paid. A guardian ad litem who acts reasonably and in good faith is entitled to be paid whether or not he is successful in the litigation. Copple v. Bowlin, 172 Neb. 467, 110 N. W. 2d 117. He is entitled to such compensation for such service as the court shall deem reasonable. § 7-113, R. R. S. 1943; Wood Realty Co. v. Wood, *supra;* Copple v. Bowlin, *supra.*

The district court was in error in referring to the county court for its consideration the allowance of a guardian ad litem's fee for services rendered in the district court. The allowance of such a fee is for the district court and the amount allowed should be taxed as costs in that court. On January 8, 1963, the guardian ad litem filed his application and showing in the district court for the allowance of fees, costs, and expenses in that court. Costs and other expenses amounting to $182.30 were shown. They should and hereby are taxed to the executor of the estate.

The application shows in detail the services rendered in the district court, all of which were legal in character. The matter of the allowance of the fees of the guardian ad litem for services rendered in the district court is here for review.

In determining the value of services rendered by an

attorney who has been appointed guardian ad litem the court will consider the nature of the litigation, the amount involved, the result of the suit, the length of time spent on the case, the care and diligence exhibited, and the character and standing of the attorney. Allen v. Tallon, 120 Neb. 611, 234 N. W. 411. The case was an intricate one requiring the examination of many records. It has been in the courts for more than 14 months. The legal questions involved were not simple in any sense of the word. The amount involved is $391,000. It was time consuming in its preparation and presentation to the court. We think a guardian ad litem's fee of $6,000 should have been allowed by the district court. The guardian ad litem's fee in the district court is hereby fixed at $6,000.

The guardian ad litem is also entitled to fees for services rendered in this court. The record shows that the issues in this case were tried in the county and district courts of Lincoln County, both of which resulted in adverse judgments to the guardian ad litem's contentions. The guardian ad litem perfected his appeal to this court. The case was comprehensively briefed and argued in this court. The result was a recovery of $193,000 for the two minor children whom he represented. After a consideration of all the facts before this court, we allow the guardian ad litem a fee of $4,000 for services rendered in this court.

The judgment of the trial court finding Irene Ogier to be the sole owner of the City of Cambridge bonds in the amount of $5,000 is affirmed. The judgment of the trial court holding the General Motors Acceptance Corporation notes in the amount of $275,000, the municipal bonds in the amount of $86,000, and the United States government bonds in the amount of $25,000 to be the sole property of Irene Ogier is reversed and the cause remanded with directions to enter a judgment holding such notes and bonds to have been owned by Irene Ogier and the deceased as tenants in common at the time

of the latter's death. The guardian ad litem is awarded a fee of $6,000 for services rendered in the district court and a further sum of $4,000 for services rendered in this court, payable by the executor from the residue of the estate of Raymon A. Ogier, deceased. Expenses of the guardian ad litem in the district court of $182.30 are taxed to the executor of the estate. The costs of this appeal are likewise taxed to the executor of the estate.

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

EDD STEEL, APPELLEE AND CROSS-APPELLANT, V. EMMANUEL NORDIN, APPELLANT AND CROSS-APPELLEE.

124 N. W. 2d 921

Filed November 22, 1963. No. 35476.

1. **Negligence: Trial.** The question of the existence of negligence or contributory negligence is for a jury where different minds may reasonably draw different conclusions from the evidence as to the existence of negligence or contributory negligence.
2. **Automobiles: Negligence.** When one, being in a place of safety, seeing and being aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery.
3. ———: ———. Where a person looks but does not see an approaching motor vehicle because of unusual conditions or circumstances, or sees the approaching vehicle and erroneously judges its speed or distance, or for some other reason assumes he could safely complete the movement, the question of negligence and contributory negligence is usually for the jury.

Appeal from the district court for Lincoln county: JOHN H. KUNS, Judge. Reversed and remanded with directions.

Maupin, Dent, Kay & Satterfield, Clinton J. Gatz, and Donald E. Girard, for appellant.

Murphy, Pederson & Piccolo, for appellee.

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

YEAGER, J.

This is an action by Edd Steel, plaintiff and appellee, growing out of an accident wherein the plaintiff claims to have sustained injuries and damages which he asserts were caused by negligence of Emmanuel Nordin, defendant and appellant. The action was tried to a jury and a special verdict was returned in favor of the plaintiff and against the defendant. A judgment was rendered in favor of the plaintiff and against the defendant for $13,163.31 with interest at 6 percent per annum from November 15, 1962, and costs, pursuant to indications contained in the verdict. From this judgment the defendant has appealed and the plaintiff has filed a cross-appeal.

The trial proceeded in due course and at the conclusion of the plaintiff's evidence, the defendant moved for a directed verdict. This motion was overruled. The defendant adduced his evidence and rebuttal evidence was adduced by the plaintiff. At the conclusion of all of the evidence the defendant moved for a directed verdict in his favor. The plaintiff moved for a directed verdict in his favor. These motions were overruled. The case was then submitted and the results which have been mentioned followed.

After the verdict was returned the defendant filed a motion for judgment notwithstanding the verdict and with it a motion for new trial. The plaintiff also filed a motion for judgment notwithstanding the verdict.

Afterward a judgment was rendered in favor of plaintiff and against the defendant for $13,163.31, the amount mentioned earlier herein. The motions of the parties for judgment notwithstanding the verdict and the defendant's motion for new trial were overruled.

The defendant's motion for judgment notwithstanding the verdict contains assignments of numerous rea-

sons why it should have been sustained, which are reasserted as assignments of error in this court as grounds for reversal of the judgment. One of these is that there was an insufficiency of evidence to support a submissible issue of the liability for the damage claimed by plaintiff to a jury. This question presented by assignment of error calls for first consideration herein. This is true since if the evidence is insufficient prima facie to establish liability the other asserted grounds for reversal require no consideration in this opinion.

The action here grew out of an accident which occurred in Lincoln County, Nebraska, on September 13, 1957, and was instituted by the filing of the petition on August 24, 1960. The allegations of negligence, briefly stated, are that at about 11:30 p.m. on September 13, 1957, the defendant carelessly and negligently, suddenly, without warning, and while failing to have his car under proper control and while failing to keep a proper lookout for plaintiff, who was standing behind the car, as he knew, backed his Ford car with great force and violence into and against the plaintiff in such manner that the rear bumper of defendant's car crushed and broke both of plaintiff's legs and thus proximately caused injuries, disabilities, and damages to the plaintiff. The claimed character of the injuries and damages are pleaded, but a statement thereof is of no importance here. By answer the defendant denied these allegations.

The evidence as to how the accident happened is not in any large measure in dispute. The parties agree that on the evening of the accident at the home of plaintiff, which is on a farm and ranch, they with their wives and another couple had a party. On the farm the plaintiff produced some watermelons and muskmelons. At the conclusion of the party the plaintiff offered to supply the defendant with some melons. The two got into the car, a 1951 Ford, and drove to the melon patch where some melons were obtained and placed in the car. After this the plaintiff informed the defendant that in a truck

in the barn, which was not far from the house, were some other melons some of which he offered to give to the defendant. The barn had a driveway extending from north to south and the truck with the melons stood just inside a door which was at the north end of the barn. This was a hanging door which was opened and shut by moving it back and forth by rollers on a track from which it was suspended. At the outset of events involved here the door was closed. The area was not lighted and light from adjacent areas did not extend into it.

On departure from the melon patch to get the melons at the barn the parties agreed that the defendant should drive back to the north of the barn to a driveway leading from the north southward to the barn and place his car thereon so as to back it to or near the door in order that melons from the truck could be loaded into it. The car was so placed and stopped a distance, estimated at 20 to 30 feet by the plaintiff and at 25 to 30 feet by the defendant, from the door, and the plaintiff got out of the car on the right-hand side. He had a flashlight which is not in evidence and has not been described.

It was a rainy or misty night and the soil was wet which caused the tires of the car, when it was in motion, to slip or spin on the driveway on backward movement toward the door. On the driveway extending northward about 2 feet was a cement slab. Extending northward from this slab for 8 or 10 feet was an area of gravel. From the door northward in a distance of about 16 feet the driveway declined about 15 inches.

When the car stopped the plaintiff got out on the right-hand side with his flashlight and started walking, always on the right-hand side and out of the path of the car, and signaling for backward movement of the car by the defendant.

The testimony of the plaintiff is that the car started backward pursuant to these signals and never did at any time stop until this accident happened. The evi-

dence discloses that the plaintiff moved faster than the car and when he got to a point not clearly fixed but which he desired and would have permitted the defendant to stop within 6 feet of the barn door, he signaled for defendant to stop. At that time he was still not within the path of the car which he at the time knew was moving backward.

The defendant observed the movements of the plaintiff through the window or windows on the side and the rear of the car as he moved backward with his flashlight alongside the driveway. There is no evidence that he ever saw any character of stop signal or saw or could have seen the plaintiff behind or in the path of the moving car. There is evidence that the defendant could not have seen the door from his position in the car because of absence of lighting facilities, and there is none that he could have seen the plaintiff or other objects.

Immediately after giving the signal which he said that he gave to the defendant to stop, with full knowledge that the car was moving and without waiting to see if he did, would, or could stop the car, the plaintiff turned and moved from his place of safety into the path of the car and started to open the door to the barn. After he had started to open the door, as he testified, he sensed that the car had not stopped, whereupon he turned facing the car and was pushed back into the door, and as a result thereof the bones below the knees of both legs were fractured.

The defendant testified that he saw no signal to stop and could not see anything behind the car before the accident.

There is evidence that at some point after the backward movement of the car started, the car increased its speed but none that it had ever stopped before the accident.

The plaintiff adduced evidence the effect of which was to say that after the accident the defendant stated that the increased speed was caused by his foot slipping

off of the clutch. This is denied by the defendant. The inference which flows from his testimony is that the speeding up came about when the tires reached the graveled area of the driveway, with a possibility that his foot may have slipped on the brake pedal.

It is pointed out that the evidence discloses that there was no intention on the part of the plaintiff that the car should be backed into the barn, but only that it should be backed to a point near the door so that the melons could be transferred from the truck to the car without the parties getting wet. The plaintiff intended that it should be stopped about 6 feet outside but there is no evidence that this intention as to distance was communicated to the defendant. On the basis of this intention on the part of the plaintiff and on reliance on the signal which he said he gave, he turned from his position at the side of the driveway and moved into the path of the moving car and, as has been said, was struck and injured.

It is submitted that upon this résumé of evidence the question of whether or not the plaintiff has sustained sufficient proof of a cause of action depends.

In an approach to a determination of this question the following rule must be given consideration and application and it must control if the evidence meets its affirmative exactions, in which event the right to a judgment notwithstanding the verdict would require denial: "The question of the existence of negligence or contributory negligence is for a jury where different minds may reasonably draw different conclusions from the evidence as to the existence of negligence or contributory negligence." Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040. See, also, Sayers v. Witte, 171 Neb. 750, 107 N. W. 2d 676.

The matter for consideration at this point does not relate to this rule in its entirety but only to the evidence of contributory negligence of the plaintiff, that is whether or not the plaintiff was guilty of contribu-

tory negligence of such a character and in such a degree as to defeat a right of recovery.

The defendant contends that the evidence without reasonable dispute discloses that the plaintiff was guilty of such contributory negligence. He contends that the following rule is applicable and that under it he is entitled to judgment in his favor: "When one, being in a place of safety, sees and is aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery." Travinsky v. Omaha & C. B. St. Ry. Co., 137 Neb. 168, 288 N. W. 512. This pronouncement was quoted with approval in Hughes v. Omaha & C. B. St. Ry. Co., 143 Neb. 47, 8 N. W. 2d 509. See, also, Gade v. Carlson, 154 Neb. 710, 48 N. W. 2d 727; Heinis v. Lawrence, 160 Neb. 652, 71 N. W. 2d 127, 52 A. L. R. 2d 1428; Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144; Larsen v. Omaha Transit Co., 168 Neb. 205, 95 N. W. 2d 554.

The plaintiff contends that this rule does not apply to the case here and that here was a jury question under the rule stated in Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355, as follows: "Where such a driver looks but does not see an approaching motor vehicle because of unusual conditions or circumstances, or sees the approaching vehicle and erroneously misjudges its speed or distance, or for some other reason assumes he could safely complete the movement, the question of negligence is usually for the jury." The rule which the defendant contends is applicable is also considered in this case and is in nowise modified or overruled. The two rules are also considered in Waite v. Briggs, *ante* p. 104, 120 N. W. 2d 547, and there the rule contended for by defendant is not modified or overruled.

Examination makes it clear that before the rule presented by the plaintiff can operate some condition must

be existent or come about the effect of which might or could reasonably be misleading or mistaken. This examination furnishes no excuse in instances where a person in a place of safety, seeing and being aware of the approach of a moving vehicle in close proximity to him, suddenly moves from his place of safety into the path of the vehicle and is struck and injured.

Conclusively and without substantial dispute this describes the conduct of the plaintiff which led to the accident involved here and the consequent injuries to the plaintiff. In the light of the controlling rules he was guilty of contributory negligence in a degree which was as a matter of law more than slight, the consequence of which is that the verdict in his favor may not be allowed to stand. Under the evidence no jury question was involved.

At the conclusion of the evidence in the case the defendant was entitled to a directed verdict in his favor. This was denied. After verdict he was entitled to a judgment in his favor notwithstanding the verdict. This was denied. He is now entitled to a judgment in his favor notwithstanding the verdict.

Accordingly the judgment of the district court is reversed and the cause remanded to that court with directions to render judgment in favor of the defendant on his motion for judgment notwithstanding the verdict.

The other questions raised by the parties require no consideration herein.

REVERSED AND REMANDED WITH DIRECTIONS.

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3. When railroad rates are discriminatory and preferential stated. United Mineral Products Co. v. Nebraska Railroads ---------- 285
4. Where discrimination as to rates is an issue, comparison of the commodity price with rates of transportation may be an important issue. United Mineral Products Co. v. Nebraska Railroads ---------- 285
5. Rate discrimination is a fact issue peculiarly committed to the discretion of the railway commission. Its decision may not be disturbed unless arbitrary and unreasonable and outside of the scope of its authority. United Mineral Products Co. v. Nebraska Railroads ---------- 285
6. The lowest rates published, or charged, for substantially the same kind of service are prima facie evidence of a reasonable rate for the services under investigation. United Mineral Products Co. v. Nebraska Railroads ---------- 285
7. In establishing through joint rates, the railway commission is required to consider average rates charged by the railroads for shipments within this

state for like distances over their respective lines. United Mineral Products Co. v. Nebraska Railroads 285
8. Railroads may not reduce rates to meet competition at one point and refuse to meet it at other points where the circumstances are substantially similar. United Mineral Products Co. v. Nebraska Railroads ---------- 285

Chattel Mortgages.
To warrant reformation of a chattel mortgage where there is a misdescription of land upon which a crop of wheat is growing, the proof must be clear, convincing, and satisfactory. Walkenhorst v. Apolius 583

Commerce.
1. The power of Congress to regulate commerce among the several states and with foreign nations is supreme and plenary; it is complete in itself and knows no limitations except the prohibitions and limitations of the United States Constitution and its amendments. Frontier Airlines, Inc. v. Nebraska Department of Aeronautics ---------- 501
2. Wherever interstate and intrastate transactions are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule. Frontier Airlines, Inc. v. Nebraska Department of Aeronautics ---------- 501
3. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. Frontier Airlines, Inc. v. Nebraska Department of Aeronautics ---------- 501
4. While Congress cannot delegate power to regulate foreign or interstate commerce to a state or municipal corporation, it may leave certain matters or details to officers, departments, or commissions without violating the rule. Frontier Airlines, Inc. v. Nebraska Department of Aeronautics ---------- 501
5. The execution by Congress of its power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective control of interstate commerce by the federal Congress incidentally

controls intrastate commerce. Frontier Airlines, Inc. v. Nebraska Department of Aeronautics ------ 501

6. Congress has pre-empted the field of interstate air transportation in regard to the routes and points to be served by interstate air carriers to the exclusion of conflicting regulation by the states. Frontier Airlines, Inc. v. Nebraska Department of Aeronautics ---------- 501

Constitutional Law.

1. Forfeited recognizances and cash bonds are penalties arising under the general laws of the state as provided in Article VII, section 5, Constitution of Nebraska, and should be distributed to the several school districts of the county in which they accrue. School Dist. of Omaha v. City of Omaha ---------- 21
2. Penalties which are required by the Constitution to be paid over to the common schools cannot be diverted to any other purpose by the Legislature or by a city. School Dist. of Omaha v. City of Omaha 21
3. The Legislature may not lawfully delegate its legislative powers to an administrative agency. Terry Carpenter, Inc. v. Nebraska Liquor Control Commission ---------- 26
4. In the grant of power to an administrative agency to legislate, such power must be limited to the expressed purpose and administered in accordance with standards prescribed in the legislative act. Terry Carpenter, Inc. v. Nebraska Liquor Control Commission ---------- 26
5. The constitutional guaranties of the Bill of Rights contemplate that every person legally possesses the right of acquiring the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, and the right to dispose of such property as he pleases, at such price as he can obtain in fair barter. Terry Carpenter, Inc. v. Nebraska Liquor Control Commission ------ 26
6. The Legislature, under the guise of regulation, may not indulge in arbitrary price fixing or the destruction of lawful competition. Terry Carpenter, Inc. v. Nebraska Liquor Control Commission ---------- 26
7. If an act has but one general object, no matter how broad that object may be, contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate the Constitution of Nebraska providing that no bill shall

contain more than one subject and the same shall be clearly expressed in the title. Yellow Cab Co. v. Nebraska State Railway Commission ---------- 150

8. The amendments to the Administrative Procedure Act do not violate the constitutional provision that no bill shall contain more than one subject because its provisions apply to the railway commission and other administrative agencies. Yellow Cab Co v. Nebraska State Railway Commission ---------- 150

9. There is no constitutional limitation in this state on the right to take private property for public use under the power of eminent domain, except as to the right to just compensation. Hammer v. Department of Roads ---------- 178

10. The Constitution of Nebraska requires taxes on all tangible property to be levied by valuation uniformly and proportionately. H/K Company v. Board of Equalization ---------- 268

11. Constitutional provisions requiring equality and uniformity of taxation do not apply to rent or use charges for revenue purposes, and there need be no uniformity as between occupations or businesses. City of Ord v. Biemond ---------- 333

12. By the terms of Article I, section 21, of the Constitution of Nebraska, the property of no person shall be taken or damaged for public use without just compensation therefor. State v. Dillon ------ 350

13. Every person possesses the legal right to acquire the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, including the right to sell it at such price as he can obtain in fair barter. Elder v. Doerr ---- 483

14. The right to engage in a lawful and useful occupation may be subjected to reasonable regulation in the public interest, even though it results in some degree of limitation of the rights of property. Elder v. Doerr ---------- 483

15. Under the Constitution of Nebraska, an act regulating interest on money must be general and not special; the act must be made by general law on a reasonable classification of persons or things. Elder v. Doerr ---------- 483

16. The price differential provided in the Nebraska Installment Sales Act is a charge for the hire of money or the forbearance of debt, and is therefore a regulation of interest within the meaning of the Constitution of Nebraska. Elder v. Doerr -------- 483

17. The fixing of different interest rates for installment sales contracts in sales of automobiles based on classifications of automobiles according to their ages, is special legislation inhibited by Article III, section 18, Constitution of Nebraska. Elder v. Doerr 483
18. The fixing of different interest rates on automobiles and other personal property is special legislation inhibited by Article III, section 18, Constitution of Nebraska, in that there is no substantial difference of situation or circumstances that would naturally suggest the justice or expedience of diverse legislation with respect to the object of their classification. Elder v. Doerr ---------- 483
19. The Nebraska Installment Sales Act is unconstitutional in that it contravenes Article III, section 18, Constitution of Nebraska, and it is of no force and effect. Elder v. Doerr ---------- 483
20. The power of Congress to regulate commerce among the several states and with foreign nations is supreme and plenary; it is complete in itself and knows no limitations except the prohibitions and limitations of the United States Constitution and its amendments. Frontier Airlines, Inc. v. Nebraska Department of Aeronautics ---------- 501
21. The power of the Legislature to regulate interest on money is limited by Article III, section 18, Constitution of Nebraska, which provides that it may not be done by local or special laws. Stanton v. Mattson ---------- 767
22. By Article III, section 18, of the Constitution of Nebraska, the Legislature is prohibited from passing local and special laws regulating the interest on money. It prohibits class legislation which does not operate equally and uniformly upon all members of the class brought within its operation. Stanton v. Mattson ---------- 767
23. Rule as to classification of persons and property for purposes of legislation stated. Stanton v. Mattson ---------- 767
24. The designation of retail installment sales contracts as a class to the exclusion of all others including manufacturers, distributors, and others making such contracts, in fixing maximum interest to be charged, is special and not general legislation inhibited by Article III, section 18, of the Constitution of Nebraska. Stanton v. Mattson ---------- 767
25. The statutory definition of an installment sales

contract as one in which a lien is taken or title retained, to the exclusion of other such contracts, is special and not general in that it has no reasonable relation to the regulation of interest on money. Stanton v. Mattson ---------- 767

26. The exclusion of motor vehicles from the provisions of sections 6 and 7 of Legislative Bill 811, 73rd session of the Legislature, makes such sections special as distinguished from general provisions. Stanton v. Mattson ---------- 767

27. Legislative Bill 811, 73rd session of the Legislature, is unconstitutional and void in that it contravenes Article III, section 18, and Article I, section 16, Constitution of Nebraska. Stanton v. Mattson -- 767

28. The protection of the Fourth Amendment to the Constitution of the United States and the holdings of the United States Supreme Court in construing such protections are binding upon the courts of this state. State v. O'Kelly ---------- 798

29. Evidence obtained as the fruit of an illegal search or arrest, in violation of the Constitutions of the United States and Nebraska is inadmissible in a prosecution in this state and must be excluded. State v. O'Kelly ---------- 798

30. The applicable standard for an arrest without warrant is that there is reasonable ground to believe that a felony has been committed and to believe the person arrested is guilty of such offense. This standard is the same standard as that of the Fourth Amendment to the Constitution of the United States protecting persons against unreasonable seizures. State v. O'Kelly ---------- 798

31. The reasonableness of a search or seizure in the first instance is a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of constitutional requirements. State v. O'Kelly ---------- 798

32. A preliminary hearing is not a trial within the meaning of Article I, section 11, of the Constitution of Nebraska, and there is no requirement that counsel be furnished an accused prior to that time. State v. O'Kelly ---------- 798

33. Investigation and examination of an accused after a proper legal arrest and before a preliminary hearing is not in violation of the United States or Nebraska Constitutions and is consistent with due process. State v. O'Kelly ---------- 798

Contracts.

1. Consideration for an agreement or a promise is sufficient if there is any benefit to the promisor or any detriment to the promisee. Dorland v. Dorland ---- 233
2. If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce it to writing, execute, and deliver it, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract. Dorland v. Dorland ---------- 233
3. When writings show a complete legal obligation, without any uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included in the writings. Glass v. Nebraska State Bank ---------- 673
4. Parol evidence of prior or contemporaneous oral agreement may not be introduced to vary, alter, or contradict the clear and unambiguous terms of a written contract. Glass v. Nebraska State Bank -- 673
5. Preliminary negotiations, conversations, or oral understandings are merged in a written contract or agreement. Glass v. Nebraska State Bank ------ 673
6. A provision in a contract that all matters relating to the execution, interpretation, validity, and performance of it shall be governed by the laws of Nebraska is not a waiver of privilege from suit in Nebraska by an assignee of the contract. Hills v. Burnett ---------- 871
   Bair v. Michigan Nat. Bank ---------- 875

Corporations.

1. The management of corporate litigation is under the direction and control of corporate officials. System Meat Co. v. Stewart ---------- 387
2. If gross negligence, fraud, or flagrant abuse of discretion is present, courts should interfere with the management of corporate litigation to protect the stockholders. System Meat Co. v. Stewart -------- 387
3. In the absence of usurpation, fraud, gross negligence, or transgression of statutory limitations, courts of equity will not interfere at the suit of dissatisfied stockholders merely to overrule the discretion of directors on questions of corporate management, policy, or business. System Meat Co. v. Stewart ---------- 387
4. Where stockholders for sufficient reason are per-

mitted to intervene, they become parties to the litigation until such time as the court, upon a proper hearing, finds it unnecessary for them to participate. System Meat Co. v. Stewart ---------- 387
5. Under the facts presented in this case, interveners are entitled to their day in court to contest the fairness of the proposed settlement agreement. System Meat Co. v. Stewart ---------- 387
6. Jurisdiction over a foreign corporation which is actually doing business in Nebraska may be obtained by service of process upon the Secretary of State even though the corporation has not expressly consented to such jurisdiction. Berg v. Midwest Laundry Equipment Corp. ---------- 423
7. It is a question of fact as to whether a foreign corporation is doing business in this state. Each case must be decided upon its own facts. Berg v. Midwest Laundry Equipment Corp. ---------- 423
8. A corporation may draw or accept a bill of exchange for the purpose of its business. Geyer v. The Walling Co. ---------- 456
9. Where a private corporation has power to issue negotiable paper and the officer or agent of the corporation by whom the instrument is executed, accepted, or endorsed has apparent authority to perform such act, the fact that he does not have actual authority or that the instrument was unauthorized is not a defense as against a bona fide holder of the instrument. Geyer v. The Walling Co. ---- 456
10. A corporation can act only by its agents. The presumption is that an act pertaining to its ordinary business when performed by an officer who could ordinarily transact such business is legally done and is binding on the corporation. Geyer v. The Walling Co. ---------- 456

Costs.

1. Statute providing that the guardian or next friend is liable for costs of an action brought by him has no application to a case brought by another against minors or incompetents he has been appointed to defend. White v. Ogier ---------- 883
2. The fee of a guardian ad litem for services rendered should be fixed by the court in which such services were rendered and taxed as costs in such action or proceeding. White v. Ogier ---------- 883
3. The circumstances of each case are to be con-

sidered in determining to whom the fees of a guardian ad litem are to be taxed or from what source they are to be paid. White v. Ogier ---------- 883

4. In determining the value of services rendered by a guardian ad litem the court will consider the nature of the litigation, the amount involved, the result of the suit, the length of time spent on the case, the care and diligence exhibited, and the character and standing of the guardian ad litem as a lawyer. White v. Ogier ---------- 883

Courts.

1. A court of record has inherent authority to amend its records so as to make them conform to the facts. Gunia v. Morton ---------- 54
2. In the absence of fraud, the courts will not ordinarily consider the effect of votes not actually cast at an election or the effect of fixing of a particular time for the election which is allegedly more favorable to one side than the other. Peterson v. Cook ---------- 296
3. Generally, courts will presume that all electors failing to vote at an election assent to the affirmative vote as shown by the returns. Peterson v. Cook ---------- 296
4. The presumption in favor of the regularity of proceedings in courts of general jurisdiction does not apply to courts or tribunals of inferior or limited jurisdiction who act in a judicial capacity. As to such courts or tribunals the facts necessary to confer jurisdiction must affirmatively appear upon the face of the record. Everts v. School Dist. No. 16 310
5. It is a judicial question as to whether an act of the Legislature pertains to a matter of statewide concern or to a matter of purely local concern. State ex rel. City of Grand Island v. Johnson -------- 498
6. While a court will take judicial notice of its own records, it will not ordinarily in one case take judicial notice of the record in another case. Knapp v. City of Omaha ---------- 576
7. A court may take judicial notice of its own proceedings and judgments where cases are interdependent and interwoven. Knapp v. City of Omaha 576
8. Matters so judicially noticed are properly considered when determining the questions presented by a demurrer. Knapp v. City of Omaha -------- 576

Criminal Law.

1. By statute, the issuance of an insufficient fund check is presumptive evidence of intent to defraud and of knowledge of insufficient funds in the bank. State v. Eggers ---------- 79
2. The presumption of intent to defraud is a rebuttable presumption and does not shift the burden of proof. The presumption of innocence is still a matter of evidence to which the defendant is entitled, but along with it the jury is entitled to consider the presumption provided by this statute as to knowledge and intent. State v. Eggers ------ 79
3. The crime of obtaining money by means of an insufficient fund check is completed at the time the check is uttered and passed. State v. Eggers ------ 79
4. Unless subsequent transactions have some bearing on the transaction involved in the issuance of a check, they are immaterial and incompetent. State v. Eggers ---------- 79
5. The question of the competency of a venireman to sit in the trial of a criminal case cannot be raised by a motion for a continuance. State v. Eggers 79
6. It is the duty of a trial court to see that a defendant in a criminal case is tried by a jury such that not even the suspicion of bias or prejudice can attach to any member thereof. State v. Eggers ---- 79
7. The right to challenge jurors for cause is a right which may be waived. State v. Eggers -------- 79
8. Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal action, the introduction of evidence thereafter by the defendant waives any error in the ruling on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction. State v. Eggers ---------- 79
9. In a criminal action, the Supreme Court will not interfere with a verdict of guilty based upon conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Miller ---------- 213
   State v. Nichols ---------- 761
10. The failure of the court to instruct the jury that a defendant charged with rape cannot be convicted without evidence corroborating the prosecutrix is

not error, unless it appears that such an instruction was requested. State v. Miller ---------- 213
11. An instruction is erroneous and should not be given where it is apt to confuse or mislead the jury. State v. Miller ---------- 213
12. If it does not appear from the record that an incorrect instruction to the jury did not affect the result of a trial of a criminal case unfavorably to the defendant the giving of the instruction must be considered prejudicial error. State v. Miller 213
13. The habitual criminal law does not set out a distinct crime, but provides that the repetition of the criminal conduct aggravates the offense and provides heavier penalties. Von Bokelman v. Sigler 305
14. An instruction which informs the jury that when there is conflict in the evidence it is its duty to reconcile the evidence if it can, and if it cannot, then to determine which is true and which is untrue, does not infringe upon the right of the jury to judge the credibility of witnesses and the weight to be given their testimony. State v. May ---- 318
15. The words "who shall be convicted," contained in motor vehicle statute, apply to the offense charged and not to the penalty. State v. Steemer -------- 342
16. Motor vehicle statute, providing an increased penalty for a second offense, is not ex post facto as to a first conviction prior to its passage, since an offender is not punished under it but on a conviction of an offense after its passage. State v. Steemer ---------- 342
17. Penalty provision of motor vehicle statute deals with offenses committed after its passage, permits inquiry into previous convictions, and in fixing the penalty does not punish for previous offenses but for persistence in violating the statute. State v. Steemer ---------- 342
18. Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. State v. Dodd ------ 533
19. It is not the province of the Supreme Court in a criminal case to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Nichols ---------- 761
20. In order to warrant a conviction on circumstantial evidence, the circumstances taken together must be of such conclusive nature and tendency as to

produce beyond a reasonable doubt a reasonable and moral certainty that the accused committed the offense charged. State v. Nichols ---------- 761

21. In determining the weight of circumstantial evidence, a jury must find that the facts and circumstances are of such a conclusive nature as to exclude to a moral certainty every other rational hypothesis except that of guilt of the accused. State v. Nichols ---------- 761

22. An instruction with respect to circumstantial evidence is not erroneous when it states that if all of the facts and circumstances relied upon by the State to secure a conviction can reasonably be accounted for upon any theory consistent with the innocence of the defendant, then the jury should acquit him. State v. Nichols ---------- 761

23. An accused must be brought before a magistrate in the first instance as soon as is practical under the existing circumstances. State v. O'Kelly ---- 798

24. When the accused is in fact present before the magistrate at the time the complaint is filed, the court may proceed with the examination of the defendant on preliminary hearing to determine probable cause without the issuance of a warrant. State v. O'Kelly ---------- 798

25. A preliminary hearing is not a trial within the meaning of Article I, section 11, of the Constitution of Nebraska, and there is no requirement that counsel be furnished an accused prior to that time. State v. O'Kelly ---------- 798

26. Investigation and examination of an accused after a proper legal arrest and before a preliminary hearing is not in violation of the United States or Nebraska Constitutions and is consistent with due process. State v. O'Kelly ---------- 798

27. The effect of a plea of nolo contendere in a criminal case is the same as that of a plea of guilty. State v. Hylton ---------- 828
State v. Neuman ---------- 832

28. Where the defendant pleads nolo contendere, the court was not required to impose a sentence but was empowered to suspend proceedings and place defendant on probation. State v. Hylton ---------- 828

29. Where the punishment of an offense created by statute is left to the discretion of a court to be exercised within certain prescribed limits, a sentence imposed within such limits will not be dis-

turbed unless there appears to be an abuse of discretion. State v. Hylton ---------- 828
State v. Neuman ---------- 832
30. Where the court is empowered to exercise a discretion as to the imposition of sentence and the term thereof in a criminal case, it is empowered to examine reports made by probation officers as to the character and qualities of the defendant. State v. Hylton ---------- 828
31. By statute, the Supreme Court is authorized to reduce a sentence when in its opinion the sentence is excessive, and it is made the duty of the court to render such sentence as in its opinion may be warranted by the evidence. State v. Neuman -- 832
32. A statute makes it the duty of the Supreme Court, when the proper proceedings are had, to review the evidence and prevent the imposition of punishment which the evidence will not warrant. State v. Neuman ---------- 832

Crops.
1. In an instance of the destruction of matured crops of a condemnee the measure of the damage is the value at the time of destruction. State v. Dillon 350
2. In the case of injury to crops the condemnee is entitled to the difference between what they were worth at the time of maturity and what they would have been worth if they had not been injured. State v. Dillon ---------- 350

Damages.
1. In an action for wrongful death, the measure of the damage is the pecuniary loss to the statutory beneficiaries. Darnell v. Panhandle Coop. Assn.-- 40
2. In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. Neill v. McGinn 369
3. The injured party is not permitted to recover in addition to the reasonable market value of an automobile immediately before and after the accident damages for loss of use thereof. Neill v. McGinn ---------- 369
4. For all injuries or damages which may arise on account of the proper construction or future op-

eration of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings. State v. Dillon ---------- 444
5. Rule stated as to determination of damages to remaining property not taken in eminent domain proceedings. State v. Dillon ---------- 444
6. In an action for breach of contract of purchase where the defects in a house may be remedied without materially injuring or reconstructing any substantial portion of the house, the measure of damages is the cost of repairs in making it conform with the terms of the contract. Jacobs v. Korst 639
7. Where defects cannot be remedied without reconstruction of, or a material injury to, a substantial portion of a house, the measure of damages is the difference between its market value at the time of sale and its market value if it had been as warranted or represented. Jacobs v. Korst ---------- 639
8. Where a certain theory as to the measure of damages is relied upon by the parties in the trial court, it will be adhered to on appeal whether or not it is correct. Jacobs v. Korst ---------- 639
9. A verdict and judgment will not be set aside as inadequate unless they are clearly wrong and so against the weight and reasonableness of the evidence as to indicate that they were the result of passion, prejudice, or mistake. Cooper v. Hastert 836

Death.

In an action for wrongful death, the measure of the damage is the pecuniary loss to the statutory beneficiaries. Darnell v. Panhandle Coop. Assn. ------ 40

Deeds.

1. In construing a deed it will be presumed that the grantor intended the deed to be a consistent whole. If it can reasonably be done, the court will harmonize ambiguous expressions with the plain provisions of the deed to effectuate the grantor's intent. City of Gering v. Jones ---------- 626
2. An otherwise effective conveyance of property transfers the entire interest which the conveyor had and has the power to convey, unless an intent to transfer a less interest is effectively manifested. City of Gering v. Jones ---------- 626
3. Where property is conveyed directly to a municipal corporation to hold for purposes for which the

corporation was created, no trust for the benefit of others arises, unless such intent can be found to be effectively manifested by apt and appropriate language creating a trust in the property. City of Gering v. Jones ---------- 626

Descent and Distribution.

The Legislature has full power within constitutional limits to provide the manner of distribution of the estates of deceased persons and to define the method of creating the various types of estates in real and personal property. When such action is taken by clear and unambiguous language, the Supreme Court is required to give effect thereto. Rose v. Hooper ---------- 645

Divorce.

1. The decree of the trial court in a divorce action insofar as minor children are concerned is never final in the sense that it cannot be changed but is subject to review at any time in the light of changing conditions. Matson v. Matson ---------- 60
2. Where custody of a minor child is awarded to the mother in a divorce action, the father should ordinarily have the right of visitation, subject to appropriate conditions. Matson v. Matson ---------- 60
3. Ordinarily alimony should not be allowed by requiring the husband to pay a fixed sum each month during the life of the parties or for an indefinite period of time but should be in the form of a lump sum. Matson v. Matson ---------- 60
4. Rule for determination of alimony in divorce case stated. Matson v. Matson ---------- 60
   Schwarck v. Schwarck ---------- 560
5. Where a wife is conclusively found to be occupying an adulterous relationship with a man not her husband she is an unfit person as a matter of law to have the legal custody of her minor children. Beck v. Beck ---------- 108
6. Condonation is forgiveness, express or implied, for a breach of marital duty, with the implied condition that the offense shall not be repeated. Beck v. Beck 108
7. Where in an action for divorce both parents are found to be unfit or unsuitable to have the care and legal custody of the minor children of the parties, the welfare and best interest of the children

will constitute the sole consideration in determining the right of custody. Beck v. Beck ---------- 108

8. Under the Separate Juvenile Court Act, where the parents of minor children are unfit or unsuitable to have their custody, the separate juvenile court may properly place their legal custody in the chief juvenile probation officer on such terms and conditions as the court may prescribe. Beck v. Beck -- 108

9. Where adultery by a wife is established in an action for divorce, she is not entitled to an award of alimony and ordinarily will not be allowed an attorney's fee to be paid by the husband. Beck v. Beck ---------- 108

10. An allowance of child support against a husband will not ordinarily be disturbed on appeal in the absence of evidence of inadequacy or excessiveness. Beck v. Beck ---------- 108

11. An application for a modification of or a change, with respect to an allowance of child support in a divorce decree, may be made subsequent to the time of the decree, but must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. Shipley v. Shipley ---------- 119

12. In the absence of proof of new facts and circumstances arising since the time of the original decree, an allowance of child support provided for therein will be deemed res judicata. Shipley v. Shipley ---------- 119

13. The circumstances surrounding the remarriage of the father in a divorce case may be considered by the Supreme Court, but the remarriage of a father of itself does not relieve him of the obligations fixed by the decree. Shipley v. Shipley ---- 119

14. The normal incidents and obligations of a remarriage alone do not justify a reduction of an amount of child support properly awarded in a decree of divorce. Shipley v. Shipley ---------- 119

15. A divorce from bed and board may be granted on the petition of the wife when the husband, having sufficient ability to provide suitable maintenance and support, does grossly, wantonly, or cruelly refuse to do so. Murphy v. Murphy ---------- 239

16. Even if a wife fails to establish her right to a divorce from bed and board, she is entitled to an award for support and maintenance by the husband. Murphy v. Murphy ---------- 239

17. Where a wife has prayed for a divorce from bed and board and supported the same by sufficient evidence, and the husband has prayed for an absolute divorce but failed in his proof, the trial court has no discretion in granting the remedy but must decree a divorce from bed and board as prayed. Murphy v. Murphy ---------- 239
18. Corroboration relied upon in a suit for divorce must be competent evidence of the acts or conduct asserted as grounds for divorce. Schwarck v. Schwarck ---------- 560
19. Corroborative evidence other than the declarations, confessions, or admissions of the parties is required of the acts or conduct asserted as grounds for divorce. Schwarck v. Schwarck ---------- 560
20. Ordinarily, condonation is complete if there is a resumption of marital relations after the alleged breach of marital duty. Schwarck v. Schwarck -- 560
21. Rule for determination of alimony provides no mathematical formula by which an alimony award can be exactly determined. Generally speaking, awards in cases of this kind vary from one-third to one-half of the value of the property, depending on the facts and circumstances of the particular case. Schwarck v. Schwarck ---------- 560
22. While a divorce proceeding is pending, the parties must live separate and apart. Such a separation is not wrongful, and ordinarily a charge of abandonment or desertion cannot be based thereon. Upah v. Upah ---------- 606
23. A divorce case is tried de novo on the record in the Supreme Court, which is required to reach independent conclusions of fact without reference to findings made by the trial court. Upah v. Upah 606
24. Although no violence is threatened, yet harping and nagging, continued for years by either a husband or wife, concerning conduct above reproach, may be so unreasonable as to utterly destroy the peace of mind, seriously impair health, and ruin all legitimate ends and objects of matrimony, and constitute extreme cruelty. Upah v. Upah ------ 606
25. Power of court in divorce action to revise or alter decree with respect to care, custody, and maintenance of children stated. Grothendick v. Grothendick ---------- 726
26. In the absence of error or a showing that the action of the district court with respect to custody of

children was unreasonable, such action will not ordinarily be vacated or set aside on appeal. Grothendick v. Grothendick ---------- 726

27. 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. Koch v. Koch ---------- 737

28. Where one against whom a divorce decree has been granted remarries, it is the general rule that such party is thereafter estopped to assail the validity of the divorce. Koch v. Koch ---------- 737

29. Where the care, custody, and control of children have been awarded to one of the parents by a divorce decree which has become final, such care, custody, and control will not ordinarily be changed in the absence of changed conditions or where the best interests of the children demand it. Koch v. Koch ---------- 737

30. It is the better practice to keep the custody of children awarded in a divorce suit within the jurisdiction of the court having control over them unless the best interests of the children demand otherwise. Koch v. Koch ---------- 737

31. In a divorce action it is ordinarily within the discretion of the court to allow or refuse to allow attorney's fees. Koch v. Koch ---------- 737

Easements.

1. Where an easement is necessary for the enjoyment of the estate conveyed, an implied grant is constructively implied in the conveyance. First Investment Co. v. State Fire Marshal ---------- 66

2. Owners of a party wall are not tenants in common, but each owns in severalty the part thereof situated on his own land, with an easement of support from the other part. First Investment Co. v. State Fire Marshal ---------- 66

3. Where a wall is entirely upon the property of one party, the right of an adjoining owner to have support therefrom, whether derived from contract or acquired by prescription, is in the nature of an easement, which is terminated upon destruction of the building by accident or casualty. First Investment Co. v. State Fire Marshal ---------- 66

4. Where a facility becomes so dilapidated as to be no longer usable for the purpose for which it was intended, the law implies an abandonment and ter-

mination of the right of user. First Investment Co. v. State Fire Marshal ---------- 66
5. The easement of each proprietor in the tenement of the other ceases with the existence of the state of things which had created it, and there is no right in either, in case the other refuses to cooperate, to rebuild the wall and claim contribution. First Investment Co. v. State Fire Marshal 66
6. There is no obligation to repair a party wall where the grant of an easement is an implied one. First Investment Co. v. State Fire Marshal ---------- 66
7. An easement for one purpose established by mere user cannot by legal intendment be extended to another purpose. First Investment Co. v. State Fire Marshal ---------- 66
8. The owners of a party wall do not have a reciprocal easement of support from each other's building, but either of them may remove his own building without liability for the resulting damage to the other, providing he gives proper notice of removal and uses reasonable care and caution to protect the wall and remaining building. First Investment Co. v. State Fire Marshal ---------- 66
9. An easement for use and occupancy of land may be created by implication. Price Realty Co. v. Airport Authority ---------- 791
10. An easement by implication may flow from and be created by the existence of an element of necessity for use and occupancy. Price Realty Co. v. Airport Authority ---------- 791
11. An easement by implication may flow from and be created by an implied grant from what has been said or done by the parties involved. Price Realty Co. v. Airport Authority ---------- 791
12. The defense of a prescriptive easement is available in a trespass action under a general denial. Martin v. Norris Public Power Dist. ---------- 815
13. Requirements of easement by prescription stated. Martin v. Norris Public Power Dist. ---------- 815
14. The existence of a prescriptive easement and the nature of the improvement which the defendant would be permitted to make under it were questions of fact which should have been submitted to the jury under proper instructions. Martin v. Norris Public Power Dist. ---------- 815
15. An easement encumbering the homestead of the grantor is void unless executed and acknowledged

by both husband and wife. Martin v. Norris Public Power Dist. ---------- 815

Elections.

1. The special election under the Reorganization of School Districts Act is governed by the general election laws and is subject to contest. Longe v. County of Wayne ---------- 245
2. An adequate statutory remedy for the settlement of the rights of parties in election cases is provided by either contest or quo warranto and these remedies are exclusive. Longe v. County of Wayne ---------- 245
3. If an election is held in fact, it is valid, though there may have been interference by the elements. Peterson v. Cook ---------- 296
4. In the absence of fraud, the courts will not ordinarily consider the effect of votes not actually cast at an election or the effect of fixing of a particular time for the election which is allegedly more favorable to one side than the other. Peterson v. Cook 296
5. Generally, courts will presume that all electors failing to vote at an election assent to the affirmative vote as shown by the returns. Peterson v. Cook 296
6. Statute on holding of school district elections is not unconstitutional because of its providing that the school board or board of education shall designate the polling places at which the elections are to be held. Peterson v. Cook ---------- 296
7. Under a statute providing for a school district election which leaves the selection of the number and location of the polling places to the school board, its decision will be final unless it is clearly shown to be arbitrary and unreasonable. Peterson v. Cook 296

Eminent Domain.

1. In a condemnation action the weight and credibility of testimony of either lay or expert witnesses as to land values is for the jury. Connor v. State -- 140
   State v. Wixson ---------- 431
   State v. Dillon ---------- 444
2. The amount of the damages sustained by a landowner for a right-of-way condemned across his land is peculiarly of a local nature to be determined by a jury, and its verdict will not ordinarily be interfered with if it is based on the testimony. Connor v. State ---------- 140
3. In a condemnation action, when the evidence is

conflicting, the verdict of a jury will not be set aside unless it is clearly wrong. Connor v. State 140
State v. Wixson 431
State v. Dillon 444
4. There is no constitutional limitation in this state on the right to take private property for public use under the power of eminent domain, except as to the right to just compensation. Hammer v. Department of Roads 178
5. As a general rule, action taken by a governmental agency with its legally constituted authority is presumed to be valid. Hammer v. Department of Roads 178
6. The burden to prove invalidity of governmental action is on the litigant contesting its validity. Hammer v. Department of Roads 178
7. Condemnation is the implementation of the power of eminent domain. It is the right of a nation or state, or some other to whom the power is lawfully delegated, to take or condemn private property for public use. State v. Dillon 350
8. Ordinarily due compensation must be made for property taken under the power of eminent domain. State v. Dillon 350
9. By the terms of Article I, section 21, of the Constitution of Nebraska, the property of no person shall be taken or damaged for public use without just compensation therefor. State v. Dillon 350
10. In an instance where land is taken by condemnation the owner is entitled to recover the fair market value of the land at the time of taking. State v. Dillon 350
11. If land is damaged by the taking of other land the right of recovery is the difference between the fair market value immediately before and immediately after taking. State v. Dillon 350
12. In an instance of the destruction of matured crops of the condemnee the measure of the damage is the value at the time of destruction. State v. Dillon 350
13. In the case of injury to crops the condemnee is entitled to the difference between what they were worth at the time of maturity and what they would have been worth if they had not been injured. State v. Dillon 350
14. In a case where land condemned is under lease to and in possession of a third person, and by the taking or damaging the lessee is deprived of his

use in whole or in part, he is entitled to recover from the condemner on the same character and quality of proof as would entitle the condemnee to recover. State v. Dillon 350
15. In a case where a lessee of land has established a right of recovery for damage to growing crops or for deprivation of right to produce such crops, the measure of his right of recovery is the difference between the value of his share of the crops at maturity and what would have been the cost of production of the entire crop. State v. Dillon 350
16. The amount of the damages sustained by a landowner for a right-of-way condemned across his land is peculiarly of a local nature to be determined by a jury, and its verdict will not ordinarily be interfered with if it is based on the testimony. State v. Wixson 431
State v. Dillon 444
17. In condemnation proceedings, an owner of real estate who is familiar with the value can testify as to the value thereof. State v. Wixson 431
18. For all injuries or damages which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings. State v. Dillon 444
19. Rule stated as to determination of damages to remaining property not taken in eminent domain proceedings. State v. Dillon 444

Equity.

1. A court of equity will not lend its aid to one who does not come into court with clean hands. Lewis v. Gallemore 279
2. The equitable principle expressed in the maxim, "He who comes into equity must come with clean hands," being founded on public policy, public policy may require its relaxation or limitation. Lloyd v. Gutgsell 775
3. Even when the parties have been found to be in pari delicto, relief may be awarded on the ground that in the particular case public policy will be deemed to be best conserved by that course. Lloyd v. Gutgsell 775

Estoppel.

1. Ordinarily the doctrine of equitable estoppel can-

not be invoked against a municipal corporation in the exercise of governmental functions but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class. Hammer v. Department of Roads ---------- 178

2. The doctrine of equitable estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done. Hammer v. Department of Roads ---------- 178

Evidence.

1. Hearsay evidence is generally inadmissible and does not become admissible because of the death of the person whose statement is sought to be proved. Darnell v. Panhandle Coop. Assn. -------- 40
2. When evidence which is not generally admissible is offered for a limited purpose, the proper procedure is for counsel to state the limited purpose for which the evidence is offered and for the trial court to admonish the jury that the evidence is received for a limited purpose only and that it cannot be considered by the jury for any other purpose. Darnell v. Panhandle Coop. Assn. -------- 40
3. As a general rule, textbooks, although standard authorities, are not competent independent evidence. Darnell v. Panhandle Coop. Assn. -------- 40
4. To lay the foundation for the proper presentment of error in the exclusion of proposed testimony, an offer to prove must be made of matter which would have been admitted as relevant, responsive, and pertinent in answer to the rejected interrogatory. State v. Eggers ---------- 79
5. By statute, the issuance of an insufficient fund check is presumptive evidence of intent to defraud and of knowledge of insufficient funds in the bank. State v. Eggers ---------- 79
6. The presumption of intent to defraud is a rebuttable presumption and does not shift the burden of proof. The presumption of innocence is still a matter of evidence to which the defendant is entitled, but along with it the jury is entitled to consider the presumption provided by this statute as to knowledge and intent. State v. Eggers ------ 79

7. An offer of proof is required for the purpose of making it appear to the court that the question put to the witness calls for competent evidence. Unless it does so without equivocation, it is not error to overrule the offer. State v. Eggers ---- 79
8. It is not error to reject an offer of proof not within the limits of the question on which the offer is based. State v. Eggers ---------- 79
9. Under ordinary circumstances the opinion of an expert witness is to be considered and weighed by triers of fact like any other testimony. Connor v. State ---------- 140
State v. Wixson ---------- 431
10. The word "evidence," in its technical meaning and common acceptation, includes all the means by which any fact in dispute at a judicial trial is established or disproved. Everts v. School Dist. No. 16 310
11. An affidavit used as evidence in the trial court cannot be considered on an appeal of a cause to the Supreme Court unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. Everts v. School Dist. No. 16 ---------- 310
12. In condemnation proceedings, an owner of real estate who is familiar with the value can testify as to the value thereof. State v. Wixson ---------- 431
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 such evidence may be destroyed even though uncontroverted by direct testimony. Pruit v. McMaken Transp. Co. ---------- 477
14. Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. State v. Dodd -- 533
15. While a court will take judicial notice of its own records, it will not ordinarily in one case take judicial notice of the record in another case. Knapp v. City of Omaha ---------- 576
Weiner v. Morgan ---------- 656
16. A court may take judicial notice of its own proceedings and judgments where cases are interdependent and interwoven. Knapp v. City of Omaha 576
17. Testimony of witnesses must be confined to concrete facts perceived by the use of their senses as

distinguished from opinions and conclusions deducible from evidentiary facts. Stillwell v. Schmoker 595
18. While an expert witness will be permitted to express his opinion, or even his belief, he cannot give his opinion upon the precise or ultimate fact in issue before the jury, which must be determined by it. Stillwell v. Schmoker 595
19. A witness may describe the marks that he observed near the place of the accident. The inference to be drawn from the testimony is solely the province of the jury. Stillwell v. Schmoker 595
20. Circumstances connected with an accident may be sufficient to overcome direct evidence as to the speed of a motor vehicle. Stillwell v. Schmoker 595
21. Parol evidence of prior or contemporaneous oral agreement may not be introduced to vary, alter, or contradict the clear and unambiguous terms of a written contract. Glass v. Nebraska State Bank 673
22. Preliminary negotiations, conversations, or oral understandings are merged in a written contract or agreement. Glass v. Nebraska State Bank 673
23. A self-serving declaration is one made by a party in his own interest at some time and place out of court, and does not include testimony which he gives as witness at the trial. Jones v. State 711
24. In order to warrant a conviction on circumstantial evidence, the circumstances taken together must be of such conclusive nature and tendency as to produce beyond a reasonable doubt a reasonable and moral certainty that the accused committed the offense charged. State v. Nichols 761
25. In determining the weight of circumstantial evidence, a jury must find that the facts and circumstances are of such a conclusive nature as to exclude to a moral certainty every other rational hypothesis except that of guilt of the accused. State v. Nichols 761
26. An objection to evidence as being self-serving is not good when the evidence is explanatory or in rebuttal of evidence offered by the opposing party. Kraft v. Fundum 821

Executors and Administrators.

1. By statute, the court is empowered to fix the time within which creditors may present claims against the estate of a decedent. Farmers Co-op. Mercantile Co. v. Sidner 94
2. By statute, it is required that notice by publication

shall be given to creditors of the estate of a decedent. Farmers Co-op. Mercantile Co. v. Sidner 94

3. By statute, it is provided that in an instance where a creditor has failed to present his claim within the time fixed, he may, within 3 months, apply for additional time not exceeding 3 months. Farmers Co-op. Mercantile Co. v. Sidner 94

4. The right to an extension of time on application to file a claim against an estate is dependent upon a showing of good cause. Farmers Co-op. Mercantile Co. v. Sidner 94

5. A claim for unliquidated damages, unasserted by the claimant or in his behalf within the time fixed by statute for the filing of claims in a probate proceeding, is a direct legal interest in an action or proceeding. Farmers Co-op. Mercantile Co. v. Sidner 94

6. A claimant who appeals from a judgment of the county court disallowing a claim against the estate of a deceased person is required to file a petition in the district court within 50 days from the date of the rendition of the judgment in the county court. Satterfield v. Estate of Buell 473

7. If the claimant fails to file a petition within 50 days from the date of the rendition of the judgment in the county court, he should be nonsuited unless the court on good cause shown shall otherwise order. Satterfield v. Estate of Buell 473

8. It is a question of fact as to whether good cause has been shown to permit a petition to be filed out of time. Ordinarily, the Supreme Court will not disturb the finding and judgment of the district court on that issue in the absence of a showing of an abuse of discretion. Satterfield v. Estate of Buell 473

Extradition.

A fugitive from justice surrendered by one state upon the demand of another may be prosecuted by the latter for any offense committed within its borders without first having had an opportunity to return to the state by which he was surrendered. State v. Dodd 533

Fines.

Where fines, penalties, and license money arise and are paid in under the general laws of the state, such money shall be paid over to the counties respectively wherein the same may be levied or im-

posed, and appropriated exclusively to the support of common schools in the several school districts of such county. School Dist. of Omaha v. City of Omaha ---------- 21

Foreign Corporations.

Where the validity of service by publication upon the defendant depends upon the defendant owning property, or having debts owing to him within the state which are sought to be taken by a provisional remedy, the defendant may appear specially and deny that he owns any property or has any debts owing to him within the state. Insurance Co. of North America v. Kunin ---------- 260

Fraudulent Conveyances.

The question of fraudulent intent in all cases pertaining to fraudulent conveyances is a question of fact, and not of law. Walkenhorst v. Apolius ---------- 583

Garnishment.

The filing of a special appearance containing allegations relating to the validity of a garnishment is not a general appearance where the jurisdiction of the court depends upon the validity of the garnishment. Insurance Co. of North America v. Kunin 260

Gas.

1. Duty of propane supplier of gas with respect to inspection stated. Darnell v. Panhandle Coop. Assn. 40
2. When a propane supplier of gas may be held liable stated. Darnell v. Panhandle Coop. Assn. ---------- 40

Habeas Corpus.

1. Where the custody of a minor child is involved in a habeas corpus action the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. Raymond v. Cotner 158
2. Habeas corpus is a collateral proceeding when regarded as a means of attack upon a sentence in a criminal case. Extrinsic evidence is inadmissible to show invalidity of sentence. Von Bokelman v. Sigler ---------- 305
3. In order to release a person from a sentence and imprisonment by habeas corpus, it must appear that

the sentence was absolutely void. Von Bokelman v. Sigler ---------- 305
4. Habeas corpus will not lie to discharge a person from sentence of penal servitude when the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose. Von Bokelman v. Sigler 305
5. Habeas corpus will not lie on behalf of a convicted prisoner on the ground that the sentence to imprisonment is in excess of the statutory period, since such sentence is erroneous merely, and not void. Von Bokelman v. Sigler ---------- 305

Highways.
1. As a general rule, action taken by a governmental agency within its legally constituted authority is presumed to be valid. Hammer v. Department of Roads ---------- 178
2. The burden to prove invalidity of governmental action is on the litigant contesting its validity. Hammer v. Department of Roads ---------- 178
3. Declaration of legislative purpose in enactment of State Highway Act is set out. Hammer v. Department of Roads ---------- 178
4. Under former statute, it was provided that drivers of vehicles proceeding in opposite directions should 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. Cole v. Wentworth ---------- 325
5. Under former statute, it was provided that upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle should drive the same upon the right half of the highway unless it was impracticable to travel on such side. Cole v. Wentworth ---------- 325

Homesteads.
1. The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife. Martin v. Norris Public Power Dist. ---------- 815
2. When plaintiff, to avoid the effect of an instrument executed by him, claims a homestead, he has the burden of proving that claim by a preponder-

ance of the evidence, and in a jury trial the jury should be so instructed. Martin v. Norris Public Power Dist. ---------- 815

Husband and Wife.

An easement encumbering the homestead of the grantor is void unless executed and acknowledged by both husband and wife. Martin v. Norris Public Power Dist. ---------- 815

Infants.

1. In a proceeding brought under the Juvenile Court Act, it is essential to the jurisdiction of the court that service of summons be had upon the person or persons having the custody or control of the child, or with whom the child may be when the action is commenced. Morimoto v. Nebraska Children's Home Society ---------- 174
2. A temporary interruption of the custody or control of a child, without fault on the part of the person having its custody or control, will not operate to excuse the failure to serve a summons as required by the Juvenile Court Act. Morimoto v. Nebraska Children's Home Society ---------- 174
3. An appeal from a finding and adjudication of the district court that a child is or is not neglected or dependent is disposed of in the Supreme Court by trial de novo. Jones v. State ---------- 711
4. Any final order or judgment entered by a separate juvenile court may be reviewed by the Supreme Court within the same time and in the same manner prescribed by law for the review of any order or judgment of the district court. Jones v. State -- 711
5. A statute providing as to who are neglected children should be liberally construed to aid the purpose of its enactment. Jones v. State ---------- 711
6. Whether a child is a neglected child is a question of fact. Each case must be determined on its own facts. Jones v. State ---------- 711
7. The jurisidiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. Jones v. State ---------- 711
8. Jurisdiction of the state over dependent children arises out of its power possessed as parens patriae. Residence within the state suffices. Jones v. State 711

9. A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it should be in danger of so becoming in the near future. Jones v. State ---------- 711
10. It is against the intent of the law to permit the removal of a child from this jurisdiction unless a proper showing is made that it will not become a neglected or dependent child. Jones v. State -- 711

Injunction.
1. Injunctive relief will not, in the absence of an abuse of discretion, issue to control the acts of school boards and county superintendents within the limits of the powers conferred on them. Bierman v. Campbell ---------- 877
2. Where there is no other adequate remedy available, unlawful acts beyond the scope of the powers of officers of a school district may be enjoined on the complaint of one whose property rights will be irreparably injured thereby. Bierman v. Campbell ---------- 877

Insurance.
A contract of insurance which is plain and unambiguous as to its meaning must be enforced according to its terms the same as any other contract. G. Bartling Co. v. Harris Truck Lines, Inc. ---- 465

Interest.
1. The Legislature may, in the exercise of the police power, fix maximum interest rates for the hire of money or the forbearance of debt. Elder v. Doerr 483
2. Interest is defined as the number of dollars that may be charged per year on one hundred dollars upon any loan or forbearance of money, goods, or things in action. Elder v. Doerr ---------- 483
3. Under the Constitution of Nebraska, an act regulating interest on money must be general and not special; the act must be made by general law on a reasonable classification of persons or things. Elder v. Doerr ---------- 483
4. The price differential provided in the Nebraska Installment Sales Act is a charge for the hire of money or the forbearance of debt, and is therefore a regulation of interest within the meaning of the Constitution of Nebraska. Elder v. Doerr ---- 483

5. The fixing of different interest rates for installment sales contracts in sales of automobiles based on classifications of automobiles according to their ages, is special legislation inhibited by Article III, section 18, Constitution of Nebraska. Elder v. Doerr ---------- 483
6. The fixing of different interest rates on automobiles and other personal property is special legislation inhibited by Article III, section 18, Constitution of Nebraska, in that there is no substantial difference of situation or circumstances that would naturally suggest the justice or expedience of diverse legislation with respect to the object of their classification. Elder v. Doerr ---------- 483
7. Regardless of the term used, if the result is a charge for the loan of money or for forbearance of a debt the result is interest. General Motors Acceptance Corp. v. Mackrill ---------- 631
Lloyd v. Gutgsell ---------- 775
8. Disguise it by any name that may be done, it is and remains interest. The concern is not with the form but the intent of the transaction. General Motors Acceptance Corp. v. Mackrill ---------- 631
9. The permissive provisions of the Installment Loan Act will not apply to a nonlicensee, but a nonlicensee will be bound by the inhibitory provisions of the act. General Motors Acceptance Corp. v. Mackrill ---- 631
10. The power of the Legislature to regulate interest on money is limited by Article III, section 18, Constitution of Nebraska, which provides that it may not be done by local or special laws. Stanton v. Mattson ---------- 767
11. By Article III, section 18, of the Constitution of Nebraska, the Legislature is prohibited from passing local and special laws regulating the interest on money. It prohibits class legislation which does not operate equally and uniformly upon all members of the class brought within its operation. Stanton v. Mattson ---------- 767
12. The designation of retail installment sales contracts as a class to the exclusion of all others including manufacturers, distributors, and others making such contracts, in fixing maximum interest to be charged, is special and not general legislation inhibited by Article III, section 18, of the Constitution of Nebraska. Stanton v. Mattson ---------- 767
13. The statutory definition of an installment sales con-

tract as one in which a lien is taken or title retained, to the exclusion of other such contracts, is special and not general in that it has no reasonable relation to the regulation of interest on money. Stanton v. Mattson ---------- 767

14. The exclusion of motor vehicles from the provisions of sections 6 and 7 of Legislative Bill 811, 73rd session of the Nebraska Legislature, makes such sections special as distinguished from general provisions. Stanton v. Mattson ---------- 767

15. The borrower as a participant in a usurious transaction is in vinculis and not in pari delicto to the lender as regards usury. Lloyd v. Gutgsell ------ 775

Intoxicating Liquors.

1. Powers of Nebraska Liquor Control Commission are stated. Terry Carpenter, Inc. v. Nebraska Liquor Control Commission ---------- 26

2. The Nebraska Liquor Control Commission may not adopt rules and regulations which are in conflict with the provisions of the Nebraska Liquor Control Act. Terry Carpenter, Inc. v. Nebraska Liquor Control Commission ---------- 26

3. The officers of the Nebraska Liquor Control Commission carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed. Terry Carpenter, Inc. v. Nebraska Liquor Control Commission ---------- 26

4. The Nebraska Liquor Control Commission is charged with the enforcement of no policy except the policy of law. Terry Carpenter, Inc. v. Nebraska Liquor Control Commission ---------- 26

Joint Tenancy.

1. Effect of withdrawal of funds by one joint owner of building and loan stock stated. Rose v. Hooper -- 645

2. A joint tenancy may be created in real estate and in any kind of personal property that may be held in severalty. White v. Ogier ---------- 883

3. In order to create a joint tenancy the purpose must be clearly expressed, otherwise the tenancy will be held to be in common. White v. Ogier ---------- 883

4. Joint tenancies are not favored in the law, and if not expressly created by statute, contract, conveyance, grant, or devise, the law presumes the existence of a tenancy in common in jointly owned property. White v. Ogier ---------- 883

5. A joint tenancy in personal property may be created by oral agreement if it is established by a preponderance of the evidence the quality of which is clear, satisfactory, and convincing in character. White v. Ogier ---------- 883
6. A joint tenancy is destroyed by any act of one joint tenant which is inconsistent with joint tenancy. Such an act has the effect of destroying the right of survivorship incidental to it. White v. Ogier 883
7. A joint tenancy in a bank account is extinguished by the withdrawal of the whole or a part thereof without the consent of the other joint tenant. White v. Ogier ---------- 883
8. The holding in the case of Crowell v. Milligan, 157 Neb. 127, 59 N. W. 2d 346, to the effect that a withdrawal of funds from a joint tenancy account does not divest the right of survivorship as to such funds is overruled whether the joint tenancy is created by statute, contract, conveyance, grant, or devise. White v. Ogier ---------- 883
9. When the evidence is insufficient to create a tenancy in jointly owned property, the presumption is that it is held as a tenancy in common. White v. Ogier ---------- 883

Judgments.

1. A petition that does not state facts sufficient to constitute a cause of action will not support a judgment rendered thereon. Hague v. Sterns ---------- 1
2. The proper function of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake has not been truly recorded. Gunia v. Morton ---------- 54
Andrews v. Nebraska State Railway Commission -- 222
3. It is not the purpose of an order nunc pro tunc to correct, change, or modify action previously taken by the court. Gunia v. Morton ---------- 54
4. An order by the district court vacating a default judgment and permitting a party to defend upon the merits is a final and appealable order. Jones v. Nebraska Blue Cross Hospital Service Assn. ------ 101
5. A district court has inherent power to vacate or modify its own judgment at any time during the term in which it is rendered. Jones v. Nebraska Blue Cross Hospital Service Assn. ---------- 101
6. Ordinarily, where a judgment has been entered by

default and a prompt application made at the same term to set it aside, with a tender of an answer disclosing a meritorious defense, the court may, on reasonable terms, sustain the motion and permit the cause to be heard upon the merits. Jones v. Nebraska Blue Cross Hospital Service Assn. ---------- 101

7. An order of the district court setting aside a default judgment will not be set aside in the absence of proof or showing that there was an abuse of discretion. Jones v. Nebraska Blue Cross Hospital Service Assn. ---------- 101

8. In the absence of any evidence in a bill of exceptions, it will be presumed by the Supreme Court on appeal that the district court has not abused its discretion in setting aside a default judgment. Jones v. Nebraska Blue Cross Hospital Service Assn. -- 101

9. A judgment which is void for failure to cause a summons to be served on a necessary party may be collaterally attacked by a petition to vacate the judgment. Morimoto v. Nebraska Children's Home Society ---------- 174

10. The rules relating to nunc pro tunc orders are generally applicable to administrative and quasi-judicial commissions. Andrews v. Nebraska State Railway Commission ---------- 222

11. The order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to satisfy the court that the order is required to make the record reflect the truth. Andrews v. Nebraska State Railway Commission ---------- 222

12. Scope of relief that may be obtained under declaratory judgment statute stated. Dorland v. Dorland 233

13. By the terms of the declaratory judgment statute a contract may be construed either before or after there has been a breach thereof. Dorland v. Dorland 233

14. Habeas corpus is a collateral proceeding when regarded as a means of attack upon a sentence in a criminal case. Extrinsic evidence is inadmissible to show invalidity of sentence. Von Bokelman v. Sigler ---------- 305

15. Material facts or questions which were an issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein. Such facts or questions become res judicata and may not again be

litigated in a subsequent action. Knapp v. City of Omaha ---------- 576

16. A cause of action, once finally determined between the parties on the merits, cannot afterwards, so long as such judgment remains in force, be litigated by new proceedings, either before the same or any other tribunal. Knapp v. City of Omaha ---------- 576

17. The rule of res judicata applies, not only to judgments which are the result of a trial of issues of fact, but also to judgments on demurrer, where such judgments go to the merits of the case. A judgment on a demurrer, which is based on a technical defect of pleading, a lack of jurisdiction, or the like, does not involve the merits of the controversy, and will not support the plea of res judicata. Knapp v. City of Omaha ---------- 576

18. 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. Knapp v. City of Omaha ---------- 576

19. A judgment of dismissal after sustaining a demurrer based on the failure to state a cause of action is a judgment on the merits even though by amendments a good cause of action might be stated. Knapp v. City of Omaha ---------- 576

20. Rule as to judicial notice in one suit of proceedings in another suit stated. Weiner v. Morgan ------ 656

21. A court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are pronounced. Such power exists entirely independent of any statute. Johnston Grain Co. v. Tridle ---------- 859

22. A court has no discretionary power or authority to vacate a judgment on application made within the judgment term but considered and ruled on at a subsequent term. Johnston Grain Co. v. Tridle ---- 859

23. The courtesy which should prevail among members of the bar is a proper matter to be considered by the trial court in exercising its discretion to set aside a judgment in term time. Johnston Grain Co. v. Tridle ---------- 859

Juries.

1. The quesiton of the competency of a venireman to sit in the trial of a criminal case cannot be raised by a motion for a continuance. State v. Eggers ---------- 79

2. It is the duty of a trial court to see that a defendant in a criminal case is tried by a jury such that not even the suspicion of bias or prejudice can attach to any member thereof. State v. Eggers 79
3. The right to challenge jurors for cause is a right which may be waived. State v. Eggers ---------- 79

Juvenile Courts.
1. In a proceeding brought under the Juvenile Court Act, it is essential to the jurisdiction of the court that service of summons be had upon the person or persons having the custody or control of the child, or with whom the child may be when the action is commenced. Morimoto v. Nebraska Children's Home Society ---------- 174
2. A temporary interruption of the custody or control of a child, without fault on the part of the person having its custody or control, will not operate to excuse the failure to serve a summons as required by the Juvenile Court Act. Morimoto v. Nebraska Children's Home Society ---------- 174

Landlord and Tenant.
1. In the absence of a statute to the contrary a tenancy cannot be terminated for the breach of a covenant, condition, or collateral agreement by the lessee unless there is an express and distinct provision in the lease for a forfeiture or right of reentry on the occurrence of the breach. Hague v. Sterns 1
2. Forfeitures of estate under leases are not favored in law and the right to forfeit must be clearly stipulated. If a forfeiture has not been stipulated for, a covenant or condition which is merely implied, or an express one not clearly within the forfeiture clause, will not sustain a claim of forfeiture for breach. Hague v. Sterns ---------- 1
3. The general rule as to forfeiture and the right of reentry has no application in this state to a breach of covenant for the nonpayment of rent in a forcible entry and detainer action. Hague v. Sterns 1
4. In a case where land condemned is under lease to and in possession of a third person, and by the taking or damaging the lessee is deprived of his use in whole or in part, he is entitled to recover from the condemner on the same character and quality of proof as would entitle the condemnee to recover. State v. Dillon ---------- 350

5. In a case where a lessee of land has established a right of recovery for damage to growing crops or for deprivation of right to produce such crops, the measure of his right of recovery is the difference between the value of his share of the crops at maturity and what would have been the cost of production of the entire crop. State v. Dillon -- 350
6. A provision in a lease for the payment of a percentage of the gross revenue of a business conducted by the lessee on the premises does not by itself alter the existence of the relationship of landlord and tenant and create an agency. Anderson v. Valley Feed Yards, Inc. ---------- 719
7. Subject to specific exceptions, the lessor of land is not liable for bodily harm caused to his lessee, or others upon the demised land with the consent of the lessee or sublessee, by any dangerous condition whether natural or artificial, which existed when the lessee took possession. Anderson v. Valley Feed Yards, Inc. ---------- 719
8. Liability of lessee for known dangerous condition of premises leased outlined. Anderson v. Valley Feed Yards, Inc. ---------- 719

Larceny.

Every person who shall break and enter, or enter without breaking, at any time, any motor vehicle, with the intent to commit the crime of larceny is guilty of a felony. Sperry v. Greiner ---------- 524

Limitations of Actions.

1. The statute of limitations commences to run against a surety when his obligation to pay accrues. Watkins Products, Inc. v. Rains ---------- 57
2. Partial payments made without the authority or consent of a surety, unless ratified by the surety, do not toll the statute of limitations as to such surety. Watkins Products, Inc. v. Rains -------- 57
3. Knowledge of the making of partial payments by the principal does not of itself affect the liability of the surety, nor operate to toll the statute of limitations as to him. Watkins Products, Inc. v. Rains 57
4. Where in an action on a written suretyship contract, it appears on the face of the petition that suit was commenced after the running of the statute of limitations, the cause of action is barred as to the sureties in the absence of allegations showing

that the statute has been tolled as to them. Watkins Products, Inc. v. Rains ---------- 57
5. Requisites necessary to establish title by adverse possession stated. Mitchell v. Beermann ---------- 616
6. The statutory period for the establishment of title to real estate by adverse possession is 10 years. Mitchell v. Beermann ---------- 616

Marriage.
A remarriage does not bear directly on the legal duty of a father to contribute to the support of his minor children by a former marriage. Shipley v. Shipley ---------- 119

Master and Servant.
1. Elements necessary to sustain a recovery under the doctrine of respondeat superior stated. Sperry v. Greiner ---------- 524
2. Statutory definition is given as to whom Safety Appliance Act is applicable. Fosler v. Aden ---- 535
3. Statutory definition of person operating a plant applies to a corporation as well as an individual. Fosler v. Aden ---------- 535
4. The term "every person" in Safety Appliance Act includes all persons, both natural and artificial. Fosler v. Aden ---------- 535
5. "Manager," in Safety Appliance Act, is defined as a person chosen or appointed to manage, direct, or administer the affairs of another person or of a corporation or company. Fosler v. Aden -------- 535

Municipal Corporations.
1. All ordinances of a general nature in a city of the second class are required to be published before they take effect. City of Milford v. Schmidt ------ 12
2. The only power which a city has to declare the maintenance of a trailer coach a nuisance is to find that it violates the interests of peace, public health, public morality, public safety, or the general welfare of the city. City of Milford v. Schmidt ------ 12
3. The exercise of the police power delegated to municipal corporations cannot be invoked on purely esthetic grounds. City of Milford v. Schmidt ---- 12
4. A municipal code provision requiring a permit does not clothe the issuing body with an arbitrary power to refuse to issue permits. City of Milford v. Schmidt ---------- 12

5. Authority to regulate does not give power to suppress. City of Milford v. Schmidt ---------- 12
6. Test of validity of zoning action stated. City of Milford v. Schmidt ---------- 12
7. A municipal corporation possesses no power or faculties not conferred upon it, either expressly or by fair implication, by the laws which created it or by other laws, constitutional or statutory, applicable to it. City of Milford v. Schmidt ---------- 12
8. A city council has no authority to determine the civil service rights of a discharged employee under the Civil Service Act. Dloughy v. City of Fremont 115
9. One of the duties of the civil service commission is to determine the civil service rights of the members of the police department in cities where the Civil Service Act is applicable. Dloughy v. City of Fremont ---------- 115
10. Ordinarily the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class. Hammer v. Department of Roads ---------- 178
11. The doctrine of equitable estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done. Hammer v. Department of Roads ---------- 178
12. The Legislature, by statute, has empowered municipalities to impose charges for the privilege of using municipal airport facilities. City of Ord v. Biemond 333
13. Where no police regulation of the manner of the conduct of a business is provided for in an ordinance or resolution by the city council, and a fee or permit charge is established for the privilege of operating a commercial business, it is a revenue measure and its validity must be tested as such. City of Ord v. Biemond ---------- 333
14. Municipalities may properly classify different business or commercial occupations for the purpose of imposing a revenue charge or fee authorized by statute. City of Ord v. Biemond ---------- 333
15. A rent or use charge imposed upon a business or an occupation for revenue purposes must be defi-

nite in its application to those upon whom the burden falls, reasonable in amount, and uniform as to the class upon which it operates. City of Ord v. Biemond ---------- 333

16. A municipality may classify commercial enterprises into different classes for the purpose of the imposition of a rent or use charge. A classification of businesses or occupations for such purpose will not be interfered with by the courts unless it manifestly appears that the classification is unreasonable and arbitrary. City of Ord v. Biemond ------ 333

17. The presumption is, unless the contrary appears by competent proof, that a use charge for revenue purposes is reasonable, and the burden of proof to establish otherwise is on the protestant. City of Ord v. Biemond ---------- 333

18. Whether a use or permit fee is reasonable or confiscatory relates to its operation on the class to which it applies and not to its effect on a particular defendant or an isolated case. City of Ord v. Biemond ---------- 333

19. An imposition of a use charge, otherwise valid, on a monthly basis to a business essentially seasonal in nature is not thereby unreasonable. City of Ord v. Biemond ---------- 333

20. Where the electors of a municipality have voted a tax upon all tangible property within the city pursuant to authority granted by the Legislature, representation in the Legislature is sufficient to defeat a claim of taxation without representation by electors of the municipality. Ratigan v. Davis -- 416

21. Where a tax was voted by the electors of a city upon all tangible property not exempt in the city, property within areas subsequently annexed becomes liable for the levy of the tax in the absence of a contrary statutory provision. Ratigan v. Davis -- 416

22. Where a statute authorizes the electors of a city to impose a tax on tangible property within the city, the electors in areas subsequently annexed cannot properly question the validity of the tax on the ground that they have no voice in the selection of those charged with the determination and certification of the amount to be levied. Ratigan v. Davis ---------- 416

23. Under such circumstances the authority to levy the tax is deemed to flow directly from the Legislature. The levy of the tax is corporate action pursuant

to state authority in which electors in subsequently annexed areas cannot void the tax as to them because of no representation on the levying body. Ratigan v. Davis ---------- 416

24. Except as limited by the Constitution, the Legislature has plenary authority over municipal corporations. Ratigan v. Davis ---------- 416

25. All bonds issued by a city are required to be registered in the office of the Auditor of Public Accounts. State ex rel. City of Grand Island v. Johnson -- 498

26. Under the Constitution of Nebraska, a home rule charter must be consistent with and subject to the Constitution and laws of this state. State ex rel. City of Grand Island v. Johnson ---------- 498

27. Where the Legislature has enacted a law affecting municipal affairs, but which is of statewide concern, such law takes precedence over the provisions of a home rule charter. State ex rel. City of Grand Island v. Johnson ---------- 498

28. It is a judicial question as to whether an act of the Legislature pertains to a matter of statewide concern or to a matter of purely local concern. State ex rel. City of Grand Island v. Johnson ---------- 498

29. There is no sure test by which matters of strictly municipal concern may be distinguished from maters of statewide concern. The court must consider each case as it arises and draw the line of demarcation. State ex rel. City of Grand Island v. Johnson 498

30. Legislative act, relating to municipal sewage disposal systems, pertains to a matter of statewide concern and takes precedence over any provision in a home rule charter which is in conflict therewith. State ex rel. City of Grand Island v. Johnson 498

31. What is the public good as it relates to zoning ordinances affecting the use of property is primarily a matter lying within the discretion and determination of the municipal body to which the power and function is committed. Unless an abuse of discretion has been clearly shown, it is not the province of the court to interfere. Crane v. Board of County Commissioners ---------- 568

Negligence.

1. As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area

lighted by his headlights. Robins v. Sandoz ---- 5
2. Even though defendant is guilty of negligence as a matter of law, where there is also evidence of negligence on the part of the plaintiff, a question for determination by a jury is presented under the comparative negligence statute. Robins v. Sandoz 5
3. The fact that a party may be guilty of negligence as a matter of law does not bar him from asserting the benefits of the comparative negligence statute. Robins v. Sandoz ---------- 5
4. Duty of propane supplier of gas with respect to inspection stated. Darnell v. Panhandle Coop. Assn. 40
5. When a propane supplier of gas may be held liable stated. Darnell v. Panhandle Coop. Assn. -------- 40
6. Essential requisites of instruction on doctrine of comparative negligence stated. Darnell v. Panhandle Coop. Assn. ---------- 40
7. The doctrine of assumption of risk in negligence cases stated. Darnell v. Panhandle Coop. Assn. -- 40
8. A business inviter owes the duty to exercise ordinary care to keep an adjacent parking area, and the approaches to his business maintained by him for the use of patrons and customers properly on the premises, in a reasonably safe condition. Crawford v. Soennichsen ---------- 87
9. Generally, there is no liability on the part of an inviter owner to protect a customer against hazards which are known to the customer, and are so apparent that he may reasonably be expected to discover them and protect himself. Crawford v. Soennichsen ---------- 87
10. The liability of an owner or occupant of the premises is predicated on proof of his superior knowledge, actual or constructive, of dangers to which an invitee is subjected and of which invitee is unaware. Crawford v. Soennichsen ---------- 87
11. Proof of knowledge, either actual or constructive, may not be predicated upon conjecture, surmise, or speculation. Crawford v. Soennichsen --------- 87
12. Generally, a store owner may not be charged with negligence by reason of the natural accumulation of ice and snow due to weather conditions, where he has not created the condition, and where the hazardous condition is as well known to the invitee as to the store owner. Crawford v. Soennichsen -- 87
13. Generally it is negligence for a motorist to drive a motor vehicle on a highway in such a manner that

he cannot stop in time to avoid a collision with an object within the range of his vision. Waite v. Briggs ---------- 104

14. Where a motorist approaching a through street or highway stops, looks, and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether he was guilty of contributory negligence which was the proximate cause of the collision is usually a jury question. Waite v. Briggs ---------- 104

15. The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured. Flynn v. Union Stock Yards Co. ---------- 124

16. Negligence is not presumed; the mere happening of an accident does not prove negligence. Flynn v. Union Stock Yards Co. ---------- 124

17. A violation of a city ordinance regulating the speed of railroad trains 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. ---------- 188

18. Instruction in railroad crossing case as to effect of speed of train was not erroneous. Carter v. Chicago, B. & Q. R.R. Co. ---------- 188

19. A guest by the terms of motor vehicle guest statute is a person who accepts a ride in a motor vehicle without giving compensation therefor. Carter v. Chicago, B. & Q. R.R. Co. ---------- 188

20. Rule for determination of what constitutes gross negligence in action under motor vehicle guest statute stated. Carter v. Chicago, B. & Q. R.R. Co. 188

21. Gross negligence means great or excessive negligence in a very high degree. Carter v. Chicago, B. & Q. R.R. Co. ---------- 188

22. Requirements of motor vehicle guest statute stated. Cole v. Wentworth ---------- 325

23. 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. Cole v. Wentworth 325

24. Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negli-

gence in a very high degree. It indicates the absence of slight care in the performance of a duty. Cole v. Wentworth ---------- 325

25. Ordinarily the question of gross negligence is one of fact for a jury, but if the evidence respecting it is not in conflict or is so conclusive that ordinary minds may not draw different conclusions therefrom, the question is one of law for the court. Cole v. Wentworth ---------- 325

26. Rule for determination of what cases shall be submitted to jury under motor vehicle guest statute stated. Cole v. Wentworth ---------- 325

27. The doctrine of res ipsa loquitur is not applicable where there is direct evidence as to the precise cause of an accident and the facts and circumstances surrounding it. The doctrine does not ordinarily apply where the structure or machine alleged to be defective was not exclusively in the possession and under the control of the defendant. Nekuda v. Allis-Chalmers Manuf. Co. ---------- 396

28. Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. Stillwell v. Schmoker ---------- 595

29. Specifications of speed as well as any other specifications of negligence claimed may be proved by circumstantial evidence. Stillwell v. Schmoker -- 595

30. Where the negligence of the driver of the automobile in which a guest is riding is the sole proximate cause of injuries to the guest, the guest has no right of recovery as against a third person. Napier v. Pedersen ---------- 703

31. Where the contributory negligence of the adjoining owner appears to be the proximate cause of the injury, or where it has materially contributed to the injury, there can be no recovery. Michelsen v. Upton 743

32. Ordinarily, the plaintiff is required to prove by a preponderance of the evidence that his damages were proximately caused by the negligence of a defendant, and also the amount of such damages. Cooper v. Hastert ---------- 836

33. An admission of liability for an accident by a defendant does not thereby constitute an admission that all damages claimed by a plaintiff were the proximate result of the accident. Cooper v. Hastert 836

34. The question of the existence of negligence or contributory negligence is for a jury where differ-

ent minds may reasonably draw different conclusions from the evidence. Steel v. Nordin ---------- 900
35. When one, being in a place of safety, seeing and being aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree as a matter of law, and precludes recovery. Steel v. Nordin 900
36. Where a person looks but does not see an approaching motor vehicle because of unusual conditions or circumstances, or sees the approaching vehicle and erroneously judges its speed or distance, or for some other reason assumes he could safely complete the movement, the question of negligence and contributory negligence is usually for the jury. Steel v. Nordin ---------- 900

New Trial.

1. Procedure outlined where appeal is taken from order granting new trial. Connor v. State ---------- 140
2. On an appeal from an order granting a new trial, errors assigned will be considered and determined so far as necessary to dispose of the appeal, subject to the right to consider plain errors not assigned. Connor v. State ---------- 140
3. A new trial is to be granted for a legal cause where it appears that a legal right has been invaded or denied. A new trial is not to be granted for arbitrary, vague, or fanciful reasons. State v. Wixson ---------- 431
4. The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion. State v. Wixson ---------- 431
5. "Judicial discretion" means the application of statutes and legal principles to all of the facts of a case. State v. Wixson ---------- 431
6. A court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are pronounced. Such power exists entirely independent of any statute. Johnston Grain Co. v. Tridle ---------- 859
7. A court has no discretionary power or authority to vacate a judgment on application made within the judgment term but considered and ruled on at a subsequent term. Johnston Grain Co. v. Tridle 859

8. A motion for a new trial which has been duly and timely filed may be heard at a subsequent term. The court may then pass upon the motion and enter judgment. Johnston Grain Co. v. Tridle -------- 859
9. The courtesy which should prevail among members of the bar is a proper matter to be considered by the trial court in exercising its discretion to set aside a judgment in term time. Johnston Grain Co. v. Tridle ---------- 859
10. The lack of diligence of a party or his attorney is not an unavoidable casualty or misfortune under statute authorizing setting aside judgment after expiration of term. Johnston Grain Co. v. Tridle 859

Notice.

1. By statute, whenever notice is required to be given by publication, such notice is required to be mailed to all parties known to have a direct interest in the action or proceedings. Farmers Co-op. Mercantile Co. v. Sidner ---------- 94
2. A claim for unliquidated damages, unasserted by the claimant or in his behalf within the time fixed by statute for the filing of claims in a probate proceeding, is a direct legal interest in an action or proceeding. Farmers Co-op. Mercantile Co. v. Sidner 94

Nuisances.

The only power which a city has to declare the maintenance of a trailer coach a nuisance is to find that it violates the interests of peace, public health, public morality, public safety, or the general welfare of the city. City of Milford v. Schmidt ---- 12

Parent and Child.

1. Where the custody of a minor child is involved in a habeas corpus action the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. Raymond v. Cotner 158
2. The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. Raymond v. Cotner ---------- 158
3. The right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties. The courts

may not deprive a parent of such custody unless he is shown to be unfit or to have forfeited his superior right to such custody. Raymond v. Cotner 158

4. The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. Jones v. State 711
5. Jurisdiction of the state over dependent children arises out of its power possessed as parens patriae. Residence within the state suffices. Jones v. State 711
6. A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it should be in danger of so becoming in the near future. Jones v. State 711
7. It is against the intent of the law to permit the removal of a child from this jurisdiction unless a proper showing is made that it will not become a neglected or dependent child. Jones v. State .. 711
8. Where one of the parents has had the custody of the minor children of the parties for a long period of time, the welfare of the children will generally best be served by leaving them with the parent to whom the children have become attached. Koch v. Koch 737

Parties.

1. Where stockholders for sufficient reason are permitted to intervene, they become parties to the litigation until such time as the court, upon a proper hearing, finds it unnecessary for them to participate. System Meat Co. v. Stewart 387
2. Under the facts presented in this case, interveners are entitled to their day in court to contest the fairness of the proposed settlement agreement. System Meat Co. v. Stewart 387

Partnership.

1. A dissolution of a partnership is defined in the Uniform Partnership Act as the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business. Essay v. Essay 689
2. A partnership is not terminated on dissolution but

continues until the winding up of the partnership affairs is completed. Essay v. Essay ---------- 689

3. Under the provisions of the Uniform Partnership Act, when a partnership undertaking is continued after its termination date as before without an express agreement, the rights and duties of the partners remain the same so far as is consistent with a partnership at will. Essay v. Essay ------ 689

4. Where the widow of a deceased partner, who was the beneficiary of her husband's interest in the partnership by his will, enters into a new partnership agreement with the surviving partner immediately following the death of her husband, to which her contribution of capital was her potential interest under the terms of the will, the partnership agreement is not void as between the parties. Essay Essay ---------- 689

5. When a partner denies the interest of his partner and claims it as his own, and excludes his partner from any participation in the business, his conduct operates as a dissolution of the partnership. Essay v. Essay ---------- 689

6. In a commercial partnership engaged in a business with capital invested jointly by the partners, a managing partner is not entitled to a salary for individual services, nor to an increase of authorized compensation, unless it is allowed by contract. Essay v. Essay ---------- 689

7. A managing partner having exclusive control of a partnership business is required to account to the partnership for any benefit or profit derived from any transaction connected with the formation, operation, or liquidation of the partnership or from any use by him of its property. Essay v. Essay 689

8. A partner who overdraws his share of the earnings of a partnership will ordinarily be held personally liable if his share of the partnership assets is insufficient to satisfy the excessive withdrawals. Essay v. Essay ---------- 689

9. Where miscellaneous receipts are shown to have come into the possession of the partnership which are not accounted for, the managing partner is required to account to the partnership for them. Essay v. Essay ---------- 689

10. Where a managing partner received prizes from a manufacturer or wholesaler for the volume of sales of its products, and he does nothing inde-

pendent of his obligations to the partnership business to obtain them, the prizes belong to the partnership and not to the managing partner. Essay v. Essay ---------- 689

11. Where a partnership has been dissolved but not terminated, the partners share the net profits as before until there is a winding up of the business of the partnership. Essay v. Essay ---------- 689

Party Walls.

1. Owners of a party wall are not tenants in common, but each owns in severalty the part thereof situated on his own land, with an easement of support from the other part. First Investment Co. v. State Fire Marshal ---------- 66
2. Where a wall is entirely upon the property of one party, the right of an adjoining owner to have support therefrom, whether derived from contract or acquired by prescription, is in the nature of an easement, which is terminated upon destruction of the building by accident or casualty. First Investment Co. v. State Fire Marshal ---------- 66
3. Where a facility becomes so dilapidated as to be no longer usable for the purpose for which it was intended, the law implies an abandonment and termination of the right of user. First Investment Co. v. State Fire Marshal ---------- 66
4. The easement of each proprietor in the tenement of the other ceases with the existence of the state of things which had created it, and there is no right in either, in case the other refuses to cooperate, to rebuild the wall and claim contribution. First Investment Co. v. State Fire Marshal ---------- 66
5. There is no obligation to repair a party wall where the grant of an easement is an implied one. First Investment Co. v. State Fire Marshal ------ 66
6. The owners of a party wall do not have a reciprocal easement of support from each other's building, but either of them may remove his own building without liability for the resulting damage to the other, providing he gives proper notice of removal and uses reasonable care and caution to protect the wall and remaining building. First Investment Co. v. State Fire Marshal ---------- 66
7. The removal of a part of a building pursuant to an order of condemnation creates no obligation on the part of the owner of the part of the building re-

moved to provide future protection for an interior division wall. First Investment Co. v. State Fire Marshal ---------- 66

Penalties.

1. Where fines, penalties, and license money arise and are paid in under the general laws of the state, such money shall be paid over to the counties respectively wherein the same may be levied or imposed, and appropriated exclusively to the support of common schools in the several school districts of such county. School Dist. of Omaha v. City of Omaha ---------- 21
2. Forfeited recognizances and cash bonds are penalties arising under the general laws of the state as provided in Article VII, section 5, Constitution of Nebraska, and should be distributed to the several school districts of the county in which they accrue. School Dist. of Omaha v. City of Omaha ---------- 21
3. Penalties which are required by the Constitution to be paid over to the common schools cannot be diverted to any other purpose by the Legislature or by a city. School Dist. of Omaha v. City of Omaha 21

Pleading.

1. A petition that does not state facts sufficient to constitute a cause of action will not support a judgment rendered thereon. Hague v. Sterns ---------- 1
2. A party may at any time invoke the language of his opponent's pleading on which the case is tried, on a particular issue, as rendering certain facts indisputable. Gunia v. Morton ---------- 54
3. A motion for judgment on the pleadings, like a demurrer, admits the truth of all well-pleaded facts in the pleadings of the opposing party and all reasonable inferences to be drawn therefrom. Watkins Products, Inc. v. Rains ---------- 57
4. Exhibits, unless made so by appropriate reference, are not a part of the pleadings, and, to be otherwise a part of the record on appeal, must be contained in a bill of exceptions or some substitute therefor. Connor v. State ---------- 140
5. The prayer for relief is a part of the petition, but it is no portion of the statement of facts which are required to constitute a cause of action, and it may be in excess of what the court is empowered to grant in the action. Connor v. State ---------- 140
6. Where there is no response to an answer, and no ob-

jection or exception is taken thereto, the affirmative allegations of the answer will be regarded as having been generally denied. Dorland v. Dorland 233
7. The allegations of a petition require proof by evidence incorporated in the bill of exceptions. Everts v. School Dist. No. 16 ---------- 310
8. When a party affirmatively pleads a fact that is material to the issue, he thereby assumes the burden of proving the existence of such fact. Everts v. School Dist. No. 16 ---------- 310
9. A judgment of dismissal after sustaining a demurrer based on the failure to state a cause of action is a judgment on the merits even though by amendments a good cause of action might be stated. Knapp v. City of Omaha ---------- 576
10. Matters so judicially noticed are properly considered when determining the questions presented by a demurrer. Knapp v. City of Omaha ---------- 576
11. 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 it does not admit the pleader's conclusions either of law or of fact. Weiner v. Morgan ---------- 656
12. If a demurrer is sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct. Weiner v. Morgan ---- 656
13. Either party to an action may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer, or reply alleging facts material to the case, occurring after the former petition, answer, or reply. Weiner v. Morgan ---------- 656
14. The right to amend pleadings is not absolute. Before error can be predicated upon the refusal of the court to permit an amendment to a petition, after demurrer thereto is sustained, the record must show that under the circumstances the ruling was an abuse of discretion. Weiner v. Morgan ---------- 656
15. In a case where a demurrer to a petition is sustained, the plaintiff's action is dismissed, and a motion for a new trial and rehearing is filed and ruled upon, the time for appeal begins to run from the date of the ruling on the motion for a new trial and rehearing. Weiner v. Morgan ---------- 656
16. To entitle the defendant to proceed on a setoff or counterclaim, it must state a separate cause of

action against the plaintiff and be pleaded as fully and distinctly, and with the same requisites, as an original cause of action. Giesler v. City of Omaha 706

Principal and Agent.

1. Agency cannot be established by the acts or declarations of the alleged agent, but must be proved by the acts or declarations of the principal. Berg v. Midwest Laundry Equipment Corp. 423
2. Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. The distinguishing features of agency are its representative character and its derivative authority. Anderson v. Valley Feed Yards, Inc. 719
3. Whether a particular relationship is an agency depends on the relations of the parties as they in fact exist, without regard to what they call their relationship. Anderson v. Valley Feed Yards, Inc. 719

Principal and Surety.

1. The statute of limitations commences to run against a surety when his obligation to pay accrues. Watkins Products, Inc. v. Rains 57
2. Partial payments made without the authority or consent of a surety, unless ratified by the surety, do not toll the statute of limitations as to such surety. Watkins Products, Inc. v. Rains 57
3. Knowledge of the making of partial payments by the principal does not of itself affect the liability of the surety, nor operate to toll the statute of limitations as to him. Watkins Products, Inc. v. Rains 57
4. Where in an action on a written suretyship contract, it appears on the face of the petition that suit was commenced after the running of the statute of limitations, the cause of action is barred as to the sureties in the absence of allegations showing that the statute has been tolled as to them. Watkins Products, Inc. v. Rains 57

Process.

1. Jurisdiction over a foreign corporation which is actually doing business in Nebraska may be obtained by service of process upon the Secretary of

State even though the corporation has not expressly consented to such jurisdiction. Berg v. Midwest Laundry Equipment Corp. ---------- 423

2. It is a question of fact as to whether a foreign corporation is doing business in this state. Each case must be decided upon its own facts. Berg v. Midwest Laundry Equipment Corp. ---------- 423

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. Yellow Cab Co. v. Nebraska State Railway Commission ---------- 150
2. The term "agencies" set out in the title to the Administrative Procedure Act includes the railway commission. Yellow Cab Co. v. Nebraska State Railway Commission ---------- 150
3. The rules relating to nunc pro tunc orders are generally applicable to administrative and quasi-judicial commissions. Andrews v. Nebraska State Railway Commission ---------- 222
4. On appeal to the Supreme Court from an order of the railway commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. Andrews v. Nebraska State Railway Commission ---------- 222
5. In the absence of a bill of exceptions, no question will be considered, a determination of which requires an examination of the evidence produced at a hearing before the railway commission. Andrews v. Nebraska State Railway Commission ---------- 222
6. Questions for determination upon appeal from order of railway commission fixing rates stated. United Mineral Products Co. v. Nebraska Railroads ---- 285
7. The railway commission has the power, and it is its duty, as between points within the state, to fix all necessary rates and to correct abuses and prevent unjust discriminations as to such rates. United Mineral Products Co. v. Nebraska Railroads ------ 285
8. The rate-fixing power of the railway commission, if properly exercised, is legislative in character and has the force and effect of a statute on the subject. United Mineral Products Co. v. Nebraska Railroads ---------- 285
9. In the fixing of rates, railroads may not give

any undue preference or advantage to any particular person or locality, or subject any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. United Mineral Products Co. v. Nebraska Railroads ---------- 285

10. When railroad rates are discriminatory and preferential stated. United Mineral Products Co. v. Nebraska Railroads ---------- 285

11. Where discrimination as to rates is an issue, comparison of the commodity price with rates of transportation may be an important issue. United Mineral Products Co. v. Nebraska Railroads ------ 285

12. Rate discrimination is a fact issue peculiarly committed to the discretion of the railway commission. Its decision may not be disturbed unless arbitrary and unreasonable and outside of the scope of its authority. United Mineral Products Co. v. Nebraska Railroads ---------- 285

13. The lowest rates published, or charged, for substantially the same kind of service are prima facie evidence of a reasonable rate for the services under investigation. United Mineral Products Co. v. Nebraska Railroads ---------- 285

14. In establishing through joint rates, the railway commission is required to consider average rates charged by the railroads for shipments within this state for like distances over their respective lines. United Mineral Products Co. v. Nebraska Railroads 285

15. Railroads may not reduce rates to meet competition at one point and refuse to meet it at other points where the circumstances are substantially similar. United Mineral Products Co. v. Nebraska Railroads 285

16. The railway commission lacks authority to compel a carrier licensed by the Civil Aeronautics Board to continue operations over a segment of a route which that board has authorized to be discontinued. Frontier Airlines, Inc. v. Nebraska Department of Aeronautics ---------- 501

Quieting Title.

A party who seeks to have title to real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence. Mitchell v. Beermann ---------- 616

Quo Warranto.

An adequate statutory remedy for the settlement of the rights of parties in election cases is provided by either contest or quo warranto and these remedies are exclusive. Longe v. County of Wayne 245

Railroads.

1. A violation of a city ordinance regulating the speed of railroad trains 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. 188
2. Instruction in railroad crossing case as to effect of speed of train was not erroneous. Carter v. Chicago, B. & Q. R.R. Co. 188

Rape.

1. In the prosecution of cases wherein assault with intent to commit rape is pleaded, the statute defining rape and also assault with intent to commit rape must be considered as in pari materia. State v. Miller 213
2. The failure of the court to instruct the jury that a defendant charged with rape cannot be convicted without evidence corroborating the prosecutrix is not error, unless it appears that such an instruction was requested. State v. Miller 213

Receivers.

1. A court-appointed receiver is not an adverse party within the meaning of statute providing for an attorney's lien. An attorney can obtain no lien upon the funds in the possession of such receiver. Lewis v. Gallemore 279
2. The basis for the payment of attorney's fees and expenses by a court from funds in the possession of a court-appointed receiver is founded on general equitable principles which are proper only for dominating reasons of justice. Lewis v. Gallemore 279

Sales.

1. Under the provisions of the Uniform Sales Act, notice of a breach of warranty must be given within a reasonable time. Unless such notice be given, the purchaser has neither a right of action for the

breach of a promise or warranty in the contract, nor a defense to an action for the purchase price. Nekuda v. Allis-Chalmers Manuf. Co. ---------- 396

2. It is essential to a recovery on an implied warranty that the implied warranty be established, a breach thereof be shown, and the damages resulting from the breach be proved. Where the evidence fails to show a breach of warranty a basis for recovery is not established. Nekuda v. Allis-Chalmers Manuf. Co. ---------- 396

3. Distinction between a bona fide time sale and an installment loan stated. Berg v. Midwest Laundry Equipment Corp. ---------- 423

4. Whether or not a transaction is a bona fide time sale or the financing of the balance of a cash purchase price is a question of fact. Elder v. Doerr -- 483

5. In considering whether a transaction is a time sale made in good faith or a loan, the court will look through the form and examine its substance. Elder v. Doerr ---------- 483
General Motors Acceptance Corp. v. Mackrill ---- 631
Lloyd v. Gutgsell ---------- 775

6. A transaction is not a valid time sale made in good faith unless the seller informs the buyer at the time of the sale of the cash and time sale prices and gives the buyer the opportunity to choose the one he will accept. Elder v. Doerr ---------- 483

7. The Nebraska Installment Sales Act is unconstitutional in that it contravenes Article III, section 18, Constitution of Nebraska, and it is of no force and effect. Elder v. Doerr ---------- 483

8. An installment sales contract, in which the seller is a nonlicensee, which exacts interest in excess of 9 percent, is usurious and void in that it violates the provisions of the Nebraska Installment Loan Act. Elder v. Doerr ---------- 483

9. 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. General Motors Acceptance Corp. v. Mackrill ---------- 631

10. The fact that a purchaser has full knowledge of and accepts the terms of a proffered sale is not a defense to a charge of usury. General Motors Acceptance Corp. v. Mackrill ---------- 631

11. The lender is the violator of the law and against

him alone are its penalties enacted. General Motors Acceptance Corp. v. Mackrill ---------- 631
12. The contract involved in this case is in violation of the Installment Loan Act and is void and uncollectible. General Motors Acceptance Corp. v. Mackrill ---------- 631
13. Legislative Bill 811, adopted at the 1963 session of the Legislature, is a bill for the regulation of interest on money. Stanton v. Mattson ---------- 767
14. Legislative Bill 811, of the 73rd session of the Nebraska Legislature, is unconstitutional and void in that it contravenes Article III, section 18, and Article 1, section 16, Constitution of Nebraska. Stanton v. Mattson ---------- 767
15. If a purported time sale is in fact a loan, and the loan is in violation of the Installment Loan Act, the penalities of the act apply to it. Lloyd v. Gutgsell 775
16. Where a time sale price is determined by applying a certain schedule of rates or charges to the cash price, the resulting product is interest. Lloyd v. Gutgsell ---------- 775

Schools and School Districts.

1. It is the mandatory duty of the county superintendent of schools to certify the result of school district elections under Reorganization of School Districts Act. Longe v. County of Wayne ---------- 245
2. The special election under the Reorganization of School Districts Act is governed by the general election laws and is subject to contest. Longe v. County of Wayne ---------- 245
3. Statute on holding of school district elections is not unconstitutional because of its providing that the school board or board of education shall designate the polling places at which the elections are to be held. Peterson v. Cook ---------- 296
4. Under a statute providing for a school district election which leaves the selection of the number and location of the polling places to the school board, its decision will be final unless it is clearly shown to be arbitrary and unreasonable. Peterson v. Cook ---------- 296
5. In proceedings for change of school district boundaries, a statute requires the giving of notice by publication and also by posting notice in certain places. Where the proof of such notice does not appear in the bill of exceptions, the action of the

board in granting the request for change of school district boundaries will be held void for want of jurisdiction. Everts v. School Dist. No. 16 ------ 310
6. Requirement that county superintendent dissolve a school district which for 5 years contracts for instruction may be waived and restricts the right of the county superintendent to dissolve a school district during the school year covered by the waiver. Bierman v. Campbell ---------- 877
7. The waiver, having been granted for the sixth year, has exactly the same effect as if the sixth year were the fifth year of the contract instruction. Bierman v. Campbell ---------- 877
8. Injunctive relief will not, in the absence of an abuse of discretion, issue to control the acts of school boards and county superintendents within the limits of the powers conferred on them. Bierman v. Campbell ---------- 877
9. Where there is no other adequate remedy available, unlawful acts beyond the scope of the powers of officers of a school district may be enjoined on the complaint of one whose property rights will be irreparably injured thereby. Bierman v. Campbell -- 877

Searches and Seizures.
1. Evidence obtained as the fruit of an illegal search or arrest, in violation of the Constitutions of the United States and Nebraska is inadmissible in a prosecution in this state and must be excluded. State v. O'Kelly ---------- 798
2. The reasonableness of a search or seizure in the first instance is a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of constitutional requirements. State v. O'Kelly ---------- 798
3. The practicability of obtaining a search warrant is not the controlling factor when a search is sought to be justified as incident to arrest. Each case must be determined from the particular circumstances present. State v. O'Kelly ---------- 798

Setoff and Counterclaim.
1. Where a setoff or counterclaim has been presented, the defendant has a right to proceed to the trial of his claim, although the plaintiff may have dismissed his action. Giesler v. City of Omaha ----- 706
2. To entitle the defendant to proceed on a setoff or

counterclaim, it must state a separate cause of action against the plaintiff and be pleaded as fully and distinctly, and with the same requisites, as an original cause of action. Giesler v. City of Omaha ---------- 706

3. Where a setoff or counterclaim does not state a separate cause of action against the plaintiff, a dismissal by the plaintiff of his cause of action has the effect of withdrawing the entire case from the consideration of the court. Giesler v. City of Omaha ---------- 706

Sheriffs and Constables.

1. Every sheriff, deputy sheriff, or police officer is authorized to arrest and detain any person found violating any law of this state until a legal warrant can be obtained. Sperry v. Greiner -------- 524
2. Evidence was sufficient from which a jury could find the officer had probable cause to believe plaintiff had committed a felony. Sperry v. Greiner 524

Statutes.

1. The Legislature, under the guise of regulation, may not indulge in arbitrary price fixing or the destruction of lawful competition. Terry Carpenter, Inc. v. Nebraska Liquor Control Commission ------ 26
2. If an act has but one general object, no matter how broad that object may be, contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate the Constitution of Nebraska providing that no bill shall contain more than one subject and the same shall be clearly expressed in the title. Yellow Cab Co. v. Nebraska State Railway Commission ---------- 150
3. The amendments to the Administrative Procedure Act do not violate the constitutional provision that no bill shall contain more than one subject because its provisions apply to the railway commission and other administrative agencies. Yellow Cab Co. v. Nebraska State Railway Commission -- 150
4. The Legislature in enacting a law may properly delegate to the governmental subdivisions involved the authority and discretion necessary to effectuate its execution. Peterson v. Cook ---------- 296
5. Where the Legislature has enacted a law affecting municipal affairs, but which is of statewide con-

cern, such law takes precedence over the provisions of a home rule charter. State ex rel. City of Grand Island v. Johnson ---------- 498

6. There is no sure test by which matters of strictly municipal concern may be distinguished from matters of statewide concern. The court must consider each case as it arises and draw the line of demarcation. State ex rel. City of Grand Island v. Johnson ---------- 498

7. Legislative act, relating to municipal sewage disposal systems, pertains to a matter of statewide concern and takes precedence over any provision in a home rule charter which is in conflict therewith. State ex rel. City of Grand Island v. Johnson 498

8. Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment is controlling. Crane v. Board of County Commissioners ---------- 568

9. Statute prescribing effect of joint ownership of building and loan stock is intended for the protection of the building and loan association and, in addition thereto, fixes the property rights of the persons named, unless a contrary intent affirmatively appears from the terms used in the stock certificate. Rose v. Hooper ---------- 645

10. The provision of the statute as to joint ownership of building and loan stock is in derogation of the common law. It eliminates all legal refinements and technicalities growing out of judicial precedents determining the nature of the transactions therein described since the adoption of the act. Rose v. Hooper ---------- 645

11. Building and loan statute clearly and without ambiguity provides that whenever certificates in a building and loan association are made to the joint account of two or more persons the shares represented thereby shall be payable to any one of them. Rose v. Hooper ---------- 645

12. General rule for construction of a statute stated. Rose v. Hooper ---------- 645

13. A statute providing as to who are neglected children should be liberally construed to aid the purpose of its enactment. Jones v. State ---------- 711

14. Whether a child is a neglected child is a question of fact. Each case must be determined on its own facts. Jones v. State ---------- 711

Taxation.

1. An appeal to the district court from the action of the county board of equalization is heard in equity, and upon appeal to the Supreme Court is tried de novo. H/K Company v. Board of Equalization ---- 268
2. The burden of proof is upon the taxpayer to establish his contention that his property has been unreasonably valued in an amount greater than its actual value, or that its value has not been fairly and properly equalized with all other property resulting in a discriminatory and unfair assessment. H/K Company v. Board of Equalization ---------- 268
3. The valuation of property made by an assessor for taxation purposes is presumed to be correst if it reflects his own information and judgment. H/K Company v. Board of Equalization ---------- 268
4. If the assessor does not inspect the property and accepts the valuation fixed by another person, the presumption that his valuation is correct does not exist. H/K Company v. Board of Equalization -- 268
5. Statutory rule for valuing and assessing tangible personal property and real estate stated. H/K Company v. Board of Equalization ---------- 268
6. Actual value of property is ascertained by using statutory formula where applicable. H/K Company v. Board of Equalization ---------- 268
7. The Constitution of Nebraska requires taxes on all tangible property to be levied by valuation uniformly and proportionately. H/K Company v. Board of Equalization ---------- 268
8. Constitutional provisions requiring equality and uniformity of taxation do not apply to rent or use charges for revenue purposes, and there need be no uniformity as between occupations or businesses. City of Ord v. Biemond ---------- 333
9. The maxim of no taxation without representation has a very restricted meaning since it is not contained in the Constitution, and representation is not a condition precedent to the levy of an authorized tax. Ratigan v. Davis ---------- 416
10. Where the electors of a municipality have voted a tax upon all tangible property within the city pursuant to authority granted by the Legislature, representation in the Legislature is sufficient to defeat a claim of taxation without representation by electors of the municipality. Ratigan v. Davis -- 416
11. Where a tax was voted by the electors of a city upon

all tangible property not exempt in the city, property within areas subsequently annexed becomes liable for the levy of the tax in the absence of a contrary statutory provision. Ratigan v. Davis -- 416

12. Where a statute authorizes the electors of a city to impose a tax on tangible property within the city, the electors in areas subsequently annexed cannot properly question the validity of the tax on the ground that they have no voice in the selection of those charged with the determination and certification of the amount to be levied. Ratigan v. Davis 416

13. Under such circumstances the authority to levy the tax is deemed to flow directly from the Legislature. The levy of the tax is corporate action pursuant to state authority in which electors in subsequently annexed areas cannot void the tax as to them because of no representation on the levying body. Ratigan v. Davis ---------- 416

Tenancy in Common.

1. Joint tenancies are not favored in the law, and if not expressly created by statute, contract, conveyance, grant, or devise, the law presumes the existence of a tenancy in common in jointly owned property. White v. Ogier ---------- 883

2. When the evidence is insufficient to create a tenancy in jointly owned property, the presumption is that it is held as a tenancy in common. White v. Ogier ---------- 883

Torts.

Rule with respect to causation of injury in tort action stated. Flynn v. Union Stock Yards Co. ---------- 124

Trespass.

The defense of a prescriptive easement is available in a trespass action under a general denial. Martin v. Norris Public Power Dist. ---------- 815

Trial.

1. In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at decision considered only such evidence as was competent and relevant. The Supreme Court will not reverse a judgment in a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record

to sustain the judgment. Terry Carpenter, Inc. v. Nebraska Liquor Control Commission ---------- 26
2. A jury should not be instructed as to the amounts prayed for in the petition of the plaintiff, and an instruction that a verdict for the plaintiff may not exceed such specific amounts should not be given. Darnell v. Panhandle Coop. Assn. ---------- 40
3. Essential requisites of instruction on doctrine of comparative negligence stated. Darnell v. Panhandle Coop. Assn. ---------- 40
4. A party may at any time invoke the language of his opponent's pleading on which the case is tried, on a particular issue, as rendering certain facts indisputable. Gunia v. Morton ---------- 54
5. Where a motion for a directed verdict is made at the close of the evidence of the state in a criminal action, the introduction of evidence thereafter by the defendant waives any error in the ruling on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction. State v. Eggers ---------- 79
6. In testing the sufficiency of the evidence for determining the propriety of a directed verdict, the plaintiff is entitled to have all controverted facts resolved in her favor, and she is entitled to have the benefit of every inference that can reasonably be drawn from the evidence. Crawford v. Soennichsen 87
7. Where the facts adduced to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury. Crawford v. Soennichsen 87
Flynn v. Union Stock Yards Co. ---------- 124
Michelsen v. Upton ---------- 743
8. Rule for consideration of motion for directed verdict or judgment notwithstanding the verdict stated. Flynn v. Union Stock Yards Co. ---------- 124
9. The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured. Flynn v. Union Stock Yards Co. ---------- 124
10. Rule with respect to causation of injury in tort action stated. Flynn v. Union Stock Yards Co. -- 124
11. Where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. The rule also

applies to the district court when reviewing its own proceedings on motion for a new trial. Connor v. State ---- 140
State v. Dillon ---- 444
12. Where a verdict of a jury is clearly against the weight and reasonableness of the evidence it will be set aside and a new trial granted. Connor v. State ---- 140
State v. Dillon ---- 444
13. Under ordinary circumstances the opinion of an expert witness is to be considered and weighed by the triers of fact like any other testimony. Connor v. State ---- 140
State v. Wixson ---- 431
State v. Dillon ---- 444
14. The amount of the damages sustained by a landowner for a right-of-way condemned across his land is peculiarly of a local nature to be determined by a jury, and its verdict will not ordinarily be interfered with if it is based on the testimony. Connor v. State ---- 140
State v. Wixson ---- 431
State v. Dillon ---- 444
15. In a condemnation action, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong. Connor v. State 140
State v. Wixson ---- 431
16. Where the charge to a jury in a particular respect contains a correct general statement of the law, error cannot be predicated on a failure to give a more specific instruction in the absence of a request therefor. Carter v. Chicago, B. & Q. R.R. Co. 188
17. Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects. Carter v. Chicago, B. & Q. R.R. Co. ---- 188
18. Instructions given to a jury must be construed together and if, when considered as a whole, they properly state the law that is sufficient. Carter v. Chicago, B. & Q. R.R. Co. ---- 188
19. An instruction which informs the jury that when there is conflict in the evidence it is its duty to reconcile the evidence if it can, and if it cannot, then to determine which is true and which is un-

true, does not infringe upon the right of the jury to judge the credibility of witnesses and the weight to be given their testimony. State v. May 318

20. One who has brought out improper testimony on the examination-in-chief of his own witness over proper objections cannot complain of cross-examination of the witness on the same subject. Neill v. McGinn 369

21. Where it is not relevant to any issue in the case, the fact that a party carries liability insurance is not admissible in evidence. Neill v. McGinn 369

22. If evidence is properly admissible for any purpose, it cannot be excluded for the reason that it tends to show that the party carries liability insurance. Neill v. McGinn 369

23. Where it is clear that a verdict of the jury is based upon compromise and disregard of evidence, it must be set aside. Gillaspie v. Nebraska Tractor & Equipment Co. 401

24. In a condemnation action the weight and credibility of testimony of either lay or expert witnesses as to land values is for the jury. State v. Dillon 444

25. A bona fide holder for value of a past-due negotiable instrument is entitled to a peremptory instruction in his favor. Geyer v. The Walling Co. 456

26. Courts must apply a rigid test to explanations offered for previous omissions when material facts are elicited for the first time in a subsequent hearing. Pruitt v. McMaken Transp. Co. 477

27. Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of such evidence may be destroyed even though uncontroverted by direct testimony. Pruitt v. McMaken Transp. Co. 477

28. In the absence of a special requirement, a board of adjustment in zoning case is not required to include findings of fact or a statement of the reasons for its decision in the order entered upon an application made to the board. Crane v. Board of County Commissioners 568

29. Evidence that previous applications for special permits to operate trailer courts have been refused does not establish that the refusal to grant a subsequent application for such a permit is arbitrary and capricious. Crane v. Board of County Commissioners 568

30. An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications to enable a jury to observe and understand the duty of drivers at the time and place in question. Stillwell v. Schmoker ---------- 595

31. Although the evidence may be entirely circumstantial as to the rate of speed at which a motor vehicle was operated, it may be sufficient to support a reasonable conclusion reached by the jury on the issue of negligence. Stillwell v. Schmoker ---------- 595

32. It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence, and a failure to do so is prejudicial. Stillwell v. Schmoker ---------- 595

33. In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom. Napier v. Pedersen 703

34. Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. Napier v. Pedersen ---------- 703

35. 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. Michelsen v. Upton ---------- 743

36. 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. Michelsen v. Upton ---------- 743

37. An instruction with respect to circumstantial evidence is not erroneous when it states that if all of the facts and circumstances relied upon by the State to secure a conviction can reasonably be accounted for upon any theory consistent with the

innocence of the defendant, then the jury should acquit him. State v. Nichols ---------- 761
38. A party to an action is entitled to have the jury instructed with reference to his theory of the case when the pleadings present the theory as an issue and it is supported by competent evidence, whether or not the court is requested to do so. Kraft v. Fundum ---------- 821
39. An instruction that a plaintiff may not recover if the jury finds defendant's motor vehicle was stopped in the street when the collision occurred, and had been so stopped before it came into plaintiff's vision, is a correct statement of the law where there is no evidence sustaining recognized exceptions to the rule. Kraft v. Fundum ---------- 821
40. Although a jury should be instructed without undue repetition, it is not reversible error unless the court singles out a particular part of the evidence and refers unduly to its weight, strength, or probative force. Kraft v. Fundum ---------- 821
41. Ordinarily, the plaintiff is required to prove by a preponderance of the evidence that his damages were proximately caused by the negligence of a defendant, and also the amount of such damages. Cooper v. Hastert ---------- 836
42. An admission of liability for an accident by a defendant does not thereby constitute an admission that all damages claimed by a plaintiff were the proximate result of the accident. Cooper v. Hastert 836
43. A verdict and judgment will not be set aside as inadequate unless they are clearly wrong and so against the weight and reasonableness of the evidence as to indicate that they were the result of passion, prejudice, or mistake. Cooper v. Hastert 836
44. Instructions to a jury should be considered as a whole. The meaning of instructions when taken as a whole, and not the phraseology of any particular portion, is the important consideration. Cooper v. Hastert ---------- 836
45. The trial court is required to submit to the jury the issues raised by the pleadings which are supported by the evidence. Zager v. Johnson ---------- 866
46. Circumstantial evidence may be sufficient to support a finding as to the rate of speed at which a motor vehicle was operated, and may be sufficient to overcome direct evidence as to that fact. Zager v. Johnson ---------- 866

47. The meaning of an instruction, and not its phraseology, is the important consideration. Where the meaning of an instruction is reasonably clear it is not prejudicially erroneous. Zager v. Johnson ---- 866
48. The question of the existence of negligence or contributory negligence is for a jury where different minds may reasonably draw different conclusions from the evidence. Steel v. Nordin ---------- 900

Trusts.

1. Where property is conveyed directly to a municipal corporation to hold for purposes for which the corporation was created, no trust for the benefit of others arises, unless such intent can be found to be effectively manifested by apt and appropriate language creating a trust in the property. City of Gering v. Jones ---------- 626
2. The burden of proof that a deposit is for a special purpose or of a trust nature devolves on the party who claims that it is impressed with such character. Glass v. Nebraska State Bank ---------- 673

Usury.

1. Distinction between a bona fide time sale and an installment loan stated. Berg v. Midwest Laundry Equipment Corp. ---------- 423
2. A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan. Elder v. Doerr ---------- 483
3. Whether or not a transaction is a bona fide time sale or the financing of the balance of a cash purchase price is a question of fact. Elder v. Doerr 483
4. In considering whether a transaction is a time sale made in good faith or a loan, the court will look through the form and examine its substance. Elder v. Doerr ---------- 483
   General Motors Acceptance Corp v. Mackrill ---- 631
   Lloyd v. Gutgsell ---------- 775
5. A transaction is not a valid time sale made in good faith unless the seller informs the buyer at the time of the sale of the cash and time sale prices and gives the buyer the opportunity to choose the one he will accept. Elder v. Doerr ---------- 483
6. Where usury is established, the lender alone is the violator of the law and the borrower has no equit-

able duty to the lender with reference thereto. Elder v. Doerr ---------- 483
7. The Legislature may, in the exercise of the police power, fix maximum interest rates for the hire of money or the forebearance of debt. Elder v. Doerr 483
8. An installment sales contract, in which the seller is a nonlicensee, which exacts interest in excess of 9 percent, is usurious and void in that it violates the provisions of the Nebraska Installment Loan Act. Elder v. Doerr ---------- 483
9. Regardless of the term used, if the result is a charge for the loan of money or for forbearance of a debt the result is interest. General Motors Acceptance Corp. v. Mackrill ---------- 631
10. Disguise it by any name that may be done, it is and remains interest. The concern is not with the form but the intent of the transaction. General Motors Acceptance Corp. v. Mackrill ---------- 631
11. The permissive provisions of the Installment Loan Act will not apply to a nonlicensee, but a nonlicensee will be bound by the inhibitory provisions of the act. General Motors Acceptance Corp. v. Mackrill ---------- 631
12. The fact that a purchaser has full knowledge of and accepts the terms of a proferred sale is not a defense to a charge of usury. General Motors Acceptance Corp. v. Mackrill ---------- 631
13. The lender is the violator of the law and against him alone are its penalties enacted. General Motors Acceptance Corp. v. Mackrill ---------- 631
14. The contract involved in this case is in violation of the Installment Loan Act and is void and uncollectible. General Motors Acceptance Corp. v. Mackrill ---------- 631
15. The defense of usury is personal to a borrower, and is available only to the borrower himself and to those in legal privity to him. Rader v. Burnett 663
16. A mere purchaser of the equity of redemption, being neither surety nor privy, cannot avail himself of the usurious contract of his grantor to which he is a stranger. Rader v. Burnett ---------- 663
17. This is true whether the statutes declare the contract void in whole or only to the extent of the usury. Rader v. Burnett ---------- 663
18. The rule of legal privity embraces the heirs, legal representatives, and devisees of the borrower or debtor and those who stand in relation of sureties,

guarantors, or accommodation endorsers, with respect to the tainted transaction. Rader v. Burnett 663
19. A cause of action on a usurious contract is not assignable to a stranger to the transaction. Rader v. Burnett 663
20. Legislative Bill 811, adopted at the 1963 session of the Legislature is a bill for the regulation of interest on money. Stanton v. Mattson 767
21. The borrower as a participant in a usurious transaction is in vinculis and not in pari delicto to the lender as regards usury. Lloyd v. Gutgsell 775
22. Even when the parties have been found to be in pari delicto, relief may be awarded on the ground that in the particular case public policy will be deemed to be best conserved by that course. Lloyd v. Gutgsell 775
23. If a purported time sale is in fact a loan, and the loan is in violation of the Installment Loan Act, the penalties of the act apply to it. Lloyd v. Gutgsell 775
24. Where a time sale price is determined by applying a certain schedule of rates or charges to the cash price, the resulting product is interest. Lloyd v. Gutgsell 775

Vendor and Purchaser.

1. The conveyance of a thing imparts a grant of it as it actually exists at the time the conveyance is made, unless the contrary intention is manifested in the grant. First Investment Co. v. State Fire Marshal 66
2. In an action for breach of contract of purchase where the defects in a house may be remedied without materially injuring or reconstructing any substantial portion of the house, the measure of damages is the cost of repairs in making it conform with the terms of the contract. Jacobs v. Korst 639
3. Where defects cannot be remedied without reconstruction of, or a material injury to, a substantial portion of a house, the measure of damages is the difference between its market value at the time of sale and its market value if it had been as warranted or represented. Jacobs v. Korst 639

Waters.

1. Surface waters are defined as waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular

course, which ordinarily result from rainfall or melting snow. Nielsen v. Chappelear ---------- 381

2. Diffused surface waters, which ordinarily result from rainfall and melting snow and having no permanent source of supply or regular course, may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence. Neilsen v. Chappelear ---------- 381

3. When surface waters concentrate and gather in volume, so as to lose their character as diffused surface waters and flow into a natural depression, draw, swale, or other natural drainway, the flow may not be arrested or interfered with to the injury of neighboring proprietors. Nielsen v. Chappelear ---------- 381

4. Rule stated as to right of landowner to control surface waters. Nielsen v. Chappelear ---------- 381

5. While the flow of surface waters in a natural depression, draw, swale, or other natural drainway may be temporary and occasional, the course which they uniformly take is the controlling factor. Nielsen v. Chappelear ---------- 381

6. A party who seeks to have title to real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence. Mitchell v. Beermann ---------- 616

Wills.

1. The cardinal rule of testamentary construction is to ascertain the intention of the testator as expressed in the will. First Nat. Bank & Trust Co. v. Oeltjen ---------- 345

2. In construing a will the court should give effect to the true intention of the testator as shown by the will itself in the light of the attendant circumstances under which it was made, if that intention is consistent with the applicable rules of law. First Nat. Bank & Trust Co. v. Oeltjen ---------- 345

3. No particular words or conventional forms of expression are necessary to enable one to make an effective testamentary disposition of his property. First Nat. Bank & Trust Co. v. Oeltjen ---------- 345

4. The intention of the testator is to be ascertained from a liberal interpretation and comprehensive

view of all of the provisions of the will. First Nat. Bank & Trust Co. v. Oeltjen ---------- 345
5. Where possible, a will should be construed so as to give effect to every part of it. First Nat. Bank & Trust Co. v. Oeltjen ---------- 345

Witnesses.

1. In a condemnation action the weight and credibility of testimony of either lay or expert witnesses regarding value of land taken or value of remainder immediately before and immediately after taking is for the jury. Connor v. State ---------- 140
State v. Wixson ---------- 431
2. Under ordinary circumstances opinion evidence of an expert is to be considered and weighed by the triers of fact like any other testimony. State v. Dillon ---------- 444
3. Testimony of witnesses must be confined to concrete facts perceived by the use of their senses as distinguished from opinions and conclusions deducible from evidentiary facts. Stillwell v. Schmoker 595
4. While an expert witness will be permitted to express his opinion, or even his belief, he cannot give his opinion upon the precise or ultimate fact in issue before the jury, which must be determined by it. Stillwell v. Schmoker ---------- 595
5. A witness may describe the marks that he observed near the place of the accident. The inference to be drawn from the testimony is solely the province of the jury. Stillwell v. Schmoker ---------- 595

Workmen's Compensation.

1. In an action under the Workmen's Compensation Act the burden is on the claimant to establish by a preponderance of the evidence that he sustained a personal injury by the accident arising out of and in the course of his employment. Pruitt v. McMaken Transp. Co. ---------- 477
Wheeler v. Northwestern Metal Co. ---------- 841
2. Mere exertion which is no greater than that ordinarily incident to the employment cannot of itself constitute an accident under the Workmen's Compensation Act. Pruitt v. McMaken Transp. Co. -- 477
3. Even if exertion, combined with preexisting disease or injury, produced the disability, it does not constitute a compensable accidental injury under the

Workmen's Compensation Act. Pruitt v. McMaken Transp. Co. ---------- 477
4. A workmen's compensation award cannot be based on possibiilites or probabilities but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment. Pruitt v. McMaken Transp. Co. ---- 477
5. Rule of construction under the Workmen's Compensation Act stated. Pruitt v. McMaken Transp. Co. 477
6. Questions of dependency of parents on a deceased minor son, in whole or in part, under the provisions of the Workmen's Compensation Act, is determined in accordance with the fact as the fact may be at the time of the injury to the deceased employee son. Lighthill v. McCurry ---------- 547
7. Parents are not presumed to be dependents of minor children but, on the facts, may be found to be dependent. Lighthill v. McCurry ---------- 547
8. Where a claim is made under the Workmen's Compensation Act on account of dependency, actual as distinguished from mere legal dependency must be shown. Lighthill v. McCurry ---------- 547
9. The determination of the fact of partial dependency under the Workmen's Compensation Act must be based upon contributions made by the employee for the purpose of support of the claimed dependent. Lighthill v. McCurry ---------- 547
10. It is not money contributed but money contributed for the purpose of support of the claimant that must be the basis of any claim of partial dependency under the Workmen's Compensation Act. Lighthill v. McCurry ---------- 547
11. "Dependency" and "support" under the Workmen's Compensation Act are terms that are not capable of certain definition. Lighthill v. McCurry ------ 547
12. If a contribution is made to the ordinary comforts and conveniences which are reasonably appropriate to parties in their station in life, it should be considered as support and the recipient regarded as a dependent. Lighthill v. McCurry ---------- 547
13. The fact that an employer is engaged in farming does not remove from the coverage of the Workmen's Compensation Act other businesses or occupations carried on by the employer which are otherwise in the coverage of the statute. Campos v. Tomoi ---------- 555
14. The whole character of the employment must be

looked to to determine whether an employee is a farm laborer within the meaning of the Workmen's Compensation Act. Campos v. Tomoi ---------- 555

15. A group of farmers operating a commercial hay grinding business on a partnership basis may not, during the course of the operation of said separate business, be deemed employers of farm laborers within the meaning of the Workmen's Compensation Act. Campos v. Tomoi ---------- 555

16. In order to receive workmen's compensation from the Second Injury Fund a claimant must in fact have a permanent total disability. Kelly v. Peter Kiewit Sons Co. ---------- 621

17. A workman who is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted, except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act. Kelly v. Peter Kiewit Sons Co. -- 621

18. Statutory definition of word "accident" in Workmen's Compensation Act is given. Wheeler v. Northwestern Metal Co. ---------- 841

19. Facts must be proved by a claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and the cause of his disability. Wheeler v. Northwestern Metal Co. ---------- 841

20. Workmen's Compensation Act should be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation. Wheeler v. Northwestern Metal Co. 841

21. In considering the sufficiency of the proof, the rule of liberal construction, as it relates to the Workmen's Compensation Act, applies to the law and not to the evidence offered to support a claim by virtue of the law. Wheeler v. Northwestern Metal Co. ---------- 841

22. Total disability under Workmen's Compensation Act is defined. Wheeler v. Northwestern Metal Co. -- 841

23. Total disability is not affected by ability to obtain trivial occasional employment under rare conditions at small remuneration. The test is whether the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous

occupation or any other established field of employment for which he is fitted. Wheeler v. Northwestern Metal Co. ---------- 841

24. Where reasonable controversy exists between an employer and an employee as to the employer's liability, the employer is not liable for the penalty for waiting time or for allowance of attorney's fees. Wheeler v. Northwestern Metal Co. -------- 841

Zoning.

1. Test of validity of zoning action stated. City of Milford v. Schmidt ---------- 12
2. A decision of a board of adjustment in zoning case will not be disturbed unless it is illegal, is not supported by the evidence, is arbitrary and unreasonable, or is clearly wrong. Crane v. Board of County Commissioners ---------- 568
3. Under zoning regulations, an applicant is not entitled to a special permit to operate a trailer court as a matter of right upon a showing of compliance with applicable health and sanitation regulations. Crane v. Board of County Commissioners 568
4. In the absence of a special requirement, a board of adjustment in zoning case is not required to include findings of fact or a statement of the reasons for its decision in the order entered upon an application made to the board. Crane v. Board of County Commissioners ---------- 568
5. Evidence that previous applications for special permits to operate trailer courts have been refused does not establish that the refusal to grant a subsequent application for such a permit is arbitrary and capricious. Crane v. Board of County Commissioners ---------- 568
6. The exercise of the zoning power may not be denied on the ground that individual property rights may be adversely affected thereby. Crane v. Board of County Commissioners ---------- 568
7. Zoning regulations must give reasonable consideration to the character of the district, and should conserve the value of buildings and encourage the most appropriate use of the land. Crane v. Board of County Commissioners ---------- 568
8. What is the public good as it relates to zoning ordinances affecting the use of property is primarily a matter lying within the discretion and determination of the municipal body to which the

power and function is committed. Unless an abuse of discretion has been clearly shown, it is not the province of the court to interfere. Crane v. Board of County Commissioners ---------- 568

9. Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment is controlling. Crane v. Board of County Commissioners ---------- 568

10. Nonconforming uses are not favored. Crane v. Board of County Commissioners ---------- 568