Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
09/16/2026 06:30 AM CDT

ELIZA WOODS, APPELLEE, V. GEORGE WOODS, APPELLANT.
129 N. W. 2d 519

Filed July 10, 1964. No. 35564.

1. **Pleading.** When an adverse party files a reply to an unverified answer, thus pleading over, he waives any objection as to the verification thereto.
2. **Contracts.** A binding oral agreement or understanding may be implied from conduct and circumstances and may be shown by circumstantial evidence and the admissions of the parties sought to be charged.
3. ———. It is sufficient, if the facts and circumstances, together with the words of the parties used at the time, are such that reasonable persons in conducting the ordinary affairs of business would be justified in inferring such a contract or agreement.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Reversed and remanded.

Stern, Harris & Feldman, for appellant.

Jerome P. Grossman, for appellee.

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

WHITE, C. J.

Defendant, George Woods, in November and December 1957, received a total sum of approximately $2,408.10 in money from Eliza Woods, his mother. This is an action by the mother, Eliza Woods, to recover that sum. Defendant admits receiving the money, from cashing an endorsed check and the sale of some livestock. As a defense, he seeks to establish that he had a contract with plaintiff under which he was to receive the money in return for an agreement to support and care for the plaintiff. He pleaded this defense by an unverified answer. The plaintiff filed a reply and the parties proceeded to trial. The court, on its own motion, struck the answer on the grounds that it was unverified. The plaintiff by filing a reply, thus pleading over, waived

any objection as to verification thereto. Northup v. Bathrick, 80 Neb. 36, 113 N. W. 808; Blodgett v. Swanson Bros., 105 Neb. 191, 179 N. W. 1011. This was error and the answer should not have been stricken.

Plaintiff's husband had been ill for about a year and died on October 22, 1957, at Little Rock, Arkansas, near Forrest City where plaintiff and her deceased husband farmed and rented out two small acreages. Several of the children who lived in Omaha, Nebraska, had gone to Arkansas to help during their father's illness. George, the defendant, had gone from Omaha to Arkansas in May 1957, and stayed there until his return to Omaha late in December 1957. Augusta Bowers, a daughter, lived in Arkansas. The defendant offered to prove, by Augusta's testimony, over objection, that on October 28, 1957, the day after the father's funeral, his mother, Augusta, and defendant were driving in his car to Forrest City, Arkansas; that Augusta told her mother there had been a meeting of the family the previous evening; that they agreed it would be best for the mother to go to Omaha and live with George; that if it was all right with the plaintiff George should use whatever funds were then available or became available for the care and support of the plaintiff; that while in the car George agreed to assume this responsibility; and that the plaintiff agreed to this arrangement in the presence of George and Augusta as they were in the car driving to Forrest City. The evidence shows that the plaintiff went to Omaha and began living with the defendant in February 1958, and lived with him for about a month. Sometime during this period of time she began demanding the return of her money.

The court, on its own motion, rejected the offer of proof as to the contract and refused permission for either Augusta or George to testify as to the conversation and agreement during the automobile trip. The court, therefore, directed a verdict for the plaintiff and entered judgment accordingly. This was prejudicial error.

A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality, or express utterance from the parties themselves as to all of the details of the proposed agreement. It may be established by the parties assenting to the proposal drawn, or uttered by a third party to which they assent or to which they agree, and it may be implied from conduct and circumstances and may be shown by circumstantial evidence and the admissions of the parties sought to be charged. Evidence of facts and circumstances, together with the words of the parties used at the time, from which reasonable persons in conducting the ordinary affairs of business, but with special reference to the particular matter on hand, would be justified in inferring such a contract or promise, is sufficient. Citizens State Bank v. State Bank, 111 Neb. 571, 197 N. W. 607; In re Estate of McKeon, 227 Iowa 1050, 289 N. W. 915; Kladivo v. Melberg, 210 Iowa 306, 227 N. W. 833; Restatement, Contracts, § 22, comment (a), p. 27.

Plaintiff argues that there is a presumption of a gift when a child renders service to parents, that the offer of proof didn't refer to any specific contract for the use of the mother's money, and that the offer of proof does not cover all of the necessary elements or details of such a contract for services. Part of these arguments are based on an acceptance of plaintiff's testimony and version of the facts. Defendant, however, was entitled to have the testimony presented supporting his theory of defense. The offer of proof was sufficient. It need not state with precision every detail of the proposed testimony of the witnesses establishing the agreement or contract. It is sufficient if it directs the court's attention to material testimony establishing or supporting defendant's theory of defense. It is not asserted that the defendant's pleading in this respect is insufficient.

For the reasons given, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

GUSTAVE R. WOLF ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

129 N. W. 2d 501

Filed July 10, 1964. No. 35649.

1. **Zoning: Municipal Corporations.** The city of Omaha under its home rule charter has the power, by ordinance, to zone the city in the interest of public health, safety, morals, and the general welfare. Any such act of the city must however not be unreasonable, discriminatory, and arbitrary and it must bear some relationship to the purpose or purposes sought to be accomplished by the ordinance.
2. **Municipal Corporations.** To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory.
3. ———. In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.
4. ———. In the exercise of police power delegated by the state Legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised.
5. **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 of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere.
6. **Zoning: Appeal and Error.** In passing upon the validity of zoning ordinances, an appellate court should give great weight to the determination of local authorities and local courts especially familiar with local conditions.
7. **Zoning: Municipal Corporations.** Every zoning ordinance effects some impairment of vested rights either by restricting

prospective uses or by prohibiting continuation of existing uses, because it affects property already owned by individuals at the time of its enactment.

8. ———: ———. Whether a zoning ordinance is unreasonable, arbitrary, and discriminatory is related to its application to particular property involved, and each case must be determined on its own facts.

9. ———: ———. A zoning ordinance may be amended from time to time as new and changing conditions warrant revision.

10. ———: ———. Public welfare must be considered from the standpoint of objective of zoning and of all property within any particular use district, and it is not contemplated that preexisting nonconforming uses are to be perpetual.

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

Hilmes & Woodruff, for appellants.

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Edward M. Stein, Sebastian J. Todero, Frederick S. Geihs, and Walter J. Matejka, for appellee.

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

MESSMORE, J.

This is an action brought in the district court for Douglas County by Gustave R. Wolf and Esther E. Wolf, husband and wife, for themselves and others similarly situated, seeking a temporary and permanent injunction to enjoin the City of Omaha, a municipal corporation, defendant, from enforcing the provisions of section 55.50.050 of the Omaha municipal code, as amended by ordinance No. 21611 of the city of Omaha.

The trial court found generally in favor of the defendant and against the plaintiffs; that ordinance No. 21611 of the city of Omaha passed by the city council on February 7, 1961, and approved by the mayor of the city on February 9, 1961, the same being section 55.50.050 of the Omaha municipal code, was valid and constitutional; that the plaintiffs were not entitled to a

permanent injunction preventing its enforcement; and that the restraining order issued in this action be dissolved.

The plaintiffs filed a motion for new trial which was overruled, and the plaintiffs appealed.

The plaintiffs are residents of the city of Omaha, a municipal corporation of the metropolitan class, organized and existing under and by virtue of the Constitution and laws of the State of Nebraska.

The plaintiffs alleged in their petition that this is a class action brought by the plaintiffs in their behalf and in behalf of others similarly situated with respect to the subject matter of this action; that the plaintiffs for many years have bred and raised purebred dogs at their home and upon the premises owned by them; that when the defendant enacted an ordinance defining a dog kennel, and exempting one or two dogs owned by a single owner from the provisions of such ordinance, the plaintiffs, upon the advice of city officials, secured a license from the city of Omaha, paying the prescribed fees therefor, which license entitled them to continue breeding and raising purebred dogs; that the plaintiffs' acts constitute a nonconforming use; that the plaintiffs were in operation and licensed for such breeding and raising of purebred dogs prior to the enactment of any regulating and prohibiting ordinance by the defendant; and that the Legislature, under the provisions of Chapter 14, article 4, of the statutes, which act is controlling of the zoning regulations of the defendant, in 1925 enacted what is now section 14-406, R. R. S. 1943. The plaintiffs' petition then sets forth the ordinances, the statutes, and the zoning regulations, their passage and dates pertinent to the instant case, and what such instruments disclosed. The plaintiffs further alleged that section 55.50.050 of the Omaha municipal code is unreasonable, arbitrary, discriminatory, and illegal because it violates the Fourteenth Amendment to the Constitution of the United States and Article I, sections 1 and 3, of the Constitution

of the State of Nebraska, and other reasons. The plaintiffs' petition prayed that the court declare section 55.50.050 of the city code to be illegal, invalid, and unconstitutional, and for a permanent injunction prohibiting the enforcement of section 55.50.050 of the city code.

The defendant, by answer, denied all allegations of the plaintiffs' petition not admitted, and alleged that Chapter 14, article 4, R. R. S. 1943, delegates the powers to cities of the metropolitan class to zone and provide for location and use of buildings, structures, and land for the residents or other purposes. The answer then set forth the history of the ordinances here involved, and alleged that the city had the power delegated to it by the Legislature and by its police power to zone and regulate dog kennels such as owned by the plaintiffs herein, and prayed that the plaintiffs' petition be dismissed.

An exhibit in evidence is a stipulation that the ordinances and sections thereof enacted by the city council of the defendant, the dates of enactment thereof, and the periods said ordinances and sections thereof are alleged to be in force and effect are admitted to be true and correct, and that the same be considered as being correct without further introduction of evidence.

The original home rule charter adopted by the city of Omaha, and which was in effect until 1956, was adopted July 18, 1922, pursuant to Article XI, section 5, of the Constitution of Nebraska. See Belitz v. City of Omaha, 172 Neb. 36, 108 N. W. 2d 421. In 1956, by vote of the electors, the city of Omaha adopted the home rule charter of 1956, which charter is now in effect. See Mollner v. City of Omaha, 169 Neb. 44, 98 N. W. 2d 33.

The home rule charter of 1922, in effect until 1956, included the following provisions setting forth the grant of power by statute to the city of Omaha to enact zoning regulations.

As a background, the following relate to the history of the subject matter here involved.

Section 14-401, R. R. S. 1943, provides: "For the purpose of promoting the health, safety, morals or the general welfare of the community, the city council in a city of the metropolitan class is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes. Such regulations may provide that a board of appeals may determine and vary their application in harmony with their general purpose and intent, and in accordance with general or specific rules therein contained."

Section 14-402, R. R. S. 1943, provides: "For any or all of said purposes the city council may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of sections 14-401 to 14-418. Within such districts it may regulate, restrict or prohibit the erection, construction, reconstruction, alteration or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts."

Section 14-406, R. R. S. 1943, provides: "The lawful use of land existing on April 1, 1925, although such use does not conform to the provisions hereof, may be continued, but if such nonconforming use is abandoned, any future use of said premises shall be in conformity with the provisions of sections 14-401 to 14-418. The lawful use of a building existing on April 1, 1925, may be continued, although such use does not conform with the provisions hereof, and such use may be extended throughout the building, provided no structural alterations, except those required by law or ordinance are

made therein. If no structural alterations are made, a nonconforming use of a building may be changed to another nonconforming use of the same or a higher classification. Whenever a use district shall be changed, any then existing nonconforming use in such changed district may be continued or changed to a use permitted in that district, provided all other regulations governing the new use are complied with. Whenever a nonconforming use of a building has been changed to a more restricted use or to a conforming use such use shall not thereafter be changed to a less restricted use."

Section 14-403, R. R. S. 1943, provides: "Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements, and to promote convenience of access. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."

An exhibit relating to chapter 55.50, nonconforming uses, section 55.50.010, provides: "The provisions of Section 14-406, Revised Statutes of Nebraska, 1943, and any amendments which may be made thereto, relating to Non-Conforming Uses, shall be applicable to all of the provisions of this Title and any amendments thereto. (Ord. 15239 § XXI part; February 13, 1945)."

Section 55.50.020 provides: "In addition to said Section 14-406, Revised Statute of Nebraska, 1943, and any amendments thereto, the following provisions shall be

applicable to non-conforming uses. (Ord. 15239 § XXI part; February 13, 1945)."

Section 55.50.050 provides: "A dog kennel which was in non-conforming use on February 1, 1955, may remain in such use for a period up to and including February 16, 1962. Discontinuance of the non-conforming use for a period of three months will constitute an abandonment of said non-conforming use and terminate the same. (Ord. 21611 § 1; February 7, 1961)."

Ordinance No. 21611 provides: "AN ORDINANCE to amend Section 55.50.050 of the Omaha Municipal Code pertaining to Dog Kennels in non-conforming use; to repeal Section 55.50.050 of the Omaha Municipal Code as heretofore existing; and to provide the effective date hereof. * * * Section 1. That Section 55.50.050 of the Omaha Municipal Code be, and the same hereby is, amended to read as follows:

" '55.50.050 Dog Kennels. A dog kennel which was in non-conforming use on February 1, 1955 may remain in such use for a period up to and including February 16, 1962. Discontinuance of the non-conforming use for a period of three months will constitute an abandonment of said non-conforming use and terminate the same.'

"Section 2. That Section 55.50.050 of the Omaha Municipal Code as heretofore existing be, and the same hereby is, repealed.

"Section 3. That this Ordinance shall be in full force and take effect fifteen (15) days from and after the date of its passage."

Ordinance No. 18274 provides: "AN ORDINANCE to amend Section XXII, Additional Regulations, of Ordinance No. 15239, as amended, the Zone Ordinance for Omaha, Nebraska, by adding thereto a new paragraph to be numbered '13, pertaining to conditions for non-conforming uses of dog kennels. * * *

" '13. Non-Conforming Use, Dog Kennel: A dog kennel which is in non-conforming use may remain in such use for a period not to exceed five years from the

effective date of this ordinance. Discontinuance of the non-conforming use for a period of three months will constitute an abandonment of said non-conforming use and terminate the same.' " Passed February 1, 1955, and to become effective 15 days from and after its passage.

Ordinance No. 18275 is an ordinance to amend section I of ordinance No. 15239, as amended, the zone ordinance for Omaha, Nebraska, by adding thereto definitions for dog kennels and dog kennels nonconforming, and provides: "That Section I of Ordinance No. 15239, as amended, the Zone Ordinance for Omaha, Nebraska, be, and it hereby is, amended by adding thereto the following definitions:

" 'DOG KENNEL: A lot, building, structure, enclosure, or premises whereon or wherein three (3) or more dogs over four months of age are kept or maintained for any purpose whatsoever.'

" 'DOG KENNEL—NON-CONFORMING: A dog kennel used for non-commercial purposes which is located in an area other than one classified as 2nd Commercial District, or Industrial Districts, as of March 1, 1955.' " This ordinance to be in full force and take effect after 15 days from and after its passage. Passed on February 1, 1955.

Then there is a provision relating to licenses of dogs in the city of Omaha, which provisions have been complied with by the plaintiffs. This instrument also contains the regulations relating to dogs in commercial and private kennels which need not be set forth, but which plaintiffs apparently adhered to.

The Omaha municipal code, Title 55, zoning, section 55.02.50, contains the following: "DOG KENNEL, NON-CONFORMING: A dog kennel used for non-commercial purposes which is located in an area other than one classified as 2nd Commercial District, or Industrial District, as of March 1, 1955."

Section 55.50.050 provides: "Dog kennels. A dog kennel which was in non-conforming use on February 1,

1955, may remain in such use for a period up to and including February 16, 1962. Discontinuance of the non-conforming use for a period of three months will constitute an abandonment of said non-conforming use and terminate the same. (Ord. 21611 § 1; February 7, 1961)."

The home rule charter of the city of Omaha, 1956, section 7.09, Zoning Ordinance and Zoning Administration, provides in part: "The preparation, adoption, and administration of the zoning ordinance and the creation, powers, and duties of the Board of Appeals shall be as provided by the laws of the State of Nebraska."

For convenience we will refer to the City of Omaha as the city, and to Gustave R. Wolf and Esther E. Wolf, husband and wife, as plaintiffs.

The trial court, in addition to its finding and judgment, set forth in the transcript an opinion relating to this case.

The plaintiffs assign as error that in the opinion filed, the trial court erred in finding that zoning regulations enacted by the city were of local rather than statewide concern; that the statutes of the State of Nebraska conferring upon the city the power and authority to zone and regulate the use of land and buildings within its jurisdiction were of no force and effect upon the exercise of such power and authority; in finding that the city had the power and authority to terminate a lawful, valid, existing, and vested nonconforming use of real estate by zoning legislation; and in failing to grant the plaintiffs the injunctive relief prayed for against the enforcement of section 55.50.050 as heretofore set forth.

In connection with the above assignments of error, the plaintiffs set forth the following: The city, under the laws of the State of Nebraska, may regulate and restrict the use of land and buildings within its jurisdiction and in accordance with its home rule charter, subject to the grant of authority conferred upon it by the Constitution and statutes of the State of Nebraska. How-

ever, any such regulation or restriction is subject to the limitation that the same may not operate retroactively to deprive a property owner of his previously vested rights. The plaintiffs cite Chapter 14, article 4, R. R. S. 1943, particularly sections 14-401, 14-402, and 14-406; section 7.09 of the home rule charter of the Omaha municipal code, page XXXXVI; section 55.50.010 of the Omaha municipal code, as heretofore set forth; and cases from this state and some from foreign jurisdictions, relating to such subject matter.

In the case of City of Omaha v. Glissmann, 151 Neb. 895, 39 N. W. 2d 828, this court said: "A zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning ordinance cannot deprive the owner of a use to which his property was put before the enactment of the ordinance. See Cassel Realty Co. v. City of Omaha, 144 Neb. 753, 14 N. W. 2d 600.

"However, the purchase or leasing of lands with the intent to use them for a use then permissible under a zoning ordinance does not prevent the city from changing its zoning ordinance applicable thereto as such property is always held subject to the city's lawful exercise of the police power. See, West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 192 S. E. 881; 16 C. J. S., Constitutional Law, § 175, p. 541; and 11 Am. Jur., Constitutional Law, § 264, p. 1000."

In addition to the above-quoted language from the opinion, this court in City of Omaha v. Glissmann, *supra,* announced other rules applicable to the situation presented in the instant case, as follows: " 'The city of Omaha under its home rule charter has the power, by ordinance, to zone the city in the interest of public health, safety, morals and the general welfare. Any such act of the city must however not be unreasonable, discriminatory and arbitrary and it must bear some relationship to the purpose or purposes sought to be ac-

complished by the ordinance.' Cassel Realty Co. v. City of Omaha, *supra.*

"However, an ordinance passed in the exercise of such police power properly delegated to a city is presumably valid and the courts will not interfere with its enforcement until the unreasonableness or want of necessity of such measure is made to appear by satisfactory evidence. See, Union Pacific R. R. Co. v. State, 88 Neb. 247, 129 N. W. 290; Faucher v. Grosse Ile Township Building Inspector, 321 Mich. 193, 32 N. W. 2d 440; Ervin Acceptance Co. v. City of Ann Arbor, 322 Mich. 404, 34 N. W. 2d 11; Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 175 P. 2d 542.

"As stated in Lombardo v. City of Dallas (Tex. Civ. App.), 47 S. W. 2d 495: 'The authorities are unanimous in holding that courts will presume that the legislative body, in enacting ordinances, acted within their authority, and the burden rests upon those who challenge their validity to show that, in the matter called in question, the action of the municipal authorities was arbitrary, unreasonable, and without substantial relation to the public safety, health, morals, or the general welfare.'

"We said in State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 135 N. W. 376, 40 L. R. A. N. S. 898:

" 'To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory.

" 'In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.

" 'In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people,

and as to when and how such police power should be exercised.'

"As stated in Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N. W. 2d 634:

" 'What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and unless an abuse of this discretion has been clearly shown it is not the province of the court to interfere. * * *

" 'In passing upon the validity of zoning ordinances, an appellate court should give great weight to the determination of local authorities and local courts especially familiar with local conditions.'

"Therein we cited with approval the following from Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 213 N. W. 835:

" 'The police power is inherent in the effective conduct and maintenance of government and is to be upheld, even though the regulation affects adversely property rights of some individual. City of Aurora v. Burns, 319 Ill. 84.

" ' "If considerations of public health, safety, comfort or general welfare could have justified zoning ordinance, the court must assume that they did justify it, and cannot take issue with the city council." State v. City of New Orleans, 154 La. 271.'

"In Pettis v. Alpha Alpha Chapter of Phi Beta Pi, *supra,* the court went on to say: 'The weight of judicial authority clearly appears to support the proposition that, before a zoning ordinance can be declared unconstitutional, such ordinance must be either an arbitrary or an unreasonable pronouncement of the council, or it must be without substantial relation to public health, safety, morals, or general welfare.' * * *

" 'Every intendment is in favor of the validity of the exercise of police power, and, even though a court might

differ from the determination of the legislative body, if there is a reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, the zoning measure will be deemed to be within the purview of the police power. * * * (Cases are cited.)

" 'What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere. Morgan v. City of Chicago, 370 Ill. 347; Speroni v. Board of Appeals, 368 id. 568; Michigan-Lake Building Corp. v. Hamilton, *supra;* Minkus v. Pond, 326 Ill. 467.' Zadworny v. City of Chicago, 380 Ill. 470, 44 N. E. 2d 426.

"The question of the validity or invalidity of a zoning ordinance presents a question to be determined on examination of the facts presented in each particular case."

With the foregoing in mind, the evidence discloses the following.

A licensed judge of the American Kennel Club, qualified to judge all breeds of dogs, who had been a private and public handler of dogs and in an advisory capacity concerning dogs, and who had bred dogs, testified that he was acquainted with the plaintiffs and had seen the kennel that they operate; that the plaintiffs' kennel is run as a hobby kennel, purely for enjoyment as a hobby, and is not advertised as a commercial kennel; that when the plaintiffs sell a dog they do it by indirect contact, not by advertising in the newspapers or dog publications; that plaintiffs do not have a kennel arrangement such as runs and cages; and that they have a fenced-in yard, and their dogs are not allowed to run at large. He then testified that he knew Mr. H. F. Jacobberger, another owner of dogs, and had been at his

home, and this person operates his kennel similar to the way the plaintiffs do and has his dogs fenced; that he had seen their dogs at shows and in their homes; that a good purebred dog that is a show dog is valued at from $400 to several thousands of dollars; that the people involved in this case have quality dogs; and that definitely there is no nuisance, every kennel is run as a hobby type of kennel. This witness further testified that these dogs are kept under control; that there are no offensive odors nor signs or commercial activity; that hobby breeding of dogs is fairly common around the country; that there is no mass production of dogs, but it is a technical matter where a study of bloodlines is made of the animals, and where the objective is to produce a winning dog; that that is the type of breeding such people engage in, and if they were forced to dispose of their animals they would suffer a loss financially; and that from a breeding standpoint a person cannot go into the market and buy the type of dogs that these hobby owners have. He further testified that if a stranger wanted to see the dogs he would call up and get permission to do so; and that these kennels are not run as a commercial kennel.

On cross-examination this witness testified that he would not consider a hobby kennel offensive if he lived next door to one, but that he would consider a business or commercial kennel offensive; that generally a hobby kennel is run on a small scale whereas a business-type kennel might consist of 40 or 50 dogs; that the hobby kennel owners pick up the droppings at regular intervals; and that if this was not true, it could be considered a nuisance.

On redirect examination he testified that if the owners have three dogs they may have a litter of three or four pups, but they never keep all of the pups, but probably keep the best one for themselves; that home breeders keep their dogs at a minimum because it is a hobby and not a money-making proposition; that in hobby ken-

nels the dogs are confined; and when they go for a walk they are on a leash.

On recross-examination he testified that if the owner lets the dogs bark at will, and does not pick up the droppings, or advertises and has people coming on the premises, there might be a basis for calling such a kennel a nuisance, but this condition does not exist, to the knowledge of this witness, among hobby dog owners. This witness further testified that he did not believe any person operating a hobby kennel makes a profit; and that the money put into the business to show dogs is necessary because it is expensive, and at the end of the year such hobby owners are definitely in the red.

The chief environmental health sanitarian for the city testified that his duties are anything that has to do with environment, which could be dog problems, nuisances, garbage, and trash; that his department is charged by ordinance, together with the humane society, with general supervision to correct such problems; and that he has served in such capacity since January 11, 1954. This witness further testified that with home kennels which had been inspected twice a year for 5 years, there was no problem involved, and they were not nuisances so far as his department was concerned; that the dogs were enclosed as provided by ordinance, and proper sanitary facilities and housing were provided; that the dogs were kept under shelter as they should have been; and that no complaints were made to him. He further testified that in 1961, these hobby kennels were inspected, and before the owners could obtain a license the kennels had to be inspected every year by the humane society, the planning people, and the health department; that he found nothing objectionable at the time; that the dogs in most cases were kept in a kennel with cages, but were treated more as pets; and that the kennels were hobby kennels and not business kennels. He testified to a record of the owners of dogs that operated such kennels; that there was little

variance during the years relating to the number of dogs that were kept by such owners; that the number was constant; that hobby owners might have three dogs, and with the exception of puppies, that number would remain constant; that all animals in the city are problems, such as dogs running at large, littering neighbors' yards and trespassing on flowers; and that there are also dog bites, and the problem of keeping the pens clean.

On cross-examination this witness testified that he had been with the health department since 1953, and had worked with the humane society since that time; that with reference to the ordinance drafted in 1955, it defined a kennel as having three or more adult dogs, and provided that kennels could only be located in the second commercial or industrial districts; that if a kennel was in existence in a residentially zoned district it could exist for up to 5 years; that that ordinance was passed because it was thought that kennels in a residential district would be a nuisance; that he had investigated kennels in which more than three dogs were kept and where complaints had been made; and that these complaints presented problems such as sanitation and noise, and would constitute a nuisance.

Gustave R. Wolf, one of the plaintiffs, testified that he had been breeding pug dogs approximately 12 years; that the dogs are kept in the basement of his home; that his backyard is fenced; that the dogs are in the house after hours; that during the daytime they are not allowed out unless his wife is with them; that if they hear a peep out of the dogs they are brought in; that the dogs are not permitted to run in the yard for long periods of time; that the yard is cleaned periodically, meaning picking up droppings which are not very much with small dogs; that he has received no complaints from his neighbors about odor, noise, or anything of that nature; that as far as his dogs are concerned, it is a hobby; that he is not in the business to breed as many

dogs as he can; that in the last year and a half, or possibly 2 years they had had one litter of pups, that the only reason they breed dogs is to improve the bloodlines and try to get a potential champion; that going to dog shows is expensive; that he spends money on dogs to try to get a perfect dog; that this is on a hobby basis; that people are acquainted with him and his wife because they have built up prestige by attendance at dog shows in the Midwest, and when somebody is looking for a good pug dog they think of the plaintiffs; that these dogs will be sold to people who call them and want to know if they have any dogs for sale; that as far as the sale of dogs is concerned, they had sold only one dog in the past year; that there is no traffic in dogs; that he doubted if he could replace his champion dog on the market because he is one of the outstanding dogs in the Midwest; that there are no signs, no advertising, and no invitation to the public to come and see the dogs; that if someone would call up and want to breed to their champion, the plaintiff would have to know all about the female dog, want to see her and know her bloodlines; and that they are not interested in the few dollars that could be received as a stud fee.

On cross-examination this witness testified that he lives in a fifth residential district and has three adult dogs; that with only two dogs plaintiffs would be unable to pursue this hobby and retain the bloodlines necessary to develop the quality dogs; that each dog has a cage which is kept in the basement; that the dogs bark very little; and that a kennel is not offensive if it is kept clean and free from noise.

The chief environmental health sanitarian of the city testified for the city that there had been situations in the city where three or more dogs had created a problem in quite a number of cases, and in most cases they had constituted a nuisance, usually a noise nuisance, and in a number of cases had created a sanitary nuisance. When the owners do not pick up after the dogs, such

problems have been offensive to the public health, safety, and public welfare. There are cases where persons have three dogs and where complaints were lodged, and the department reduces their number of dogs to two. By sanitation this witness meant when the owners of dogs do not pick up their droppings for some period of time until they are forced to, then odor and fly problems exist. This condition constitutes a health hazard and a nuisance within the ordinance under the health department of the city.

The city planning director since 1956 testified that he was the administrative officer of the planning department which is charged with the responsibility of preparing and keeping up-to-date the master plan for the city, for the administration of the subdivision regulations, and for the administration of amendments to the zoning ordinance of the city; that based upon his experience as a planning director and having worked in this field, he gave as his opinion that he believed that dog kennels should be located in the rural areas surrounding the city, in the areas which are not developed into suburban residential neighborhoods yet but are on the fringe of the city; and that in his opinion dog kennels should not be located in residential districts because in the past there had been certain features about the operation of kennels which in his opinion were incompatible with the normal residential areas in the following respects; in many instances dog kennels involve one or more outbuildings located in the rear of property, and often involve high fences around runs, and this type of outbuilding construction is not typical of modern residential subdivisions and residential neighborhoods; that there is a psychological element which affects neighbors; in some cases small children, and in some cases older people, either have a fear or distaste for groups of dogs; sometimes there has been a noise in connection with kennels and in some instances odors; and that these things all taken together are a special type of ac-

tivity which is not in keeping with the normal single-family residence on a normal lot in a residential neighborhood. He was asked if he had not expressed himself as being satisfied that the home kennels could be taken care of in the draft of the proposed ordinance. He replied: "I don't want to say something that I might—I can't remember exactly. This entire matter was discussed over a period of 12 to 18 months, as I remember it, and I believe we thought this was a compromise with the kennel people and what we thought the Planning Board and the staff could recommend. I believe when I say it was a compromise that I am accurate. I don't believe I enforced it a thousand per cent, but I believe we did agree that this could be set up for hearing and sent to the council." He further testified that this was a compromise; that there were a number of changes on all sides as to the number of dogs and all the rest of it; and that it was put through a public hearing in the council. In response to a question by the court, this witness said that he would not make a distinction between so-called commercial kennels and the so-called hobby kennels or private kennels. He was asked what happens if these kennels are located in an undeveloped area adjacent to a metropolitan area such as Omaha and the city expands and neighbors move in. His answer was: "We tried to anticipate that a little bit by requiring a large tract of ground, I don't recall the exact size, but getting into an acreage size tract of ground which would have extremely wide yards between any possible kennel buildings and the neighbors, so that if the city grew up to it at least the abutting lots would be—I don't recall the size, 85, probably a hundred feet from any kennel properties, and when people move up next to an operation like that they do so knowingly, and if they mind a kennel they don't need to live next to it, and you are not superimposing something on somebody that they may not enjoy."

The plaintiffs also rely on the case of City of Omaha

v. Gsantner, 162 Neb. 839, 77 N. W. 2d 663, wherein the plaintiffs contend this court ruled indirectly upon the question of a nonconforming use. This was an injunction action wherein the plaintiff sought an injunction prohibiting the defendant from operating a dog kennel on described property. The defendant admitted the operation of such kennel and contended that it was a nonconforming use within the meaning of section 14-406, R. R. S. 1943. The trial court dismissed the city's petition. We reversed the judgment. The property of the defendant was within half a mile of a designated residential district. Section 14-406, R. R. S. 1943, was set forth in part, as has been previously set forth herein. This court said: "For defendant to come within the permitted nonconforming use provisions of the statute, it is necessary that three things be established: (1) That the use made of the premises prior to the adoption of the ordinance was a commercial livestock farm operation; (2) that the use for which the premises are now used is a commercial livestock farm operation; and (3) that the two uses are of the same classification or that the dog kennel use is of a higher classification."

The plaintiffs' contention is that the above statement by this court laid down the test for determining what is and what is not a valid nonconforming use, and established that such uses were lawful and could be continued within the bounds of the statute and this interpretation. The court further said: "Defendant seeks to change a conforming use to a nonconforming use. The ordinance prohibits it."

The plaintiffs assert that ordinance No. 15239 of the city, commonly known as the comprehensive zoning act, was adopted February 13, 1948, and included as a part thereof section 14-406, R. R. S. 1943, which appears, as heretofore set out, as section 55.50.010. The plaintiffs assert that the reason for setting the foregoing out is that the city, to zone and regulate within its jurisdiction

is dependent upon and subject to the grant to it by the Legislature of such power and authority, and to point up the fact that both charters and the applicable ordinances of the city have incorporated therein and subjected zoning regulations to the legislative grant and the specific prohibition set forth in section 14-406, R. R. S. 1943; that this latter prohibition in both statute and local regulation protects vested nonconforming uses of property in the city from interference or abolishment under the guise of zoning regulations; and that the licensees in the instant case enjoyed a vested property right which the city seeks to abridge by the cited legislative action.

The above-cited case presents an entirely different situation than appears in the instant case. Section 14-406, R. R. S. 1943, is not the only section involved in this case as heretofore indicated.

The plaintiffs' second proposition relates to the police power of the city with reference to the subject matter here involved. The law with reference thereto, insofar as this state has announced it, appears above.

The foregoing constitutes the contentions of the plaintiffs in the instant case.

We now turn our attention to the contention of the city.

No case seems to have been decided in this state squarely involving the precise question presented.

There is a decided lack of accord as to the power to terminate a lawful nonconforming use existing at the time a zoning ordinance was passed, after use has been permitted to continue. In several cases the validity of such a requirement has been upheld.

In the case of City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P. 2d 34, the defendant was in the plumbing supply business which was located in a fourth residential multiple-dwelling zone. Defendant's business produced a gross revenue varying from $125,000 to $350,000 a year. Defendant claimed, and the lower

court found, that he had obtained vested rights to continue in the location. The City of Los Angeles contended that the mandatory discontinuance of a nonconforming use after a fixed period was a reasonable exercise of the police power. The court said: "There is a growing tendency to guard against the indefinite continuance of nonconforming uses by providing for their liquidation within a prescribed period. * * * It was not and is not contemplated that pre-existing nonconforming uses are to be perpetual. (State ex rel. Miller v. Cain, 40 Wn.2d 216 [242 P. 2d 505]). The presence of any nonconforming use endangers the benefits to be derived from a comprehensive zoning plan. Having the undoubted power to establish residential districts, the legislative body has the power to make such classification really effective by adopting such reasonable regulations as would be conducive to the welfare, health, and safety of those desiring to live in such district and enjoy the benefits thereof. * * * It would seem to be the logical and reasonable method of approach to place a time limit upon the continuance of existing nonconforming uses, * * * based on the nature of the use; * * *.

"Exercise of the police power frequently impairs rights in property because the exercise of those rights is detrimental to the public interest. Every zoning ordinance effects some impairment of vested rights either by restricting prospective uses or by prohibiting the continuation of existing uses, because it affects property already owned by individuals at the time of its enactment." The court further said: "A business which, when established, was entirely unobjectionable may, by growth or change in character of neighborhood, become a source of danger to public health, morals, safety or general welfare of those who have come to be occupants of surrounding territory, and may thus become subject to municipal regulation or prohibition." The court further said: "Whether zoning ordinance is unreasonable, arbitrary and discriminatory is related to its application to

particular property involved, and each case must be determined on its own facts. * * * A zoning ordinance may be amended from time to time as new and changing conditions warrant revision. * * * Public welfare must be considered from standpoint of objective of zoning and of all property within any particular use district, and it is not contemplated that preexisting nonconforming uses are to be perpetual." The judgment was reversed.

In State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613, the defendants had used their property as a retail grocery store for a great many years prior to 1927. In 1927 the city passed a zoning ordinance which established the area in which the property was located as a residential district and provided that all businesses then in operation within that area should be liquidated within 1 year from the passage of the ordinance. It was contended that this provision was unconstitutional as being arbitrary and unreasonable, and that it amounted to a taking of the defendants' property without due process of law. After referring to, and quoting at some length from, Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016, the first case in which the Supreme Court of the United States considered and upheld the validity of a zoning ordinance, the court stated: "It is to be observed, too, that the ordinance there under consideration provided for the establishment and maintenance of residential districts from which every kind of business was excluded. The ordinance did not deal specially with any already established business in the zoned district. But, if the village had the authority to create and to maintain a purely residential district, which the court held it did have, and if such an ordinance was not arbitrary and unreasonable, it follows necessarily that the village was vested with authority to remove any business or trade from the district and to fix a limit of time in which the

same shall be done." The Supreme Court of the United States denied certiorari. 280 U. S. 556, 50 S. Ct. 16, 74 L. Ed. 612.

In State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314, the validity of a zoning ordinance of New Orleans was attacked. The ordinance prohibited any business establishment from operating within a prescribed area, and gave all businesses in operation at the time 1 year in which to liquidate. The defendant had operated a small retail drugstore on her property for some time prior to the passage of the ordinance. She disregarded the ordinance. The court said: "It is also suggested that the ordinance is unconstitutional, because it grants only one year to liquidate and close an established business in the district. Defendant's drug store is a small one, and it is obvious that one year affords ample time within which to liquidate the business and close it. The validity of that provision of the ordinance was decided unfavorably to defendant's contention in State ex rel. Dema Realty Co. v. McDonald, *supra*. (168 La. 172, 121 So. 613.)"

In In re Harbison v. City of Buffalo, 4 N. Y. 2d 553, 152 N. E. 2d 42, many cases are cited where decisions have sustained ordinances where the time provided was held reasonable. See, Livingston Rock & Gravel Co. v. County of Los Angeles, 43 Cal. 2d 121, 272 P. 2d 4; Standard Oil Co v. City of Tallahassee, 183 F. 2d 410, certiorari denied 340 U. S. 892, 71 S. Ct. 208, 95 L. Ed. 647; Spurgeon v. Board of Commissioners of Shawnee County, 181 Kan. 1008, 317 P. 2d 798; Grant v. Mayor & City Council of Baltimore, 212 Md. 301, 129 A. 2d 363; Robinson Brick Co. v. Luthi, 115 Colo. 106, 169 P. 2d 171, 166 A. L. R. 655; City of Corpus Christi v. Allen, 152 Tex. 137, 254 S. W. 2d 759; Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N. W. 2d 843, 58 A. L. R. 2d 1304; United Adv. Corp. v. Borough of Raritan, 11 N. J. 144, 93 A. 2d 362.

A number of states and municipal bodies have adopted

statutes authorizing this approach to the problem. See 8 McQuillin on Municipal Corporations (3d ed.), § 25.190, p. 489. Cities that have progressed such ordinances are Chicago, Illinois; Cleveland, Ohio; New Orleans, Louisiana; Richmond, Virginia; Seattle, Washington; Wichita, Kansas; and Tallahassee, Florida.

In Spurgeon v. Board of Commissioners of Shawnee County, *supra,* the court cited cases wherein the constitutionality of such an ordinance was challenged on the ground that it violated the Fourteenth Amendment and was confiscatory, and then said that the constitutionality of zoning laws had long been a settled question as far as the Fourteenth Amendment is concerned. The Fourteenth Amendment to the Constitution of the United States does not impair the police power of a municipality. See Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923.

The general principle has been established in many cases that in the event of a conflict between a state statute and a city ordinance, the state statute will prevail if the matter is one of statewide concern, but that on the contrary the city ordinance will prevail if the matter is one of purely local concern, or one which only indirectly or remotely affects the people of the state outside the particular municipality. We do not believe that in the instant case there is any problem involving a conflict between a state statute and a city ordinance, notwithstanding the fact that section 14-406, R. R. S. 1943, is incorporated in the Omaha comprehensive zoning code. The zoning here involved is a matter of local concern rather than statewide concern.

We conclude, from the evidence in the record, that the city council did not act in an arbitrary and unreasonable manner, or in a discriminatory manner, but did take into consideration the interests and general welfare of the public with respect to public health, safety, and morals.

We find that section 55.50.050 of the city code is not

unreasonable, discriminatory, or arbitrary, and bears relationship to the purpose sought to be accomplished; and that 7 years is ample time for plaintiffs to amortize and minimize their losses, if any. The subject matter of this action is a matter of local concern and not a matter of statewide concern. No provision of the United States Constitution or the Constitution of the State of Nebraska has been violated, as contended for by the plaintiffs.

We hold the ordinance to be valid and constitutional, and a proper exercise of the police power delegated by the Legislature to the city.

We affirm the judgment of the trial court.

AFFIRMED.

IVAN KRUMWIEDE ET AL., APPELLEES, V. GERALD ROSE ET AL., APPELLANTS.

129 N. W. 2d 491

Filed July 10, 1964. No. 35677.

1. **Waters.** Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.
2. ———. Where by the process of accretion and reliction, or either, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner.
3. **Waters: Easements.** Subject to the easement of navigation, riparian owners are entitled to the possession and ownership of the soil formerly under the waters of the stream as far as the thread of the stream.
4. **Waters.** An owner of land on shore, in the absence of restrictions on his grant, owns to the thread of the stream and his riparian rights extend to existing and subsequently formed islands.
5. ———. The rule as to the ownership of accretion land remains the same, even though the processes of accretion are

caused or accelerated by the construction work of third parties.

6. **Adverse Possession.** In determining whether particular acts of ownership indicate an adverse possession, the usual and ordinary use of similar lands by their owners should be taken into consideration.

7. ———. Irrespective of the character of ownership asserted, acts of dominion over the land must, to be effective as against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another.

8. ———. A mere temporary use of the property by a trespasser at intervals, whether such intervals are remote or frequent, is not enough.

9. ———. The primary test of adverse possession is the actual, continuous, notorious, and adverse possession of the property under claimed ownership during the period of 10 years.

10. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite.

Appeal from the district court for Dakota County: FAY H. POLLOCK, Judge. Affirmed.

Mark J. Ryan, Cecil W. Orton, and Kindig, Beebe, McCluhan & Rawlings, for appellants.

Smith & Smith, for appellees.

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

WHITE, C. J.

This is a controversy about some accretion land in the Missouri River bottom between the eastern and western "high banks." The plaintiffs are the western high-bank owners. The land is embraced within the extension of the existing government survey lines of the plaintiffs' property to the thread of the main stream of the river flowing next to the eastern Iowa high bank. The defendants claim the land in question by virtue of

adverse possession. For clarity purposes only, this opinion will refer to the land in controversy as being the northern part of "Omi Island." Plaintiffs bring an action to quiet title, as riparian owners, basing their petition on the theory that they are the riparian owners of this land that has developed as accretion to their property on the bank of the river. Defendants claim that the land is an island to which they have independently acquired title by adverse possession and counterclaim for a decree quieting title to them to that effect. The southern half of Omi Island was the subject of litigation with these same defendants, Harris and Rose, with the identical issues involved, in Dartmouth College v. Rose, 172 Neb. 764, 112 N. W. 2d 256 (December 1961). The main difference between that litigation and the present litigation is that this case refers to the north half of the island and the plaintiff riparian owners in this case are different than in the Dartmouth College case. Reference is made to that case in order to secure a consecutive and comprehensive picture of the litigation involving this island. Most of the same witnesses, both lay and expert, testified in the Dartmouth College case, and their testimony in that case and in this case is strikingly similar, if not identical. Many of the same aerial photographs, maps, and exhibits used in that case were used in this case. The decision in the Dartmouth College case is not res judicata of the issues in this case because the parties plaintiff are different here. As will be seen, however, the decision in that case on the same issues is, on reexamination, controlling in this case as a matter of precedent when applied to the northern half of the same tract of land or island. Plaintiff riparian owners prevailed in the Dartmouth College case and also in this case in the district court's decision. A judgment was entered quieting title in the plaintiff highbank riparian owners to the land in question. The decision of the district court was based largely on the

holding in the Dartmouth College case. We affirm the trial court's holding.

This land developed in the lower or channel bottom of the Missouri River during a period of some 30 or 35 years in the past. The first question we will discuss is the nature of this land and its development as it relates to the basic theory of plaintiffs' claim to title in the island. Generally, the evidence shows that between the two high banks on the Nebraska and Iowa sides, the main channel of the Missouri River has moved back and forth to a considerable extent during the years. The present main stream against the Iowa eastern high bank, and the eastern portion of the plaintiffs' land that undisputedly belongs to them and the disputed land, Omi Island, are a part of a large, wide, low, alluvial plain within which the changing movement of the main channel has taken place since historic times. Channel change, accretion, and reliction, and island formation are constant and continuing processes on this alluvial Missouri River plain. All expert testimony together with numerous aerial photographs taken of the river since 1930 establish an understandable picture of how the land referred to herein as Omi Island was created. At the risk of over-simplification in a technical sense, it is clear that all of the land in controversy has been created and developed by the process of accretion and reliction. In Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57, this court stated the applicable definitions to these terms when applied to a substantially similar situation on island formation and riparian bank accretion on the Missouri River. The court stated: "The rules also are: Land uncovered by a gradual subsidence of water is not an accretion, but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner. State v. Ecklund, 147 Neb. 508, 23 N. W. 2d 782. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore

line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause. Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. Ziemba v. Zeller, 165 Neb. 419, 86 N. W. 2d 190. Accordingly we will refer to the land herein involved as accretion land without making an effort to determine where accretion ends and reliction begins."

The expert testimony and the aerial photographs, beginning in 1930, lead to a conclusion that the main, direct, and deeper channel of the Missouri River has generally been on the east and close to the Iowa high bank. But, there has been, until about 1945 or 1946, a channel or chute on the western side also. There is some variation as to the description and difference of opinion as to the function of this chute or channel on the west. The 1930 aerial photograph shows the beginning of the formation of the sandbar or island which extends slightly into the area now claimed by the plaintiffs. At that time, this sandbar or island was out in, if not close to, the center of the one main stream channel of the Missouri River. The evidence shows that it gradually became larger by the process of accretion. By 1939 or 1940 it had grown large enough so that it can be stated that the channel split just above Omi Island. The deep channel flowed to the east or to the left. There was a wide channel or high water chute on the west side of Omi Island. The aerial photographs show, and especially around 1939 or 1940, that water in the west channel or high water chute extended close to the high bank of the plaintiffs' property on the west. This western channel or high water chute submerged, in varying degrees and at different times, land between plaintiffs' west high bank and Omi Island. The preponderance of the evidence and the testimony of Hart

and Towl, the two expert engineers, establish that since 1930 the western channel was a high water chute. The deep channel flowed to the east. The expert oral testimony and the photographs paint quite a clear picture of the successive processes in building up Omi Island and the whole land in controversy that is now joined in one tract from the west. Floods, wind, and deposits from Omaha Creek which came from the north on the mainland and emptied into the western chute in this area, caused a gradual process of accretion. It is fair to state that the island filled in to the west, and the main bank to the east, from the processes of accretion in the chute. It is also fair to state that deposits from the eastern and deeper side of the channel, the Iowa side, also aided this process. By 1938 or 1939 the island had grown in size so that it reached north beyond the northernmost point of the plaintiffs' riparian boundary lines extended and had built to the west considerably. About 1938 or 1939 this land or island, lying between the eastern main channel and the western chute, was large enough to be the occasion of a major channel operation by United States Army Engineers. On the eastern side of Omi Island they dug a pilot channel. Above the pilot channel they staked out the Missouri River in order to direct the flow into the pilot channel. The objective of this work was to create a new main unitary channel through the island. The photographs and the evidence show that until 1942 they partially succeeded in establishing a new central channel through the center of the island. Water was beginning to flow from both the chute and the eastern main channel into the pilot channel. This work broke down about 1942 during the war. Between 1942 and 1945, as a result of the breakdown of these structures, the main channel returned rather quickly to the eastern or Iowa side altogether. The western channel or high water chute started plugging up, adding sand, soil, and increasing amounts of vegetation in its bottom. At the same time,

the southern or bottom portion of this high water chute started filling up. Eventually, about 1958, the United States Army Engineers plugged the western high water chute and as a result there is very little, if any, water flowing in the bed of the channel of the western chute. By 1945 or 1946 all of the eastern part of Omi Island was quite densely covered with soil, willows, and vegetation. The sandy stretch to the west comprising the bed of the western high water chute, and the adjacent land forming out from the plaintiffs' western high bank, were becoming covered with vegetation and were becoming increasingly usable. For practical purposes beginning about this time there was continuous access to all of the land stretching from the western high bank. The intervening water of Omaha Creek and of the chute was easily crossed. About 1946 people began using this land for recreational purposes and for digging piling out of the abandoned river channel work. There is no evidence in this case, and it is difficult to see how there could be, to the effect that these processes were any other or different as to the southern part of the island involved in the Dartmouth College case, than as to the northern part of the island involved in this case. Against these some defendants, we decided this issue in the Dartmouth College case as follows: "The record also shows that this land is a part of a large alluvial plain in which the river has moved back and forth to a considerable extent during the years. The accretion border to which the land accreted is shown by a decree of the district court for Dakota County in 1933, * * *. *The accretion in question is that very land which became a part of plaintiffs' land.*" (Emphasis supplied.)

Returning now to the contention of the parties, they both agree that it is accretion land, but accretion to what? Defendants' theory is that the land in question, known as Omi Island, was formed from an original island in the channel of this stream and that accretion and reliction thereto has produced all of the land in

dispute. Plaintiffs' theory is that they are riparian owners of accretion land that has gradually been formed and added to their western high bank land through the years. On review of the evidence in this case, we adhere to the holding in the Dartmouth College case. The reasoning of that holding is controlling here even though the doctrine of res judicata is not applicable to this case.

Defendants rely upon the testimony of Missouri River engineer, Roy N. Towl, and strenuously urge that the difference in his testimony from the other case furnishes ample grounds for departure from the holding in the Dartmouth College case as to the southern half of this land. It is true that this witness' testimony, based upon long experience in dealing with the Missouri River valley and this particular area, may be interpreted to the effect that a large part of the land in question comes from accretion to independently formed Omi Island, which started as a sandbar arising from the bottom of the old main channel of the Missouri River. One portion of his testimony gives rise to an inference that the land in question is not accretioned to the mainland at all. At this point, however, there is a complete gap in the defendants' argument. They simply assert that the plaintiffs cannot recover in a quiet title action because they must show that this land was accretion to the western high bank. Since it is not, they say, the plaintiffs may not prevail because they must recover on the strength of their own title. This contention is in error.

It makes no difference whether the land began as a sandbar island in a main stream or whether it was all formed by accretion to the mainland or by both processes joining. If, as in Burket v. Krimlofski, *supra,* there is another owner of the island, then the ownership is split to the thread of the chute in which the accretion is taking place to both the island and the mainland. Who owned Omi Island at the time of its origin? In Nebraska the rule as to ownership on the bottom of the river including islands formed by accretion to the thread of

the channel is the same, whether the stream is navigable or nonnavigable. The only difference is that in case of a navigable stream, such as the Missouri River, it is subject to the superior easement of navigation. This basic decision was reached in Kinkead v. Turgeon, on rehearing, 74 Neb. 580, 109 N. W. 744, 7 L. R. A. N. S. 316, 13 Ann. Cas. 43, 121 Am. S. R. 740. The exact application to the case at bar is the holding in Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647, where it is said: "All states do not agree as to the ownership of land along navigable streams like the Missouri river. In Nebraska this court, after the rehearing in the case of Kinkead v. Turgeon, 74 Neb. 580, 7 L. R. A. N. S. 316, 13 Ann. Cas. 43, *held that riparian owners are entitled to the possession and ownership of the soil formerly under the waters of such a stream as far as the thread of the stream, while in other states the title to the bed of the navigable river is in the state, and the grantee of land along the line of such stream owns only to the shore line.* Haight v. City of Keokuk (1856) 4 Ia. 199; Payne v. Hall, 192 Ia. 780. So that if an island occurs in the Missouri river on the Iowa side of the thread of the stream, *it is an accretion to the soil in the bed of the river, and not to the land of the riparian owner.*" (Emphasis supplied.)

An owner of land on shore, in the absence of restrictions on his grant, owns to the thread of the stream, and his riparian rights extend to existing and subsequently formed islands. Ohm v. Clear Creek Drainage Dist., 153 Neb. 428, 45 N. W. 2d 117; Haney v. Hewitt, 105 Neb. 746, 181 N. W. 861; Higgins v. Adelson, 131 Neb. 820, 270 N. W. 502; Briard v. Hashberger, 107 Neb. 199, 185 N. W. 430; Burket v. Krimlofski, *supra.*

The evidence shows that a signifcant factor in the development of Omi Island and this land was the construction and channel work of the United States Armv Engineers attempting to control the channel of the river, divert it, and develop a new channel across Omi

Island beginning about 1938. As we have mentioned, this development work finally resulted in the destruction of the western channel or high water chute and the acceleration of accretion to both the west bank and the original Omi Island. The fact that third parties performed construction work and accelerated these processes does not alter the application of the rule as to ownership of accretion land. Ziemba v. Zeller, 165 Neb. 419, 86 N. W. 2d 190; Burket v. Krimlofski, *supra*. Nor does the intervening flow of Omaha Creek affect this determination. Dartmouth College v. Rose, *supra;* Independent Stock Farm v. Stevens, *supra*.

Omi Island, if such, and all accretions to it and to the mainland became the property of the riparian owners at the time of the accretion. The evidence here, including the abstract of title, establishes ownership in the plaintiffs as successors to the original owners of the riparian land at the time of the development and appearance of Omi Island. This, of course, occurred many years prior to the defendants' first appearance or claim of title to the land beginning about 1946, the land becoming accessible and usable at about that time.

Nevertheless, the defendants claim title by adverse possession beginning in 1946. To the defendants' evidence in this respect we apply the same test that was used in Dartmouth College v. Rose, *supra*, against the same defendants as to the adjoining land of Omi Island to the south. We said: "In the instant case the parties do not question that accretion is here involved. * * * It appears from the record that the *defendants claim ownership of the entire island.* The evidence shows that the land in question was used *by the public generally for the purpose of hunting, fishing, trapping, pulling piling,* and picking up flotsam. *The defendants were engaged in these activities, and such are insufficient to place the owner on notice of adverse possession.* * * * The evidence shows that in the early part of 1951, the defendants well knew that others were using and oc-

cupying the island. In this connection we make reference to the evidence of Duane Jenkins, Byron B. Morrow, and Ivan Krumwiede. The defendants made no objection to such occupancy, nor did they seek to oust the parties from the land. In 1951, Duane Jenkins put in about 40 acres of crops on this land. Ralph Ropken testified that he and Duane Jenkins had the island to themselves when they were working on it. Harris came on the island and started to do some work on it in 1953, and Rose came on the island for the same purpose in 1955. Ivan Krumwiede (a plaintiff in the present case) testified that Harris first cultivated some of the land on the island in 1953, with his permission. * * * 'In determining whether particular acts of ownership indicate an adverse possession, the usual and ordinary use of similar lands by their owners should be taken into consideration. No precise rule of general application can be laid down. Any act, or series of acts, which shows the open, notorious, exclusive, and hostile possession of one who claims to be the owner of the land may be proven as evidence of adverse possession. Thus, such possession may be evidenced by * * * clearing and cultivating, * * * pasturing, cutting timber, * * * fishing, * * * or performing similar acts. However, irrespective of the character of ownership asserted, acts of dominion over the land must, *to be effective as against the true owner,* be so open, notorious, and hostile as to put an ordinarily prudent person *on notice of the fact that his lands are in the adverse possession of another.* A mere temporary use of the property by a trespasser at intervals, whether such intervals are remote or frequent, is not enough.' 1 Am. Jur., Adverse Possession, § 132, p. 867. See, also, Huston v. Graves (Mo.), 213 S. W. 77, 5 A. L. R. 423; Walker v. Bell, supra; Stokes v. State, 121 Ark. 95, 180 S. W. 492, Ann. Cas. 1917D 657." (Emphasis supplied.)

We will not recite the detailed testimony of the witnesses as to adverse possession. The same defendants

and most of the same witnesses testified as in Dartmouth College v. Rose, *supra*. A detailed recital of these witnesses' testimony will be found in that case. The additional testimony offered here is cumulative in nature. All of this testimony is not only substantially similar, but almost identical to the testimony given by these same witnesses in the present case. We attach to it the same significance we gave to it in the Dartmouth College case. The evidence is sufficient to establish that whatever possession the defendants made of the land was not a visible and hostile possession with an intention to possess the land occupied under a belief that it belonged to them. Ordinarily the hidden or remote view or the belief of a possessor in taking possession does not relate itself to the adverse character of the possession. Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331. The evidence fails to meet the primary test of adverse possession that the defendants have been in actual, continuous, notorious, and adverse possession of the property under claimed ownership during the period of 10 years required by the statute. See Jones v. Schmidt, 170 Neb. 351, 102 N. W. 2d 640. This land was used for recreational purposes by the public generally subsequent to 1946. It was also used by many parties for the purposes of pulling up the abandoned piling on the shore, for fishing, and for picking up flotsam. The defendants were doing these same things along with and during the period of time that many other people were. They claim to have built several structures on the property and to have cleared and raised crops several years. Much of this testimony was denied by many other witnesses who were on the island during the period of time that the defendants claim that these acts took place. The defendants claim that they erected shacks, fences, and "no trespassing" signs on the property. Witnesses who were on Omi Island many times deny seeing these evidences of their possession. It appears that at no time did the defendants oust either the plaintiffs or any

other of the numerous parties who were on the property and who were performing the same acts that the defendants claim they did. In one sense, every one of the parties who were on this property for recreational purposes occupied it hostilely for the short periods of time that they were on it. The defendants' testimony fails when it comes to proving the elements of exclusiveness and continuousness. Without dispute, other parties grew substantial acreages of crops on the land in the years between 1951 and 1955. In subsequent years, other parties also grew crops and performed many of the same acts of possession claimed to have been performed by the defendants. Some of the parties who had grown crops on the island testified that they had the island to themselves while they were working it. As an original matter, the evidence fails to measure up to the tests that are required to establish title by adverse possession. In any event, giving maximum reach to the defendants' testimony, it establishes, at most, a direct conflict in the testimony. The trial judge saw and observed the witnesses and resolved this conflict in favor of the plaintiffs who were the riparian bank owners. These findings should be given great weight, as they were in Dartmouth College v. Rose, *supra.* See, also, Dunbier v. Rafert, 170 Neb. 570, 103 N. W. 2d 814.

No problem appears in this case as to the description of the property, or its proper apportionment. The court by its judgment extended the existing government survey lines of the plaintiffs' property to the thread of the river. This is the correct apportionment rule and it was applied here and in the prior adjudication concerning this property. See 65 A. L. R. 2d, § 6(a), p. 159, § 6(b), p. 162.

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

AFFIRMED.

LOUIS WEINER, APPELLANT, V WARREN SCHREMPP ET AL., APPELLEES.

129 N.W. 2d 518

Filed July 10, 1964. No. 35693.

Actions: Attorney and Client. In actions in court in this jurisdiction plaintiffs have the liberty of prosecuting, and defendants have the liberty of defending, in their own proper persons, and without the assistance of an attorney.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Reversed and remanded.

Lyle B. Gill, for appellant.

Stoehr, Rickerson, Sodoro & Caporale and Schrempp, Lathrop & Rosenthal, for appellees.

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

YEAGER, J.

This is an action at law instituted by Louis Weiner, plaintiff and appellant, against Warren Schrempp, David Lathrop, and Henry Rosenthal, Jr., defendants and appellees, who are attorneys at law admitted to practice in the State of Nebraska. By the petition in the action it is charged that the defendants were retained by the plaintiff to represent him as attorneys in certain described litigation and that for the service to be performed they received a fee in retainer, but that they, with due notice, failed to exercise due and reasonable care, skill, and diligence in representing plaintiff in the litigation for which they were retained, in consequence of which the plaintiff was damaged. The action is to recover the damages so sustained. In the action in the district court the plaintiff was not represented by counsel. The case was filed by the plaintiff pro se.

No answer or other pleading was filed in the case attacking the petition as to sufficiency of statement as a

cause of action from either a factual or legal viewpoint. The only formal attack of any kind made in the case is in a motion which is as follows: "Come now the defendants, and each of them, and move the Court for an order to strike plaintiff's Petition from the files and records of this Court for the reason that the same was not filed in accordance with the provisions of Section 7-101 of the Revised Statutes of Nebraska of 1943, as amended." No defense is asserted in the motion.

A hearing was had on the motion at which the plaintiff was called as a witness by the defendants. No other witness was called. He testified that he represented himself in the preparation and the filing of the action and, as the record indicates, that the handling was by him pro se. On the basis of the record and this evidence the court sustained the motion and dismissed the action.

This action was clearly erroneous. Section 7-110, R. R. S. 1943, provides: "Plaintiffs shall have the liberty of prosecuting, and defendants shall have the liberty of defending, in their proper persons."

In interpretation of this statutory provision the decisions of this court permit parties to litigation, if they so desire, to present and defend their own interests without the assistance of any attorney. See, Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497; Niklaus v. Abel Constr. Co., 164 Neb. 842, 83 N. W. 2d 904.

The judgment dismissing this action is therefore reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

ELMA MECKE, APPELLEE, V. MAX BAHR, APPELLANT.
129 N. W. 2d 573

Filed July 17, 1964. No. 35689.

Evidence: Insurance. The discovery statute does not permit, before liability is determined, the discovery of coverage and limits

of liability under an insurance policy issued to the owner of an automobile involved in an accident where the information sought will not be admissible at the trial of the pending action nor where the disclosure of such information does not appear reasonably calculated to lead to the discovery of admissible evidence.

Appeal from the district court for Knox County: FAY H. POLLOCK, Judge. Reversed and remanded with directions.

Frederick M. Deutsch, William I. Hagen, and James P. Monen, for appellant.

Roscoe L. Rice, Frank Roubicek, and George F. Johnson, for appellee.

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

CARTER, J.

This is an appeal from the imposition of a fine of $100 on the defendant for contempt of court for refusing in open court to answer an interrogatory as ordered by the court. The defendant has appealed.

The record discloses that the plaintiff commenced an action against the defendant, seeking damages for personal injuries and property damage sustained in an automobile accident.

During the pendency of the case for trial, plaintiff directed the following interrogatory to the defendant: "What is the name of the insurance company, policy number, coverage and limits of liability insurance coverage issued by the automobile insurance company that had your 1961 Chevrolet sedan insured on October 6, 1962, at the time of the accident involved herein?"

The defendant objected to answering the interrogatory as follows: "The objection is that the information sought is not relevant to the subject matter involved in the pending action; that the information sought would not be admissible at the trial of the pending action nor would the disclosure of said information appear rea-

sonably calculated to lead to the discovery of admissible evidence."

The record shows that on the hearing before the court on defendant's objections to the interrogatory, and after the overruling of the objections, counsel for defendant advised the court that he had been directed by his client not to disclose the amount of coverage under the insurance policy, and, without intending any personal disrespect for the court, to stand in contempt of the court's order in order that the question could be appealed to the Supreme Court and a final disposition of the issue obtained. The trial court thereupon assessed a fine of $100 on defendant for contempt of court and this appeal was taken therefrom.

It is provided in part by section 25-1267.38, R. R. S. 1943: "Interrogatories may relate to any matters, not privileged, which are relevant to the subject matter involved in the pending action, and the answers may be used by any party to the same extent as testimony taken by deposition."

By section 25-1267.02, R. R. S. 1943, it is provided as to the scope of the examination in the taking of depositions: "Unless otherwise ordered by the court, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

The statute governing the use of interrogatories is patterned after Rules 26(b), 26(d), and 30(b) of the Federal Rules of Civil Procedure. The adoption of a

rule of a foreign jurisdiction ordinarily requires that great weight be given to the construction given such rule by the courts of such foreign jurisdiction, except where it is violative of some established state policy. The rule is of little aid in the instant case because of the division of authority in the federal courts on the construction to be given to the applicable federal rules. The division in authority also extends into the holdings of the state courts. Since the case is one of first impression in this state, our construction of the applicable statutes necessarily rests on sound reasoning rather than on the weight of authority in other jurisdictions.

Under Federal Rule 26(b), there is included the provision: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." This provision is not contained in section 25-1267.38, R. R. S. 1943, but it is contained in section 25-1267.02, R. R. S. 1943, and must be considered in pari materia in view of the provision in section 25-1267.38, R. R. S. 1943, stating "and the answers may be used by any party to the same extent as testimony taken by deposition." It seems to us, therefore, that the issue resolves itself into the question as to whether the information sought, admittedly not admissible at the trial, "appears reasonably calculated to lead to the discovery of admissible evidence."

Cases which hold that the coverage and limits of liability insurance are proper subjects of discovery rely largely upon the following reasons: The Legislature has, by statute, conferred an interest in such a policy upon every member of the public who is negligently injured, and its existence and amount are related to the merits of the matter in litigation. People ex rel. Terry v. Fisher, 12 Ill. 2d 231, 145 N. E. 2d 588. To be relevant to the subject matter involved, the matter inquired about need not be evidence which will be admissible at trial, nor need it be reasonably calculated to

lead to discovery of admissible evidence, and the existence of liability insurance and the policy limits of such insurance were relevant to the subject matter of an automobile accident case. Lucas v. District Court, 140 Colo. 510, 345 P. 2d 1064. Since the standard liability policy evidences a contract which inures to the benefit of every person who may be negligently injured by the insured and recovery may be had against the insurer upon judgment being entered against the insured, the insurance carrier is in fact a party in interest. The insurance carrier ordinarily does the investigation work, employs counsel for its insured, and assumes control of the litigation. An insurance contract is no longer a secret, private, confidential arrangement between the insurance carrier and the individual, but is an agreement that embraces those whose person or property may be injured by the negligence of the insured. The questions are relevant to the subject matter of the litigation and within the spirit and meaning of the rule. Maddox v. Grauman (Ky.), 265 S. W. 2d 939, 41 A. L. R 2d 964. See, also, Brackett v. Woodall Food Products, 12 F. R. D. 4; Orgel v. McCurdy, 8 F. R. D. 585.

Cases holding that the coverage and limits of liability insurance are not properly subjects of discovery before trial rely upon the following reasons: Purpose of discovery rules is to take surprise out of trials of cases by permitting all relevant facts and information to be ascertained in advance of trial, but information which can have no bearing on the merits is not subject to discovery. Amounts and limits of insurance liability coverage, sought for the purpose of evaluating the case for purposes of possible settlement, are not relevant and subject to discovery. Jeppeson v. Swanson, 243 Minn. 547, 68 N. W. 2d 649. The rule permitting discovery of matters relevant to subject matter in pending action is applicable only to matters admissible in evidence or calculated reasonably to lead to the discovery of ad-

missible evidence in a pending action. Discovery on the theory that it would aid in negotiation of a settlement is not within the purview of the rule. Brooks v. Owens (Fla.), 97 So. 2d 693. The purpose of Rule 26(b) was to limit the meaning of the term "which is relevant to the subject matter involved" to the discovery of facts either to use in the trial, or to use it as a lead to information for use in a trial. The California and Illinois cases are based in part upon their interpretation of statutes which, in our opinion, in nowise justify the broadening of the language used in Rule 26(b). The public policy declared in Tom Reed Gold Mines Co. v. Morrison, 26 Ariz. 281, 224 P. 822, is diametrically opposed to defendant's position and Rule 26(b) construed most favorably in favor of the right of discovery does not justify it. Di Pietruntonio v. Superior Court, 84 Ariz. 291, 327 P. 2d 746. The Federal Rules of Civil Procedure clearly limit discovery to matters which are relevant to the subject matter of the pending action or are reasonably calculated to lead to the discovery of matters which are relevant to the subject matter. The answers to the interrogatories propounded as above set forth would do neither. The subject matter is the charge of negligence against the defendant which caused the injury to the plaintiff. Answers to the propounded interrogatories would not be relevant to show negligence nor would they be reasonably calculated to lead to the discovery of admissible evidence showing negligence. The policy, if any, would not prove nor tend to prove the alleged negligence. The proof of such negligence must be made dehors the policy. If the plaintiff is permitted to discover the existence, amount, and provisions of liability coverage under the discovery provisions of Federal Rules of Civil Procedure prior to the determination of liability against the defendant, then it would logically follow that the same latitude would extend to defendant's other assets. Requiring the disclosure of the insurance policy or other assets would give to all the world

knowledge of the financial condition of any defendant, and thereby invade the privacy of an individual before any liability has been determined against him. A more tempting invasion of the right of privacy or violation of the right against unreasonable searches would be difficult to imagine. The disclosure of insurance might be conducive to a settlement without litigation, but such advantage to the plaintiff would not outweigh the infringements upon the rights of the defendant. The holdings in the Illinois, Colorado, and Kentucky cases, cited herein, appear to require a disclosure of defendant's financial resources prior to an adjudication of liability. This appears to violate the Fifth Amendment to the Constitution of the United States. The matter for which disclosure is asked cannot be used at the trial nor would such disclosure be reasonably calculated to lead to the discovery of matters which could be used at the trial. It is apparent that the requirements are not met and the objections to the interrogatories should be sustained. Gallimore v. Dye, 21 F. R. D. 283. It appears that the weight of reason is on the side of interpreting the rule as not contemplating or permitting the disclosure by discovery of insurance matters in the ordinary automobile accident case where punitive damages are not involved and where the evidence would not be admissible upon trial nor reasonably lead to admissible evidence. Hillman v. Penny, 29 F. R. D. 159. See, also, Langlois v. Allen, 30 F. R. D. 67; McNelley v. Perry, 18 F. R. D. 360; Goheen v. Goheen, 9 N. J. Misc. 507, 154 A. 393; Roembke v. Wisdom, 22 F. R. D. 197; State ex rel. Allen v. Second Judicial Dist. Court, 69 Nev. 196, 245 P. 2d 999; Verrastro v. Grecco, 21 Conn. Sup. 165, 149 A. 2d 703.

In our opinion the provisions of section 25-1267.38, R. R. S. 1943, providing that interrogatories may relate to any matters, not privileged, which are relevant to the subject matter involved in the pending action are limited by section 25-1267.02, R. R. S. 1943, wherein it is

provided that it is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. The above provisions are contained in the same act and it appears that the provisions are to be construed together, since they are in pari materia by virtue of the provisions of section 25-1267.02, R. R. S. 1943, providing that the answers to interrogatories may be used by any party to the same extent as testimony taken by deposition.

The interrogatory before us does not call for answers that would be admissible at the trial. We fail to see how the testimony sought by the interrogatory appears reasonably calculated to lead to the discovery of admissible evidence, and the plaintiff below does not so contend. The subject matter is the charge of negligence against the defendant which caused the injury to the plaintiff. The answer to the propounded interrogatory would not be relevant to show negligence nor would it be reasonably calculated to lead to the discovery of admissible evidence showing negligence. It is not the province of the courts to declare a matter of public policy by construing legislative language beyond its express terms. The establishment of public policy is the province of the Legislature, not the courts.

We think the Minnesota court correctly analyzed the situation when it said: "Under the guise of liberal construction, we should not emasculate the rules by permitting something which never was intended or is not within the declared objects for which they were adopted. Neither should expedience or the desire to dispose of lawsuits without trial, however desirable that may be from the standpoint of relieving congested calendars, be permitted to cause us to lose sight of the limitations of the discovery rules or the boundaries beyond which we should not go. If, perchance, we have the power under the enabling act to extend the discovery rules to permit discovery of information desired for the sole

purpose of encouraging or assisting in negotiations for settlement of tort claims, it would be far better to amend the rules so as to state what may and what may not be done in that field than to stretch the present discovery rules so as to accomplish something which the language of the rules does not permit." Jeppesen v. Swanson, *supra*.

We are of the opinion that the objections to the answering of the interrogatory in the instant case should have been sustained. The judgment of the district court is therefore reversed and the cause remanded with directions to sustain the objection of defendant to the interrogatory here questioned.

REVERSED AND REMANDED WITH DIRECTIONS.

BROWER, J., concurring.

I concur in the opinion of the court herein. The opinion discusses holdings of other courts, some of which may have held that either a disclosure of the defendant's financial responsibility or the amount of insurance which such a defendant carries would be in violation of the Fifth Amendment to the Constitution of the United States. Constitutional questions were not before the court in considering this case and I am sure that nothing in the opinion was meant to infer that this court was in its decision passing upon that aspect of the case.

WHITE, C. J., dissenting.

I respectfully dissent from the majority opinion and the position as presented therein. An interrogatory requiring, within the discretion of the court, the disclosure of liability insurance coverage and its limits should be allowed because:

1. The term "subject matter" of an action embraces a much broader range of discovery than "admissible evidence" as to liability issues only. As the majority opinion points out, the statute follows and copies Federal Rule 26 and ordinarily calls for an interpretation consistent with the federal court's interpretation. The important part of the rule and our statute for the pur-

poses of our examination is: "Interrogatories may relate to any matters, not privileged, which are relevant to the *subject matter* involved in the pending action, * * *." § 25-1267.38, R. R. S. 1943. The basic premise of the majority opinion is that the interrogatory requiring the disclosure of liability insurance does not call for answers that would be admissible at the trial of the case on the issue of liability. This, in turn, is based upon the reasoning and statement in the majority opinion that says: "The subject matter is the charge of negligence against the defendant which caused the injury to the plaintiff." It then follows, of course, that the testimony sought by such an interrogatory is not relevant to such an issue and could not be calculated to lead to the discovery of any admissible evidence *on this issue*. The core of the reasoning of the majority opinion appears in the following language: "The answer to the propounded interrogatory would not be relevant *to show negligence* nor would it be reasonably calculated to lead to the discovery of admissible evidence showing negligence. It is not the province of the courts to declare a matter of public policy by construing legislative language beyond its express terms. The establishment of public policy is the province of the Legislature, not the courts." (Emphasis supplied.)

The majority opinion in this case basically operates on the premise that the definition of the "subject matter" of the action is identical with the definition of the "issues as shown by the pleadings in a case." And it is true that some courts have so construed these words. As a preliminary observation, it seems to me that the very fact that the Legislature, following the federal rules, especially declared that the "subject matter" of the action would be the test is very significant. The use of a broader term than "issues" certainly indicates an attempt to open up the field of interrogatories into a broader area than exist under previous deposition procedure. The whole philosophy and purpose of pre-

trial and the newer discovery procedures are directed toward the discovery of much broader areas of information than evidence strictly material to the confined issues of liability. These purposes embrace discovery as to the whole action as distinguished from the older concept of mere perpetuation of testimony material to the issues of negligence or liability at the trial. This is well illustrated by the announced, declared, and established rule that any interrogatory, which is reasonably calculated to produce material evidence is proper. Federal Rule 26 and our statute are a calculated departure from the narrow permissible range in classic deposition procedure as it existed before the new discovery procedures. Section 25-1267.01, R. R. S. 1943, says: "Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories *for the purpose of discovery* or *for use as evidence* in the action or for both purposes." (Emphasis supplied.) We, therefore, have the terms "discovery" or "for use as evidence" to be interpreted as they relate to a distinction between "subject matter" and evidence material to liability issues. An area of inquiry broader than that of the proposed opinion is apparent from an analysis of the language of these statutes themselves. As a general proposition, the cases unequivocally support the proposition that the term "subject matter" is much broader than the term "issues." See the following authorities: 2A Barron & Holtzoff, Federal Practice and Procedure, § 646, p. 57; Maddox v. Grauman (Ky. 1954), 265 S. W. 2d 939, 41 A. L. R. 2d 964; Bloomer v. Sirian Lamp Co. (1944), 4 F. R. D. 167; Hercules Powder Co. v. Rohm & Haas Co. (1943), 3 F. R. D. 302; Laird v. United Shipyards (1941), 1 F. R. D. 772; Stevenson v. Melady (1940), 1 F. R. D. 329.

As is pointed out in these cases, discovery beyond the range of the issues is the better construction, but particularly in light of the fact that it is impossible at the time of discovery and the taking of interrogatories to

determine just exactly what the issues are that are involved in the case as they may not be clearly defined at that time. I feel that to limit an examination to matters relevant only to the precise liability issues in the case at the time of the taking would be contrary to the express language and purposes of the act and would ignore the history of the development of the rule announced in the statute. An interrogatory, in my opinion, should be considered relevant where there is any reasonable probability that information sought may be relevant to the subject matter of the action at any stage in the proceedings prior to the satisfaction of judgment. A party should be able to discover material evidence as to issues already present in a case. He should also be able to discover facts which will enable him to either eliminate, change, or frame new issues in a case. If this be not true, what then was the purpose of the Legislature in enacting these new discovery statutes, or of Federal Rule 26, when adequate means were already afforded to discover material evidence relevant to the actual issues in a case?

2. The "subject matter" embraces those steps which are necessary to collect a judgment. It would ignore reality if it were not said that this is the end objective of the action. Since this information is, therefore, clearly discoverable at a later point in the action, why should it not be discoverable, within the discretion of the court, at any time after the commencement of the action? Is there some peculiar damage suffered by a defendant (in an insurance case) because of the time point of departure of such an interrogatory?

3. This interrogatory does not permit a fishing expedition into the general discovery of the defendant's private wealth or personal assets. The inquiry here is directed only towards that segregated portion of a defendant's assets (the insurance contract) which is designed to protect the plaintiff and all other injured persons on the public highways and to which contract

the plaintiff is a third party beneficiary. What injury could there be in compelling the defendant to disclose to the injured person information about a contract that he created for this purpose? It also seems to me that in examining this situation we are ignoring the realities. We could not honor the objection of the insurance company as such since it is not a party to the case under our procedure. Fielding v. Publix Cars, Inc., 130 Neb. 576, 265 N. W. 726, 105 A. L. R. 1306. If the insured and the company are adversary to each other with reference to disclosure, why should the company be permitted, under the guise of the contractual right to represent a defendant, to secrete that which it is usually for the best interests of a defendant to disclose? The policy and its disclosure are designed to and usually prevent a reach into a defendant's property and assets.

4. Public policy, as expressed in our statutes, will be served as follows:

a. The financial responsibility statute requires the disclosure, by the defendant and the insurance company, to the state in the event of a personal injury to the plaintiff. Should not the disclosure be made to the very class of persons that the defendant and the insurance company protect under the terms of the policy and which is thought important enough to require the disclosure to the state in the interests of protecting travelers on a public highway?

b. Expedite the settlement of litigation. The subject matter of a personal accident embraces the end objective of the collection of money. As the authorities point out, a highly relevant matter to the "subject matter" is the amount of assets that are available to pay the claim before or after the judgment. In my opinion, a refusal to disclose the limits of coverage will have a tendency to harden the plaintiff in his determination to secure a final judgment and blind his eyes to compromise. It would seem that this would be true and especially when the more serious injuries are involved.

He may, and many times will, require that the litigation reach the point where he can pursue the disclosure interrogatory as to insurance. This aspect of the litigation, therefore, becomes a game, depending on the resolution of an issue collateral to the determination of liability issues. If the "subject matter" goes further than liability issues, it is difficult to see how anything could be more material than how much money is available to pay the judgment secured in the action.

5. Even before an action is filed or any issues as to liability are framed, a party litigant in our state under section 25-1267.08, R. R. S. 1943, relating to the perpetuation of testimony may, *within the discretion of the court*, secure any information pertinent to the "subject matter" of the expected action and his interest therein. That our perpetuation statute gives force to an interpretation of the interrogatory statute requiring this disclosure is supported by the following cases: Demaree v. Superior Court, 10 Cal. 2d 99, 73 P. 2d 605; Superior Insurance Co. v. Superior Court, 37 Cal. 2d 749, 235 P. 2d 833; Laddon v. Superior Court, 167 Cal. App. 2d 391, 334 P. 2d 638. We do not have a probable action here. We have a pending action. We are closer to the point of the necessity of discovery than we are in any action contemplated by the perpetuation statute. Information as to other issues may be frozen in writing to secure its existence for the future. Are assets of a defendant which are peculiarly designed to respond to this particular type of action and judgment any more sacrosanct? It would seem that this argument would have peculiar force in this situation because we are talking about a contract in which the defendant has designated the plaintiff as a beneficiary of the assets available to pay the very judgment contemplated in the action.

6. Besides the perpetuation statute, the provisions in our law permitting attachment and garnishment before trial under certain conditions and under the discretion of the court are consistent with and harmonious with

the discretionary power of a court to compel the disclosure required by this interrogatory. Why should there be any halo of secrecy surrounding this particular portion of a defendant's assets and especially so when he has designed and segregated the insurance contract to accomplish the very purpose for which disclosure is sought?

Our statute, section 25-1267.24, R. R. S. 1943, protects a defendant completely from an unwarranted or unjust disclosure. The court at any time may limit the scope and the manner of the taking of interrogatories. The defendant at any time has the right to a protective court order and, as the procedure in this case itself illustrates, he may even take an appeal to this court for an independent determination of whether there has been an abuse of discretion on the part of the trial court.

The majority opinion mentions the conflict of authority on this point. It seems to me that the recent cases and the weight of reason is strongly in favor of such dicovery as is contemplated by the interrogatory in this case. Johanek v. Aberle (1961), 27 F. R. D. 292; Hurt v. Cooper (1959), 175 F. Supp. 712; Brackett v. Woodall Food Products, Inc. (1954), 12 F. R. D. 4; Lucas v. District Court (1959), 140 Colo. 510, 345 P. 2d 1064; Laddon v. Superior Court (1959), 167 Cal. App. 2d 391, 334 P. 2d 638; People ex rel. Terry v. Fisher (1957), 12 Ill. 2d 231, 145 N. E. 2d 588; Maddox v. Grauman (Ky. 1954), 265 S. W. 2d 939, 41 A. L. R. 2d 964; Roembke v. Wisdom (1958), 22 F. R. D. 197; Gallimore v. Dye (1958), 21 F. R. D. 283; McNelley v. Perry (1955), 18 F. R. D. 360; McClure v. Boeger (1952), 105 F. Supp. 612; Ruark v. Smith (1959), 51 Del. Super. 420, 147 A. 2d 514; Di Pietruntonio v. Superior Court (1958), 84 Ariz. 291, 327 P. 2d 746; Brooks v. Owens (Fla. 1957), 97 So. 2d 693; Jeppesen v. Swanson (1955), 243 Minn. 547, 68 N. W. 2d 649; Hill v. Greer (1961), 30 F. R. D. 64; Schwentner v. White (1961), 199 F. Supp. 710; Novak

v. Good Will Grange No. 127, Patrons of Husbandry, Inc. (1961), 28 F. R. D. 394; Furumizo v. United States (1963), 33 F. R. D. 18. See, also, 2A Barron & Holtzoff, Federal Practice and Procedure, § 646, p. 57.

I think our discovery statutes contemplate a change. They should not be construed so that they return us to the same place we were before. The Legislature intended that the courts move in the stream of progress of judicial administration. If it be true that the purpose of the discovery statutes is the disclosure of the truth, how can there be any haunting fears that this interrogatory will founder on the rocks of injustice and especially when the ship is guided by the protective and limiting hand of an impartial supervisory court? It cannot be doubted that this disclosure expedites the trial of a case and serves to dispose of litigation. The volume of personal injury automobile accident litigation burdening the courts is one of the primary problems present in modern judicial administration. The new discovery statutes were designed for and have done much to help this situation. This has been because the parties are required to immediately spell out and disclose the whole truth before trial. This saves an incalculable amount of time and burdensome expense in the processes of justice. Proper safeguards are present at all times. The time has gone when we should worship the principle that a lawsuit is a gladiatorial game in which the person who is the winner is the one who has the wit to take maximum advantage of technicality, secrecy, surprise, and the failure to disclose the truth.

I am authorized to state that Judges Spencer and Boslaugh concur in this dissent.

BISHOP CAFETERIA COMPANY OF OMAHA, A NEBRASKA CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS, V. BARTON H. FORD, APPELLANT AND CROSS-APPELLEE.

129 N. W. 2d 581

Filed July 17, 1964. No. 35698.

1. **Landlord and Tenant.** Where the covenant for a renewal is general and does not state the terms of the renewal lease, the new lease is to be upon the same general terms and conditions as the old lease, which are applicable to the renewal period.
2. ———. Whether a particular clause in an original lease is applicable to the new situation arising on the tenant's holding over, depends, not upon the mere wording of the clause or whether the clause is "usual and ordinary"; but upon the nature of the clause, i.e., whether the "new situation" is sufficiently similar to the original situation to warrant the inference that the clause is one of the implied terms of the new tenancy.
3. **Trial: Judgments.** In considering a motion for summary judgment the courts should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom.
4. ———: ———. The purpose of the summary judgment procedure is not to require a plaintiff to reveal in detail the evidence he expects to produce to prove the allegations of his petition.
5. ———: ———. A motion for summary judgment is not a substitute for a demurrer, a motion to dismiss, or a motion for judgment on the pleadings.
6. ———: ———. The evidence offered on a motion for summary judgment is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, and affidavits which constitute only a part of the evidence available on a trial on the merits.
7. ———: ———. In order for the movant to obtain a summary judgment it must be shown first, that there is no genuine issue as to any material fact in the case and, second, that movant is entitled to judgment as a matter of law.
8. **Contracts: Trial.** When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment.
9. **Contracts: Evidence.** Where a written contract, signed by both parties is complete in itself, and contains and expresses the mutual covenants and promises of both, without ambiguity or apparent omission, and where the statement of the consideration

therein is of a contractual nature, and not a mere acknowledgement of receipt, parol evidence is not admissible to contradict, vary, or add to the consideration expressed in the instrument itself.

10. **Contracts.** A contract is not ambiguous within that sense merely because it may be difficult to construe. The construction of a contract, if needed, being a question of law for the court as well as a duty that rests upon the court, there can be no ambiguity within the rule to which we have referred unless and until an application of the pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties.

11. ———. A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used.

12. **Contracts: Trial.** When the provisions of a contract together with the facts and circumstances that aid in ascertaining the intent of the parties thereto are not in dispute, the proper construction of such contract is a question of law.

13. **Evidence.** Evidence of an offer or desire to compromise, consisting of a direct offer to buy peace, or settle a controversy without respect to legal liability, is not admissible against the person making it.

14. **Landlord and Tenant.** It is the well-settled common-law rule that where a tenancy is terminated between rent days, there is no apportionment of the rent so as to enable the lessor to recover a proportionate part, and therefore, a lessor cannot apportion rent under a lease at an annual rent and recover rent for part of a year, where, under a proviso in the lease, he terminates the tenancy before the end of a rent year, if the lease does not provide for such apportionment.

15. ———. In general, rent does not accrue as a debt until the tenant has enjoyed the use of the land for the period for which it is payable. Consequently, in the absence of some agreement or understanding between the parties to the contrary, rent is not due until the expiration of the term; and this is true whether the rent is reserved in gross, or on annual, quarterly, or monthly payments. If the tenant is deprived of the use and enjoyment of the property by unavoidable accident or similar contingency before the end of the term, his liability for rent extends only to that time.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed in part, and in part reversed and remanded with directions.

McCormack, McCormack & Brown, Boland, Mullin, Walsh & Cooney, A. Lee Bloomingdale, and Rodney Shkolnick, for appellant.

Eisenstatt, Lay, Higgins & Miller, for appellees.

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

BROWER, J.

The plaintiffs, Bishop Cafeteria Company of Omaha, a Nebraska Corporation, and Bishop-Stoddard Cafeteria Company, an Iowa corporation, lessees of the premises involved, brought this action at law in the district court for Douglas County, Nebraska, against the defendant, Barton H. Ford, the lessor, to recover a judgment in the amount of $132,000.

The plaintiffs base their claim on the termination of a lease by the defendant pursuant to a written cancellation clause in the original lease. This clause, which is hereinafter set forth, provided the lessor might cancel the lease in which event he was to pay the sum of $1,500 a month for the unused portion of the term which originally expired June 30, 1963, but which was extended to June 30, 1968. The plaintiffs claim they are entitled to $1,500 a month for 88 months from March 1, 1960, to and including June 30, 1968, the day of the expiration of the extended term.

The defendant answered admitting liability under the cancellation clause of the lease but only to the extent of $42,000 representing $1,500 a month for 28 months from March 1, 1960, to and including June 30, 1963, the date of the expiration of the term in the original lease. Defendant also pleaded a set-off arising from his claim of the nonpayment by the plaintiffs of a 5 percent percentage on the gross receipts of the lessees' business for the fractional year during which the cancellation occurred on which he claimed $8,281.92 due and unpaid.

Subsequent to the stipulation, both parties filed cross-motions for summary judgment. The trial court granted the plaintiffs' motion and entered judgment in favor of the plaintiffs in the amount of $123,718.08, representing the full amount prayed for in the plaintiffs' petition of $132,000, less the sum of $8,281.92, representing the full amount claimed in the defendant's set-off.

The defendant filed several motions to set aside and vacate the order and judgment of the trial court and enter an order and judgment sustaining the defendant's cross-motion for a summary judgment or in the alternative to grant a new trial. The cross-motion for summary judgment and the motions for new trial were overruled by the trial court and the defendant has thereafter brought the matter to this court by an appeal. The plaintiffs have cross-appealed as to the allowance of the defendant's set-off.

The defendant assigns error to the trial court: In overruling the defendant's motion for a summary judgment; in sustaining the plaintiffs' motion for a summary judgment and entering judgment thereon; in overruling the defendant's motion to set aside and vacate the judgment entered by the trial court on the plaintiffs' motion; in failing to set aside the judgment for the plaintiffs and enter one prayed for by the defendant or to grant a new trial; and in excluding all of the testimony of each of the witnesses John R. McCormack and Robert J. Reinders offered at the time of the hearing on the motion to set aside the summary judgment or grant a new trial and at that time excluding the defendant's exhibits numbered 1, 2, 3, 4, 5, 6, 7, and 10, the assignments of error in respect thereto being made severally.

All of the material facts at the time of the entry of the summary judgment are admitted either by judicial admissions or by stipulation of fact except the affidavit of Cyril L. Kegler, president of each of the plaintiff corporations, which was admitted in evidence at the

time of the plaintiffs' motion for summary judgment. The purpose of the affidavit was to show that the plaintiffs, relying on the last extension of the lease, made extensive improvements on the demised premises and on cancellation were put to great expense in moving and attempting to induce their old customers to patronize them at their new location.

The uncontroverted facts are that on or about March 15, 1948, the plaintiff, Bishop-Stoddard Cafeteria Company, as lessee, and the Redick Corporation, as lessor, entered into a lease agreement involving premises in the city of Omaha, Nebraska, which were to be used for restaurant and cafeteria purposes. The lease was for a term of 5 years beginning July 1, 1948, and ending June 30, 1953. By a rider attached thereto, the original lease gave to the lessee and lessor, and each of them, an option to extend the lease for an additional term of 10 years from July 1, 1953, to June 30, 1963, by giving notice of the extension during the months of April, May, or June 1953. Immediately following the provisions in the lease which granted the option to extend the lease is a cancellation clause which provides as follows:

"It is further understood and agreed that in the event the above option is exercised by either party and the Lessor makes a bona fide sale, or a long time lease for a term of 50 years or longer, of the building of which the leased premises are a part, then the Lessor may at any time after July 1, 1959, upon giving to the Lessee at least One (1) years' advance notice in writing of the Lessor's intention to terminate this lease, terminate the same; provided that in such case the Lessor shall pay to the Lessee the sum of $1,500.00 for each and every cancelled month, commencing with the effective date of termination or the date said premises are surrendered, whichever is later, and ending with the month of June 1963."

Under date of September 21, 1950, a written amend-

ment to the lease was entered into and signed by the then lessor and lessee by which it was agreed that the option provision be modified to the extent of permitting the lessee to exercise its option to extend the same at any time subsequent to September 15, 1950, and which stipulated that all other terms and conditions of the lease and rider were to remain in full force and effect.

On September 25, 1950, the plaintiff, Bishop-Stoddard Cafeteria Company, exercised its option granted in the amendment to extend the original lease for an additional 10 years from July 1, 1953, to June 30, 1963.

On June 28, 1951, the lessor, Redick Corporation, dissolved and on dissolution conveyed the real estate which had been demised together with all rights of the lease to the stockholders of the corporation.

Subsequently, plaintiff, Bishop-Stoddard Cafeteria Company, caused the formation of Bishop Cafeteria Company of Omaha, a Nebraska corporation, as its wholly owned subsidiary to carry on the restaurant and cafeteria business in Omaha, and on July 2, 1956, by a written assignment duly accepted by the then owners of the property, assigned all its rights and interest in the lease to the new corporation by which assignment both of the plaintiff corporations were liable for the payment of the rents.

On July 25, 1958, the plaintiffs, Bishop-Stoddard Cafeteria and Bishop Cafeteria Company of Omaha, entered into a second written extension of the lease with the then owners of the premises which provided:

"In consideration of the sum of One Dollar ($1.00) by each of the undersigned parties to the other in hand paid, the receipt whereof is hereby acknowledged, it is hereby mutually understood and agreed that the lease dated March 15, 1948 and of the amendment to the lease dated September 21, 1950, and of the option exercised on September 25, 1950 to extend the lease for the additional ten year period specified, ending June 30, 1963, between the Redick Corporation, a Ne-

braska Corporation as Lessor, and the Bishop-Stoddard Cafeteria Company, an Iowa Corporation as Lessee, and assigned to the Bishop Cafeteria Company of Omaha on July 2, 1956, covering the store room and basement space thereunder * * * is hereby extended *under the same terms, covenants, and conditions therein expressed and at the same rental for the further term or period of five (5) years from July 1, 1963 and ending on the 30th day of June, 1968.*" (Italics supplied.)

On November 25, 1959, the then owners of the premises conveyed the demised premises to Barton H. Ford, the defendant herein, by special warranty deed, "subject to existing leases, tenancies, and occupancies."

On February 29, 1960, the defendant through his agents gave notice to the plaintiff, Bishop-Stoddard Cafeteria Company, that the lease was terminated as of February 28, 1961, pursuant to which notice the plaintiffs vacated the premises on February 28, 1961.

There were additional agreed facts which are applicable to the cross-appeal of the plaintiffs which will be set forth when the issues with respect thereto are considered.

The defendant first assigns error to the trial court in sustaining the plaintiffs' motion for a summary judgment and entering judgment thereon, and in overruling the defendant's motion for summary judgment or in the alternative for a new trial. These assigned errors require that they be considered together.

We will first consider the construction to be placed upon the contract of the parties by the lease and the extensions thereof.

The extension for the last 5 years was by a separate instrument signed by the lessor and lessee and dated July 25, 1958. The pertinent portion was heretofore set out. It is termed an amendment to the lease. It refers to the original lease and its prior extension, and the previous assignment from the original lessee to the Bishop Cafeteria Company of Omaha. It provides that

the lease is thereby extended, "under the same terms, covenants, and conditions therein expressed and at the same rental for the further term or period of five (5) years from July 1, 1963 and ending on the 30th day of June 1968." This provision is in no way uncertain or ambiguous.

Although in view of this express agreement it becomes unnecessary to state the general law pertaining to such situation with respect to the case before us, it may be mentioned to explain the cases hereafter to be discussed in some of which the rule has been applied. "Where the covenant for a renewal is general and does not state the terms of the renewal lease, the new lease is to be upon the same general terms and conditions as the old lease, which are applicable to the renewal period. This rule is subject to the exception, however, that under a general covenant to renew, the lessee is not entitled to have inserted in the renewal lease a covenant for a further renewal." 32 Am. Jur., Landlord and Tenant, § 959, p. 807.

The plaintiffs contend that under the express agreement, which here corresponds with the rule of law cited, that on the extension of the term the provision of the original lease requiring the defendant to pay $1,500 a month was extended and made applicable throughout the canceled term. It is not surprising that cases construing exactly, similar, or even very close to the lease and extension agreement in suit have not been found either by counsel or by us on investigation. However, there are cases applying the general rule, which in the present case was adopted by the express agreement of the parties, that throw light upon our problem and we believe are of controlling significance.

Our own court in applying the general rule to the factual situation in the absence of an express agreement considered the effect of an extension on the conditions of the original lease in Pankonin v. Gorder, 97 Neb. 337, 149 N. W. 811. The facts in that case were:

A partnership of which the defendant was a member sold a certain harness and related business to the plaintiffs and at the same time entered into a lease of its property with the purchaser for 5 years with an option to renew for a period of 1 year or more, up to 5 years. A sales contract and two lease agreements were construed together as the sale and lease agreement. The executed lease recited: " 'Also in consideration of the covenants and agreements hereinafter specified to be done and performed by second party, first party agrees to, and hereby does, sell and assign to second party his good will in the business of general harness store and implement store, * * * located on said property; and agrees not to engage in the same business in the village of Louisville, during the continuance of this lease. In consideration of the leasing of said premises from said first party, and of the agreement on the part of the first party to remain out of the general harness and implement business in the village of Louisville as above specified during the term of this lease, second party hereby agrees with the first party to pay said first party the sum of twenty-two ($22) dollars per month, payable monthly in advance. It is further stipulated and agreed between the parties that in case first party, at any time during the period of this lease, carries on or engages in the general harness and implement business such as he is selling to second party, that second party is to have the use of said buildings from such time until the expiration of this lease free of charge without the payment of any rent. It is further mutually understood and agreed between the parties hereto that, at the expiration of the term of this lease, second party has the option of leasing said buildings for a period of one year or more up to five years for the same consideration, and upon the same terms and conditions as are in this lease named.' "

The lease was extended pursuant to its terms. The defendant went into a competitive business during the

period of the extension in violation of the above provision in the original lease. The court in the cited case held that the extension extended the provisions of the old lease and the provisions concerning the entering into a competitive business had been violated. That under the conditions of the old lease, when the defendant went into business competing with the plaintiff, the plaintiff need pay no further rent whatever. It becomes apparent that the provisions respecting the agreement to stay out of the business in the cited case, although they referred to the original term in the lease itself, were made applicable to the extended term and governed it also.

The case of Ogden v. Garrison, 82 Neb. 302, 117 N. W. 714, 17 L. R. A. N. S. 1135, although it was quite different, indicates that in certain instances the tenant by executing a new lease will not lose his rights that the law gave him under the old. The principal reason for discussing it, however, is that the opinion of the court therein throws clearly in relief the problem before us. In that case a tenant during his previous term erected buildings which were trade fixtures which he might remove. He renewed his term by a new lease which provided: " 'The party of the second part (defendant) will carefully protect all buildings, fences and improvements of every kind that are now on said premises, or that may be erected thereon during the continuance of this lease; that he will promptly at the expiration of the term herein granted yield up possession of said premises in as good repair as they now are or may be at any time during the continuance of this lease, ordinary wear and loss by fire excepted.' " The court discussed the then existing decisions of other courts, some of which held that under an extension his rights would be preserved but not so when a renewal took place because the tenant had thereby surrendered his previous term. However, this court said the latter rule would not be followed and it made no difference because the tenant

had stayed in possession. His occupancy was notice to the purchaser from the landlord and the tenant could remove his buildings as against the subsequent purchaser as provided in the original lease. This court there said: "Nothing appears in the renewal lease indicating an intention to give the buildings in controversy to the landlord. * * * It is not sound reasoning to hold, under the evidence of this case, that the defendant intended to make a present to the landlord. He erected the buildings. They were his property. He never received anything for them. It is difficult to see how the renewal lease, which may better be termed an extension lease, in which defendant agreed to protect the plaintiffs' buildings, can operate as a transfer of the defendant's chattels to plaintiffs' grantor. It would seem better reasoning to hold that the renewal lease was intended by the landlord as an extension of the time in which the defendant was privileged to avail himself of all the rights secured to him by the tenancy."

The lease in the present case from the facts herein related was property in the hands of the lessee. The rent charged and the cancellation payments to be exacted on termination show plainly it is valuable property. The defendant concedes that he owes $1,500 a month for the cancellation of the previous term. He contends he should receive the extended term from July 1, 1963, to June 30, 1968, for nothing. If as in Ogden v. Garrison, *supra,* it was difficult to discover any logic or equity which could be invoked to support the rationale of the rule of law urged, how can it now be asserted or implied that the parties intended on the extension of the term for 5 years that the extended term had no value and was subject to be canceled on payment of $1,500 a month for the previous term only. If it were so canceled in May 1963, the whole 5 years could be canceled for such sum.

Although other cases of this court appear to be lacking, there are several cases from courts of last

resort in other jurisdictions that are pertinent in varying respects to our problem.

Lavielle v. Erpeldinger's Executors, 218 Ky. 24, 290 S. W. 1040, was a case where the original lease was for 15 years with a privilege of 5 years extension. It had a provision that the lessee was to pay all the city, state, and county taxes and other assessments levied: " 'such taxes and assessments to be paid by the lessee for not more than 15 years in all, if this lease shall continue in force only that long, and in no event for more than twenty years in all, if this lease shall be extended and continue in force for twenty years.' " After the 20 years it was extended by an agreement containing the following: " 'it is expressly understood and agreed that said original lease dated the 8th day of September, 1903, shall be and remain in full force and effect, except only as the same is modified and altered by this agreement.' " It had no express provisions in regard to taxes. The lessor as plaintiff sued to collect the taxes for the extended term and the trial court sustained a demurrer to his petition. The appellate court, in reversing the judgment of the trial court, held: "Where original contract of lease provided for payment of taxes by lessee, and subsequent extension contract expressly provided that original contract should remain in effect as modified, lessee is liable for taxes, although no reference was made thereto in extension contract."

Some question arose as to the construction the parties placed on the lease as the lessee had paid the 1924 taxes without comment. The court said: "It is clear that in the original contract it was intended for the lessee to be liable for the taxes during the period of the lease, which in that instrument was limited to twenty years, and the quoted phrase merely emphasized the idea that this liability would not extend beyond the life of the lease. By leaving that provision unchanged in the extension contract, it is equally clear that the parties intended for the lessee to pay such taxes during

the life of the extension lease. This is somewhat strengthened by the contemporaneous construction given to the contract by the parties themselves, as it appears that Mr. Erpeldinger paid the 1924 taxes without comment. It is argued, however, that this arose from a change in the assessment period and that the 1924 payment was in the discharge of the 1923 taxes. This point is not made clear; but leaving out the question of the 1924 payment of taxes we think such is the proper construction of the contracts."

The case of Gostin v. Needle, 185 Md. 634, 45 A. 2d 772, 163 A. L. R. 1013, involved a lease to the county commissioners which contained the following provision: " 'Should The Landlords at any time during the term of this lease sell or agree to sell the property known as Number 1433 Pennsylvania Avenue, Baltimore, Maryland, and thereby desire possession thereof, the said Tenant hereby agrees to vacate, quit and surrender the said premises within sixty (60) days from the date of such notice to him of the Landlords' or purchaser's desire to regain possession, and upon such surrender in accordance with the terms of this lease, the said Tenant shall receive the sum of one thousand dollars ($1,000.00) as liquidated damages.' " At the close of the term the tenant held over and remained in possession with the defendant's consent, "subject to the said rent," and was in possession when he was notified that the property had been sold and the purchaser desired possession within 60 days. The tenant vacated and brought suit for the thousand dollars.

The court held: "Where the lessee, after the expiration of a three-year lease, which contained no provision for renewal or extension, or holding over, held over, with the consent of the lessor, a tenancy from year to year, beginning at the end of the tenancy for years, arose by agreement of the parties.

"Where a tenant for years holds over, except that the tenancy is for one year, renewable indefinitely, he im-

pliedly holds subject to all covenants in the lease which are applicable to the new situation.

"Whether a particular clause in an original lease is applicable to the new situation arising on the tenant's holding over, depends, not upon the mere wording of the clause or whether the clause is 'usual and ordinary'; but upon the nature of the clause, i.e., whether the 'new situation' is sufficiently similar to the original situation to warrant the inference that the clause is one of the implied terms of the new tenancy." The cited case was sent back for trial, however, because the petition to which a demurrer had been sustained did not allege clearly the notice was given on behalf of the landlord.

In Grummer v. Price, 101 Ark. 611, 143 S. W. 95, it was said: "A lease executed January 11, 1900, also provided that the lessor agreed that, should the lessee pay to him the sum of $220 with 10 per cent. interest and all taxes legally assessed against the land for the year on or before October 15, 1900, and also the further sum of $225, with interest from date until paid, all taxes assessed, on or before October 15, 1901, then, when the two payments have been made as provided, the lessor 'will sell said lands to' the lessee 'with good and sufficient deed, but it is distinctly understood * * * that there shall be no sale of said lands until said $445 together with interest thereon and all taxes legally assessed * * * during this term of lease has been fully paid, * * * and until then the above mentioned lease shall be solely in force.'" It was therein held that the instrument was a lease, with an option to purchase, and further that: "An indorsement by the owner on a lease, containing an option to purchase, 'extended within contract until' the date named, extends the whole contract, including the option to purchase, so as to operate as a new contract from the date of the extension, and hence the lessee was not entitled to a credit on the purchase price of the rent paid from year to year prior to his

election to exercise the option after the date of such extension. * * *

"If time was of the essence of an option to purchase land, the provision as to time was waived by an extension of the option."

Much the same result concerning an extension of a lease containing an option to purchase was reached by the court in Balsham v. Koffler, 8 N. J. Super. 48, 73 A. 2d 272.

The cases hitherto cited were determined under varying circumstances. In some instances they were decided on demurrers to a petition or with respect to motions for judgment on the pleadings or at the close of the evidence. The defendant in the case before us urges that the present case is an appeal from a summary judgment and calls attention to the rules of this court in such a situation. Those rules are set forth in Berg v. Rasmuss, 176 Neb. 340, 125 N. W. 2d 905, along with many other cases set out in the defendant's brief, as follows: "In considering a motion for summary judgment the courts should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom.

"The purpose of the summary judgment procedure is not to require a plaintiff to reveal in detail the evidence he expects to produce to prove the allegations of his petition. * * *

"A motion for summary judgment is not a substitute for a demurrer, a motion to dismiss, or a motion for judgment on the pleadings. * * *

"The evidence offered on a motion for summary judgment is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, and affidavits which constitute only a part of the evidence available on a trial on the merits.

"In order for the movant to obtain a summary judgment it must be shown first, that there is no genuine

issue as to any material fact in the case and, second, that movant is entitled to judgment as a matter of law."

The defendant urges that in the present case the trial court had no right to enter summary judgment on the plaintiffs' motion therefor. A review of the pleadings and the stipulation of facts, however, shows clearly that there is no dispute as to the essential facts. All facts set forth in the petition were admitted either by judicial admissions in the answer or by the stipulation of the parties. The express contention of the defendant is apparent. He maintains the contract in the present case is ambiguous and that he should be allowed to introduce evidence concerning the action of the parties to show their interpretation of it. The defendant cites certain cases where courts have held the contract under consideration ambiguous. The courts there held when it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment. He cites among other cases, Severson v. Fleck, 251 F. 2d 920. A reading of that case clearly shows that the contract included clauses that were diametrically opposed to each other as to the commission of the broker who brought the action. In such a case this rule is applicable. This opinion cannot be unduly extended to discuss the other cases cited which we deem inapplicable also.

Without quarreling with this rule, it may be said we do not think it has application in the present case. The defendant points out no ambiguity in the lease or the extensions before us in the present case. He contends instead that the contract should be interpreted differently than the construction placed upon it by the trial court.

In the case of Master Laboratories, Inc. v. Chesnut, 157 Neb. 317, 59 N. W. 2d 571, this court said: "'"* * * where a written contract, signed by both parties, is complete in itself, and contains and expresses the mutual

covenants and promises of both, without ambiguity or apparent omission; where the statement of the consideration therein is of a contractual nature, and not a mere acknowledgment of receipt, parol evidence is not admissible to contradict, vary or add to the consideration expressed in the instrument itself."' See, also, Spiegal & Son v. Alpirn, 107 Neb. 233, 185 N. W. 415."

A contract is not ambiguous within that sense merely because it may be difficult to construe. The construction of a contract, if needed, being a question of law for the court as well as a duty that rests upon the court, there can be no ambiguity within the rule to which we have referred unless and until an application of the pertinant rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties. See Master Laboratories, Inc. v. Chesnut, *supra.*

In the case before us the express provisions of the extension agreement adopted the terms, covenants, and conditions in the original lease. Considering the rules and decisions in the cited cases, we are satisfied that the provisions in the original lease for the payment of compensation for terminating the leasehold interest of the plaintiffs applied not only to the original term but to the extended term as well and that no other interpretation of its provisions can be made. The leasehold interest conferred by the extension appears to be a valuable property interest to the lessee as did the existing term which was then extended. Neither do we think the contract evidenced by the original lease and its provisions regarding the extension thereof and the separate extension thereafter granted were ambiguous within the rule stated in Master Laboratories, Inc. v. Chesnut, *supra.* The whole matter as we view it under the admitted facts was the interpretation of the written contract entered into by the parties.

A written contract which is couched in clear and unambiguous language is not subject to a construction other

and different from that which flows from the language used. See Mason v. Mason, 156 Neb. 478, 56 N. W. 2d 614.

On consideration of the lease and the extension clause the trial court properly held that the date, June 30, 1963, in the provisions for the monthly payment in the event of cancellation, referred to the termination date of the lease and when the lease was extended to June 30, 1968, under the same terms, covenants, and provisions, this included an extension of the agreement relative to cancellation to the new termination date of the lease. This court in Mecham v. Colby, 156 Neb. 386, 56 N. W. 2d 299, held: "When the provisions of a contract together with the facts and circumstances that aid in ascertaining the intent of the parties thereto are not in dispute, the proper construction of such contract is a question of law." It applied this rule in that case where summary judgment was entered on a written contract therein set out and discussed the other facts and circumstances involved. We think that the trial court properly did so in the present case.

The defendant sought to introduce new evidence at the time of hearing on the motion for new trial. He sought to produce the evidence of two witnesses, John R. McCormack, an attorney for the defendant, and Robert J. Reinders, an accountant for the defendant, by one or the other or both of which he attempted to identify exhibits 1 to 10, inclusive. These exhibits were letters between the parties, their attorneys, or agents, in which an apparent attempt was in progress to settle the controversy involved herein between them. The testimony of these witnesses, some of which was admitted subject to a later ruling of the court and some of which was not admitted at the time, sought to bring out further evidence concerning the negotiations. Eventually all of this evidence was excluded by the court. The apparent object of this proffered testimony and the exhibits sought to be admitted was to show that there had been, at least during a great portion of these nego-

tiations, no controversy between the parties concerning the larger claim of the plaintiffs involving the amount due for the unused portion of the term, and that at one point the plaintiffs apparently indicated they would have accepted $42,000 in complete settlement. But they relate, generally speaking, to the question of the amount of set-off claimed by the defendant for additional rental on the gross profit of the plaintiffs. The defendant contended at the hearing and now contends that the testimony and exhibits were admissible to show the construction the parties placed upon the lease in the event its terms were held to be ambiguous, and further, that it showed a genuine issue of material fact still existed which the court should have tried. The plaintiffs made objections to the evidence of the witnesses and to the exhibits. Among them was that this evidence would result in reviewing the negotiations for the settlement which was not proper to be admitted in such cases. A review of this evidence fails to show any admission that the cancellation payments were not to be made during the whole of the extended term, but it does show that no apparent claim was made by the plaintiffs to recover such payments for the extended term except at the close of the negotiations. It also showed quite plainly that the correspondence was a part of the negotiations looking for the settlement of the matters in dispute. It is a well-settled rule of law that: "Evidence of an offer or desire to compromise, consisting of a direct offer to buy peace, or settle a controversy without respect to legal liability, is not admissible against the person making it." Myers v. McMaken, 133 Neb. 524, 276 N. W. 167.

In the present case there are no admissions claimed in the correspondence for settlement that the cancellation payments were not to continue throughout the extended term. The defendant, however, points out the absence of any assertion in the early investigation that such a claim was being or could be made. This is the situation that was present in the early case of Kierstead v.

Brown, 23 Neb. 595, 37 N. W. 471. In that case this court in considering this question stated: "But the precise question here is, whether the silence of a party, where a proposition for settlement and compromise has been made to him by his opponent, can be construed into an admission of some fact deemed necessary to maintain his opponent's case. While I am unable to find an authority to this proposition, I think that it cannot. Indeed, I doubt that any action of any court has theretofore called for a discussion of this question.

"But further, it does not appear that the proposition made by the plaintiff presents any fact, the admission of which would tend to establish the plaintiff's cause of action."

The plaintiffs made further objections including that by this evidence it was sought to vary the terms of a written contract and that it was irrelevant and immaterial. We think the objections were proper and that the court did not err in refusing to admit them.

There remains the question of the determination of the cross-appeal of the plaintiffs as to the amount of the percentage rentals to which the defendant was entitled.

The additional agreed facts, so far as they relate to the cross-appeal of the plaintiffs concerning defendant's set-off, are the rental provisions of the lease which, after providing for the sum of $1,000 a month, further provided for an additional rental to be determined and paid as follows:

"(1) For each lease year during the term of this lease (it being understood that each lease year shall be construed as commencing July 1st and terminating on the last day of the month of June next following), 5 per cent of the total gross sales made during said lease year in excess of $240,000.00.

"(2) Said percentage rental shall be determined and paid as follows: at the end of each six months period during the term of this lease, the Lessee shall pay to the Lessor a sum equal to 5 per cent of gross sales made

during each such six month period in excess of $120,000.00. The amount of each such percentage rental payment shall be determined and paid on or before twenty (20) days following the end of each period above mentioned.

"(3) At the end of each lease year the percentage rental payable for each such period shall be determined and if it shall appear that the percentage paid in accordance with the paragraph numbered (2) of this Section (B) exceeds the percentage rental payable for such period as provided in the paragraph numbered (1) of this Section (B), the Lessee shall be entitled to a refund without interest, of the amount of such excess which shall be paid at the election of the Lessee in cash or by credit against the fixed monthly rental payments falling due thereafter until such excess shall be repaid."

These provisions were included in the same rider that provided for the payment of the $1,500 a month in the case of cancellation of the lease.

On answers to interrogatories it was shown that the gross sales of the restaurant and cafeteria operations under the lease from July 1, 1960, to the end of February 1961, were $325,638.43, of which total sales $56,303.71 took place in January and February 1961, and the rest took place from July 1, 1960, to December 31, 1960.

The plaintiffs urge that the court erred in granting any judgment on the claimed set-off. Their first contention is that there was only an 8-month occupied term in the last 12-month year, the conclusion of the year when the percentage rentals were to have been adjusted never came, and since there was not a full year involved, there was no lease year within which to make a computation as provided in the contract and consequently nothing was owed on the percentage rentals. Plaintiffs further contend in the alternative that in the event percentage rentals should be computed on the last fractional year of 8 months, nevertheless the full deduction of $240,000 should be deducted before the per-

centage rentals, subject to the 5 percent of excess gross sales, should apply.

The defendant contends that the percentage rentals should be computed for the last fractional year of the term but only two-thirds of the yearly deduction of $240,000 should be subtracted therefrom.

The trial court adopted the defendant's contention. The gross sales for the period as set out above were $325,638.43, from which the court deducted two-thirds of the yearly deduction of $240,000, or $160,000, leaving $165,638.43 subject to percentage rentals and fixed them accordingly at $8,281.92. If the full deduction of $240,000 were applied, the percentage rentals due from the plaintiffs on the defendant's set-off would be $4,281.92.

In 32 Am. Jur., Landlord and Tenant, § 453, p. 372, the general rule in regard to rent accruing where a tenancy is terminated between the rent days is set out as follows: "Rent does not accrue from day to day. According to the general rule at common law, in the absence of any covenant or agreement for the apportionment of rent in respect to time, it is not so apportionable. So, it is the well-settled common-law rule that where a tenancy is terminated between rent days, there is no apportionment of the rent so as to enable the lessor to recover a proportionate part, and therefore, a lessor cannot apportion rent under a lease at an annual rent and recover rent for part of a year, where, under a proviso in the lease, he terminates the tenancy before the end of a rent year, if the lease does not provide for such apportionment."

In 52 C. J. S., Landlord and Tenant, § 490, p. 267, it is said: "If the lessor terminates the tenancy between rent days, he may not maintain an action for rent which accrued between the last rent day and the termination of the tenancy; and, on the other hand, if the tenant determines the tenancy between rent days, he must pay the rent until the following rent day."

There is an extended annotation in 18 A. L. R. 957,

concerning the surrender and acceptance of the term as affecting a right to recover rent or on an obligation given for rent. On page 960 of this annotation are gathered together the cases concerning rent which accrues after the surrender of the lease on an entire premises, where it is stated: "It is the general rule that a lessor cannot recover rent from a lessee, or on an obligation for rent, where he has accepted a surrender of the term prior to the accrual of the rent claimed, as a discharge from all subsequent liability is effected thereby."

The cases cited in this note are not recent ones but the rule still seems to be adhered to in the absence of the statute apportioning rents in such a situation. See, Stiles v. Lambert, 39 Ala. App. 15, 94 So. 2d 784; Lochner, Receiver, v. Martin, 218 Md. 519, 147 A. 2d 749; In re Jay-Norm Corp., 174 F. Supp. 866; Rogoski v. McLaughlin, 228 Ark. 1157, 312 S. W. 2d 912; Petrelli v. Kagel, 37 Misc. 2d 246, 235 N. Y. S. 2d 383. Although this rule has not been fully considered in any decisions of this court, in Beacom v. Daley, 164 Neb. 120, 81 N. W. 2d 907, it was held that wherever rent is payable yearly, and there is no provision for payment in advance, it is not due until the end of the year. This would seem to adopt the general rule.

In the case before us, the percentage rental provisions of the lease were to be determined as hereinbefore set out. It first provides that for each lease year during the term, which was construed to be commencing July 1 and ending June 30, the percentage rental shall be 5 percent of the total gross sales in excess of $240,000. Second, it provides that the percentage rental shall be determined and paid at the end of each 6 months on the gross sales exceeding $120,000. Third, it provides that at the end of the year the percentage rental shall be adjusted and if the percentage rental paid during the first portion of the year exceeds the rental payable in the second half thereof, the lessee shall be entitled

to a refund without interest of the amount paid on the first half, to be credited on the rental payments falling due thereafter.

The case of Montgomery Ward & Co. v. Collins Estate, Inc., 268 F. 2d 830, involving so-called percentage rentals, in construing a provision of such a lease but where no termination of the term was involved, stated: "Provision in lease that tenant was to pay a percentage rent which was to be determined by amount of sales made 'during each lease year' * * * when considered with other provisions of lease, was construed as requiring the percentage rent to be paid annually, notwithstanding that lease also provided that mortgage indebtedness was to be paid to mortgagee on behalf of landlord by the tenant by means of fixed rent payments which were to be made monthly, semiannually or annually at election of mortgagee, and that mortgagee had elected to receive the fixed rent semiannually." The court also said: "Although no time is fixed, the general tenor of paragraph 3 clearly shows, in our opinion, that, in the absence of some contrary subsequent arrangement, the payments of percentage rent were to be made annually. The logic of this conclusion finds support in the provision in the lease itself to the effect that the amount of the percentage rent was to be determined by the amount of sales made 'during each lease year' and was to be paid 'for each such lease year'. The only relation between fixed rent and percentage rent is that the amount of the annual fixed rent entered into the determination of the 'annual basic sales total'. *As hereinbefore explained, unless and until the 'annual basic sales total' is reached in any lease year, no percentage rent will be payable, and the computation of the amount of percentage rent itself is wholly independent of the computation of the 'annual basic sales total'.* Moreover, although fixed rent is payable semiannually only by reason of the mortgagee's election, it is to be computed at an *annual rate.*" (Italics supplied.) Be-

cause of the fact that no termination of the lease was involved, it does not precisely pass on the question before us but does throw light upon it.

As previously stated herein, the gross sales for the period in which the premises were occupied by the plaintiffs were $325,638.43, of which $56,303.71 were sales during the period of January and February 1961, and $269,334.72 occurred during the last half of the year 1960. If there had been a full lease year the total percentage rentals could have been computed for that year and would have been applicable. The landlord exercised his rights of cancellation 4 months prior to the expiration of the lease year at which time the determination was to have been made and the final settlement was to have been made.

"In general rent does not accrue as a debt until the tenant has enjoyed the use of the land for the period for which it is payable. Consequently, in the absence of some agreement or understanding between the parties to the contrary, rent is not due until the expiration of the term; and this is true whether the rent is reserved in gross, or on annual, quarterly, or monthly payments. If the tenant is deprived of the use and enjoyment of the property by unavoidable accident or similar contingency before the end of the term, his liability for rent extends only to that time." 52 C. J. S., Landlord and Tenant, § 511, p. 315.

Under the circumstances we think the trial court erred in allowing the defendant the sum of $8,281.92 on his set-off, and according to our opinion, the defendant is not entitled to recover anything thereunder.

Consequently the judgment is affirmed in part, and in part reversed and the cause remanded with directions to enter judgment for the plaintiffs for the full sum of $132,000 on their petition and disallow the set-off of the defendant entirely.

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

NORTHWESTERN PUBLIC SERVICE COMPANY, A CORPORATION, APPELLEE, V. ESTHER JUHL, APPELLEE, IMPLEADED WITH CHARLES E. GRANTHAM, APPELLANT.

129 N. W. 2d 570

Filed July 17, 1964. No. 35701.

1. **Appeal and Error.** By the terms of statute it is provided that an appellant on appeal to the Supreme Court shall set out particularly each error asserted and intended to be urged for the reversal, vacation, or modification of a judgment, decree, or final order alleged to be erroneous, however the statute further provides that this court may, at its option, consider a plain error not specified in the appellant's brief.
2. **Trial: Judgments.** By the terms of statute when a trial by jury has been had, judgment must be rendered by the court and entered by the clerk in conformity to the verdict, unless it is special, or the court order the case to be reserved for future argument or consideration.

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

John P. Jensen, for appellant.

Tye, Worlock, Knapp & Tye, for appellee Northwestern Public Service Co.

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

YEAGER, J.

This is an action in replevin instituted by Northwestern Public Service Company, a corporation, plaintiff, in the county court of Buffalo County, Nebraska, on December 26, 1961, against Esther Juhl and Charles E. Grantham, defendants, to recover an air conditioner, or its value, and damages from the defendants. In the petition it was alleged that there was delivery of the conditioner to the defendant Juhl and installation was made in a cafe of which Grantham was lessee and of which Juhl was a sublessee from Grantham. The delivery was made pursuant to a conditional sales con-

tract between the plaintiff and Juhl. It was further alleged that the payments under the sales contract were delinquent, in consequence of which the action was instituted. It was further alleged that the defendants refused to deliver or to allow the plaintiff to take possession of the conditioner.

A writ of replevin was duly issued and served and in the officer's return he stated that he did not recover the property because of a denial of Grantham to permit him to enter the premises where it was located.

Pleadings were filed by Grantham and other proceedings were had the details of which do not require repetition here. No pleadings were filed by Juhl.

A trial was had at which time and at all times thereafter Juhl was in default. The trial proceeded as to both defendants and on April 4, 1962, a joint judgment was rendered in favor of the plaintiff and against the defendants for $1,000 and $8.75 costs. An appeal was taken from this decision by Grantham to the district court.

At no point up to and including the judgment of the county court was it asserted by any party that Grantham had any interest in or right of possession of the property which is the subject of action in this case. It is asserted by Grantham that the property involved is owned by his father who is the owner of the real estate under lease and sublease to the defendants, but the father has made no claim to anything involved herein.

On May 1, 1962, the plaintiff filed its petition on appeal in the district court which states substantially the same grounds of recovery as were stated in the pleadings in the county court except that here the alleged value of the property was $1,202.61 instead of $1,000, as found in the county court.

To this petition Grantham filed an answer the pertinent allegations of which are not materially different from his pleadings in the county court. A reply was filed

by the plaintiff but it contains nothing of pertinence materially different from what is contained in earlier pleadings.

On September 6, 1963, the district court, on motion of plaintiff, rendered judgment by default in favor of plaintiff and against Juhl for $1,200 with interest and for costs taxed at $42.95. This evidenced an understanding that the appeal of Grantham brought all parties including Juhl under the jurisdiction of the district court.

On October 24, 1963, the case was tried to a jury after which a verdict was returned in favor of the plaintiff, and whether the intention of the jury was that the verdict was to be applicable to both defendants is not disclosed by the charge to the jury. No judgment was rendered until October 28, 1963.

No issue of ownership was submitted to the jury by the instructions. In truth no issue was in actuality submitted for determination by the jury except the value of the interest of the plaintiff in the property in which it claimed an interest, and that it was entitled to recover on the basis of its proof of value.

The instructions do not designate the defendant or defendants against whom or which the plaintiff was entitled to have a recovery, if the evidence supported a right of recovery. In this light and in the light of the terms of the verdict returned the intention of the jury, that is whether it was intended that the verdict applied to one of the defendants or to both, cannot with any degree of certainty be ascertained.

The only instruction given relating to any matter in legal controversy except as to damage and proof thereof is the following: "You are instructed that in this case as a matter of law the plaintiff was entitled to possession of the heater and air conditioner in question on December 26, 1963 (1961), and had the right to remove the same from the premises where they were located."

The finding of the jury which was returned is as follows: "We, the Jury duly impaneled and sworn in the above entitled cause do find that the amount of plaintiff's recovery is $1202.61."

On October 25, 1963, 1 day after the return of the verdict, the plaintiff moved for vacation of the default judgment against Juhl which had been previously rendered for $1,200. This was after the verdict was returned and before any judgment was rendered against Grantham. This motion was sustained on October 28, 1963. Obviously thereafter on the same day a judgment was rendered against Grantham for $1,202.61.

On this day, not on the verdict returned by the jury under the instructions, but on an apparent analysis by the court of the verdict and the evidence relating to liability as between the two defendants, instead of rendering judgment on the verdict of October 24, 1963, the court rendered judgment against Grantham alone for $1,202.61 with interest and costs. It is from this judgment so rendered that Grantham has appealed.

The assignments of error in the brief of the appellant are of such a character that it could be said pursuant to provision of statute that the assignments of error do not direct attention to anything which amounts to reversible error, therefore the judgment should be affirmed. Section 25-1919, R. R. S. 1943, provides that on appeal the brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation, or modification of the judgment, decree, or final order alleged to be erroneous. The same section of statute provides that the Supreme Court may, however at its option, consider a plain error not specified in the appellant's brief.

Section 25-1313, R. S. Supp., 1963, provides: "When a trial by jury has been had, judgment must be rendered by the court and entered by the clerk in conformity to the verdict, unless it is special, or the court order the

case to be reserved for future argument or consideration."

The record discloses that no legally tenable ground for reversal or modification of the judgment appears in the assignments of error, and it further indicates that there was no compliance with the direction of section 25-1313, R. S. Supp., 1963, or its alternatives.

Added to this there were questions presented by the proceedings necessary to be considered in the determination of the case which were ignored and not explored in the briefs of the parties to some of which attention will be directed.

In this area is the character of the action itself. As pointed out, the action was in replevin instituted in the county court which has jurisdiction in the matter of damages limited to $1,000. The action was tried in that court and no property having been recovered, a judgment was rendered in favor of the plaintiff and against both defendants for $1,000. This was obviously on the theory that the two defendants prevented the sheriff from securing the property under the writ of replevin. The record does not disclose whether the case proceeded as an action in trover for conversion or simply one for damages.

From the county court judgment Grantham took an appeal to the district court and Juhl did not. In the district court the plaintiff prayed for a judgment against the defendants for a return of the property in question or of its value in the amount of $1,202.61 and damages. Grantham filed responsive pleadings but Juhl did not, and of course she was in default.

By motion for summary judgment Grantham asserted that the district court was without jurisdiction to entertain the petition on appeal because the claim was in excess of the jurisdiction of the county court. This was denied. This was perhaps an incident of no great moment but since a jurisdictional matter was involved, exploration was at least desirable even if not necessary.

As pointed out, before the trial, the plaintiff by motion, although Juhl was in default, treated her as a joint party to the action with Grantham and obtained a judgment on the joint claim by default against Juhl for $1,200 which was only $2.61 less than the total of the claim. Did this have the legal effect of and amount to at that time a judgment barring a right of any further judgment? This is a matter of significance which has not been explored in the presentation on this appeal.

If this did amount to a total judgment could its effect be avoided, after a trial on the merits of the cause of action jointly pleaded against the defendants? This. and other matters related thereto which it is not deemed necessary to mention here, has not been explored and presented by the briefs.

In the light of all that has been disclosed herein could it reasonably be said that with any degree of assurance of certainty that this court could, or should be required to, attempt to make an ultimate and binding declaration of the rights of the parties in this action? We think not.

Accordingly the judgment of the district court is reversed and the cause remanded to the district court for a new trial upon the legal and factual matters presented by the pertinent pleadings and the effect of the controlling factual considerations occurring during the proceedings up to and including the rendition of judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

SPENCER, J., dissenting.

I find myself in complete disagreement with the majority opinion in this case. This is an appellate and not a trial court. The opinion points out that the assignments of error do not direct our attention to anything which amounts to reversible error. This should dispose of the appeal. While it is possible for this court to recognize obvious error, there is no plain error in this record requiring the application of that rule. It is not the province of this court to frame other issues to

deprive a party of a verdict rendered by a jury on the issue actually tried in the court below.

WHITE, C. J., and BOSLAUGH, J., join in this dissent.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1964

STATE OF NEBRASKA EX REL. CITY OF ST. PAUL, APPELLEE, v. GLEN G. RUTTEN, APPELLANT.

130 N. W. 2d 558

Filed October 9, 1964. No. 35699.

1. **Intoxicating Liquors: Witnesses.** The observations on the part of a witness are an essential part of his opinion on intoxication, and ordinarily such facts must be provided as a foundation for the reception of a lay witness' opinion testimony as to intoxication.
2. ———: ———. Actual observations by a lay witness of a defendant charged with intoxication must be made within a time period reasonably related to the time it is charged he was intoxicated.
3. **Criminal Law: Costs.** The pay, expenses, and mileage of jurors are not authorized by statute to be taxed as costs, and an order of the trial court to that effect is erroneous.

Appeal from the district court for Howard County: DONALD H. WEAVER, Judge. Reversed and remanded.

Kelly & Kelly, for appellant.

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

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

WHITE, C. J.

Defendant, convicted of driving an automobile on December 8, 1962, while intoxicated, appeals. Error is

assigned in the admission of testimony and in the taxation of costs.

There were two State witnesses testifying as to intoxication. One witness was a police officer of the City of St. Paul who arrested the defendant and observed him driving for about 2 miles on a public highway south of St. Paul on the evening of December 8, 1962. No question appears as to the competency of the officer's testimony.

The other witness, Mrs. Leonard Nesiba, was a cafe and tavern operator in St. Paul, Nebraska. She was acquainted with the defendant and testified that he had been in and out of their cafe several times. She was permitted to testify, over objection, that the defendant "was intoxicated when he was in our cafe that evening." As to the time and date when she made these observations and formed her opinion as to intoxication, she testified as follows:

"Q. Do you recall seeing the defendant at any time in your cafe on December 8, 1962?

"A. I don't know the exact date. It's been a long time ago. I remember it being last fall, yes, or last winter."

The admission of this witness' opinion testimony on intoxication, over objection, was prejudicial error. The relevant time in question was the evening of December 8, 1962. Foundation testimony must be provided as to actual knowledge and sufficient observation of a defendant at or about the time in question. Pierce v. State, 173 Neb. 319, 113 N. W. 2d 333; Pribyl v. State, 165 Neb. 691, 87 N. W. 2d 201; 23 C. J. S., Criminal Law, § 866, p. 412.

Actual observations by a lay witness are an essential basis of his opinion on intoxication. These observations must be made within a time period reasonably related to the time it is charged that the defendant was intoxicated. During the fall or winter, when the witness saw the defendant several times, is insufficient to

show knowledge of intoxication in the time period at issue on the evening of December 8, 1962. The State does not deny the error in admission of this evidence but argues that it was not prejudicial. No cases are cited holding to this effect in a situation similar to this case. The quantum of proof in a criminal case requires the jury to find guilt beyond a reasonable doubt. It is true that the police officer's testimony alone was sufficient to support a conviction. But we are left to pure speculation as to what portion of the whole testimony carried the burden of proof beyond a reasonable doubt. The indicted testimony was not cumulative of other independent lay witnesses' testimony. In this situation this court cannot speculate on whether prejudice resulted when it is clear one of the defendant's rights was violated. See Pierce v. State, *supra;* Bruntz v. State, 137 Neb. 565, 290 N. W. 420.

The court taxed, as part of the costs in this case, the jury costs, including meals, mileage, and compensation for the services of the entire panel. This was error. State v. Jungclaus, 176 Neb. 641, 126 N. W. 2d 858.

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

REVERSED AND REMANDED.

DOROTHY O'BRIEN, APPELLANT, V. LEROY W. ANDERSON, APPELLEE.

130 N. W. 2d 560

Filed October 9, 1964. No. 35700.

1. **Automobiles: Negligence. By statute it is provided that the owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle.**

2. **Negligence.** 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.
3. **Automobiles: Negligence.** Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.
4. **Negligence: Trial.** 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.
5. **Negligence.** The maxim "volenti non fit injuria" means: If one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom. The maxim is predicated upon the theory of knowledge and appreciation of the danger and voluntary assent thereto.
6. ———. Within the limits of its terms the maxim of "volenti non fit injuria" is applicable to negligence actions in this jurisdiction.
7. ———. In actions based on negligence the defense of assumption of risk under the maxim "volenti non fit injuria" is not inconsistent with the defense of contributory negligence.
8. **Trial.** Instructions given to a jury must be construed together, and if when considered as a whole they properly state the law they are sufficient.
9. **Trial: Appeal and Error.** 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 that is done, the judgment will not ordinarily be reversed for such defects.

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

John F. McCarthy, for appellant.

Luebs, Elson, Tracy & Huebner, for appellee.

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

MESSMORE, J.

This is an action at law brought by Dorothy O'Brien,

plaintiff, against LeRoy W. Anderson, defendant, to recover damages for personal injuries suffered by the plaintiff while riding as a guest in the defendant's car. The case was tried to a jury resulting in a verdict for the defendant. The plaintiff filed a motion to set aside the verdict and render a decision for the plaintiff, or in the alternative to grant the plaintiff a new trial. Motion for new trial was overruled and the plaintiff appealed.

The plaintiff's petition alleged that she was an invited guest riding in the defendant's car; that upon approaching the intersection of Eddy Street with Fourth Street in Grand Island, Nebraska, the defendant drove and operated his car in such a grossly negligent manner and in such willful and wanton disregard of the safety of the plaintiff that he caused the same to collide with the rear of a 1956 Buick sedan owned and operated by Virgil R. Fittje who was stopped, waiting for a red signal light to change from red to green, and who was proceeding ahead of the defendant's car in the same general direction on the same street; and that the car driven by the defendant crashed into the rear end of the Fittje car. The plaintiff further alleged that the collision was caused by the gross negligence of the defendant as follows: Operating his motor vehicle at so great a rate of speed and failing to reduce his speed although the automobile owned by Virgil R. Fittje was stopped with his red signal lights on indicating that he was stopped on the highway, with red lights visible for a distance of 200 feet; failing to observe the signal of the car ahead; failing to yield the right-of-way to the traffic of the car ahead; and operating an automobile while under the influence of intoxicating liquor.

The defendant's answer denied generally each and every allegation of the plaintiff's petition; and specifically denied that he was operating his car while under the influence of intoxicating liquor and that he was guilty of gross negligence. For an affirmative defense, the defendant alleged that if he had been operating a motor

vehicle while under the influence of intoxicating liquor, then the plaintiff assumed the risk because the plaintiff knew the alleged condition of the defendant, appreciated the danger that alleged condition would have created, and deliberately exposed herself thereto. For his second affirmative defense the defendant alleged that the plaintiff failed to protest or complain to defendant about the manner of his driving, failed to warn him of a danger of which she knew or reasonably should have known, and failed to exercise ordinary care for her own safety in that she voluntarily entered an automobile driven by a person whom she claimed was under the influence of intoxicating liquor.

The plaintiff's reply denied all the allegations of the defendant's answer except such as admit allegations of the plaintiff's petition.

The plaintiff's pertinent assignments of error are as follows: That the verdict is contrary to the evidence and the law; that the trial court failed to instruct the jury to find for the plaintiff if the accident was the proximate cause of the injuries to the plaintiff; that the trial court erred in giving instructions Nos. 3, 4, 5, 6, 8, and 12; that the trial court erred in giving an instruction on the assumption of risk; that the trial court failed to give any instruction as to the statutory rules of the road and the requirements of the use of lights or signal lights; and that the trial court erred in singling out a particular part of the evidence expressing an opinion as to its weight, its strength, and its probative force.

On January 1, 1962, at about 1:49 a.m., the defendant, owner of a 1952 Dodge four-door sedan operated by him, was in a collision with a 1956 Buick sedan operated by Virgil R. Fittje. The collision occurred at the intersection of Fourth and Eddy Streets in Grand Island. At the time of the collision the plaintiff was an invited guest passenger in the defendant's car and was riding in the front seat thereof.

Section 39-740, R. R. S. 1943, provides in part: "The

owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term guest is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, * * *."

"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. * * * Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. * * * 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, 175 Neb. 325, 121 N. W. 2d 567.

The first witness called for the plaintiff was the defendant. He testified that he was involved in an automobile accident on January 1, 1962, when the plaintiff was riding with him. He further testified that he drove across Third Street and started down the underpass, and when he got to the bottom of the underpass he could see a car stopped; that he drove a little farther and saw that the traffic light ahead was red; that he proceeded on, looked up and the light was changing to green; and that when he got about two car lengths he looked down and saw a car in front of his car but did not have time to stop due to the ice, and he hit the car in front of him. After the impact he sat in his car for a minute, looked over at the plaintiff, and tried to open the door but it

was sprung and he could not get out of his car. He finally did get out. Some police officers arrived and wanted to see his driver's license which he showed them. They started charting the accident. The emergency unit came and took the plaintiff to the hospital.

Alfred Grubbs, a police officer, testified that he was called to the scene of the accident; that the weather was clear; that the surface of the highway was concrete, and there was some ice on the roadbed; that there were two traffic lights at the intersection of Fourth and Eddy Streets, one for northbound and southbound traffic and one for eastbound and westbound traffic; that the defendant and Virgil R. Fittje were involved in an accident; and that the defendant stated that the light was changing and he kept going and then saw the other vehicle stopped at the intersection and applied his brakes but could not stop. This witness further testified that he talked to the defendant who appeared to be all right, and no ticket was issued for a traffic violation.

Ray Scarborough, a police officer, testified that he was called to the scene of the accident; that he went there with officer Hansen; that he found that two automobiles had been in an accident and a lady was injured; and that the plaintiff was in the automobile operated by the defendant and had blood on her face. This officer further testified that he saw the defendant walking around and he seemed to be all right. On cross-examination he testified that there was no indication that the defendant was under the influence of alcoholic liquor.

James M. Hansen, a police officer, testified that he was called to the scene of the accident, and proceeded to direct traffic; and that he observed the defendant who appeared to be all right, he walked good and his speech was all right. On cross-examination he testified that there was nothing he knew of that would indicate that

the defendant was under the influence of intoxicating liquor.

Kenneth R. Carlisle testified that he was operating his car in the vicinity of Fourth and Eddy Streets at about 1:40 a.m., on January 1, 1962; that he was going south on Eddy Street and had stopped at the red light; that there was a car headed north that was stopped at the street light and a car coming underneath the underpass that ran into the back end of the car that was stopped at the street light; that when the impact occurred, the light was still red and it was just time for it to change; that the warning light came on at the time of the accident; that the defendant's car hit the car ahead of him as the light changed to green; and that he could smell liquor on the defendant, but the defendant walked normally, talked normally, and appeared to be scared. On cross-examination he testified that there was nothing to indicate that the defendant was under the influence of intoxicating liquor.

The plaintiff testified that she was acquainted with the defendant and had a date with him on New Year's Eve 1961; that the defendant called at her residence around 10 p.m.; that they went to the V. F. W. Club; that upon arriving at the club, the defendant seated her, and left to visit other people who were there; that she asked the defendant to take her home three or four times, and he finally agreed to take her home; and that the defendant did some drinking at the club, but she did not know how much. She further testified that as they went over to the car, she suggested that she drive; that he said he would drive, and she thought if he was able to that he could drive; that he drove underneath the underpass, and when they were in the middle of the underpass she noticed a car stopped at the red light ahead; that the automobile ahead of them, and which was stopped, had red lights but they were not bright; that she figured that the defendant would pull around because there was nobody on the right side, and she

thought the defendant would stop; that when she noticed that the defendant was not going to stop was at the time of the impact; that she did not say anything to the defendant, she was shocked and unable to talk, but knew something was going to happen; and that after the impact she knew something had happened, but she was "knocked a little unconscious."

On cross-examination the plaintiff testified that when the defendant came for her she could smell liquor on him; that they parked in front of the Elks Club and walked over to the V. F. W. Club; that the defendant sort of stumbled, but that could have been his normal procedure of walking; that she thought he was walking normally; that she thought the defendant was under the influence of intoxicating liquor but not to the extent that he did not know what he was doing; that at the V. F. W. Club the defendant was not sitting with her but was at the bar; that she had one and a half drinks, and did not know how many the defendant had because she was sitting at a table by herself; and that she did not know whether the defendant had anything to drink on the evening of December 31, 1961, nor the early morning of January 1, 1962, when he was at the V. F. W. Club. The plaintiff testified in her deposition that the defendant acted like he had been drinking when he picked her up; that after they parked the car and walked to the V. F. W. Club the defendant was staggering; that his speech was "blurry-like"; that he was under the influence of alcoholic liquor; that she would say that he was intoxicated; and that he remained under the influence of intoxicating liquor all evening up to and including the time that the accident happened. The plaintiff further testified that she did not have an opinion as to the speed of the defendant's car; that there was nothing abnormal about the defendant's driving, other than it seemed he was going a little faster than he should in approaching a red light and a car stopped ahead of him; that she did not know

if there was any change in the speed of the defendant's car from the middle of the underpass; and that it did not seem to her that he slowed down.

The defendant testified that the Eddy Street underpass runs from Third to Fourth Street and is about 1,500 feet long; that proceeding north, a person cannot see the intersection of Fourth and Eddy Streets when starting down the underpass; that when arriving at the bottom of the underpass, or about 750 feet from Fourth Street, a person could see a car stopped at the intersection; and that when about 500 feet from Fourth Street a person can see the overhead traffic lights at Fourth and Eddy Streets. The defendant further testified that he had not had anything to drink before he left home on the day of the accident; that on the way to pick up the plaintiff he stopped and had one drink; that he did pick up the plaintiff and take her to the V. F. W. Club, arriving there about 9:30 p.m.; that he did not know how many drinks he had or how many drinks the plaintiff had, but the plaintiff probably had a drink every time he had one because he got her one when he got one for himself; that they left the V. F. W. Club at about 1:30 a.m.; that the two of them walked together, and he was not staggering; and that the plaintiff said nothing to him about the way he was acting and did not say that she thought he should not drive and that she would drive. The defendant described the route he took after leaving the V. F. W. Club, stating that he crossed Third Street at Eddy Street at 20 to 25 miles an hour; that as he went into the underpass he was in the inside lane nearest the centerline; that starting down the underpass he was unable to see anything until he got to the bottom of the underpass then he saw a car stopped at the stop sign; that he proceeded a little farther and saw that the light was red; that he proceeded up the hill and the light was about to change; and that when he looked down it was too late and he ran into the back end of the car ahead of him. The defendant further testified that he

did not think he would have to stop because he thought the light would change and he believed the vehicle ahead of him would pull out.

On cross-examination the defendant testified that as he was driving down into the underpass he was going at a speed of about 20 to 25 miles an hour; that he was familiar with the speed sign; that the speed limit was 20 miles an hour; and that it could be 15 miles an hour. The defendant further testified that he was driving in the inside lane going north out of the underpass; that there was no traffic coming from the east to the west; that "I didn't think I would have to stop; too late to turn out; trying to hit the brake"; that the traffic light was red when he was about 500 feet away and he thought the light would change any minute; and that "I was thinking he was going to pull out. I didn't have to stop."

The plaintiff attacks instruction No. 3 which has to do with the definition of a guest passenger under section 39-740, R. R. S. 1943, in that the court should have included the entire paragraph of such statute to enable the jury to have all the facts necessary to arrive at a proper conclusion.

The plaintiff's petition alleged that the plaintiff was a guest passenger in the defendant's car. The defendant's answer admitted that fact. Instruction No. 3 given by the trial court so informed the jury. We conclude that the plaintiff's contention is without merit.

The plaintiff attacks instruction No. 4 in that the instruction is so worded that any neglect at all would bar the plaintiff from recovering; and further, that the guest should warn the driver under certain conditions rather than the second paragraph of the instruction which definitely set out to the jury that if there was any anticipation of danger, the guest should warn the driver.

In Sautter v. Poss, 155 Neb. 62, 50 N. W. 2d 547, this court said: " 'The duty of a guest riding in an automo-

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

In the case at bar, the plaintiff, on direct examination, testified that she noticed a car parked ahead when she was in the middle of the underpass; that she did not say anything to the defendant at that time; and that she was going to, but she was shocked and unable to talk, but she knew that something was going to happen. This testimony contains a clear indication that the plaintiff saw the car stopped ahead and knew something was going to happen. We conclude that the trial court did not commit prejudicial error in the giving of the above instruction.

The plaintiff attacks instruction No. 5. This instruction relates to the burden of proof upon the plaintiff to prove by a preponderance of the evidence the following propositions: That the defendant was under the influence of alcoholic liquor or was guilty of gross negligence in one or more of the particulars set out in the plaintiff's petition; that the defendant was under the influence of alcoholic liquor or the gross negligence of the defendant was the sole, proximate cause of the accident; and that the plaintiff was damaged by reason of defendant's gross negligence or his being under the influence of alcoholic liquor.

In this connection, the plaintiff asserts that the first three witnesses called by the plaintiff testified that the defendant was not under the influence of alcoholic liquor. The instruction submitted both possible grounds under the guest statute upon which the plaintiff could base a recovery. There is evidence that the defendant

was under the influence of intoxicating liquor. The evidence was conflicting in this respect. We conclude that there was no prejudicial error in the giving of this instruction.

The plaintiff attacks the trial court's instruction No. 6, which states in part: "If the accident which caused the injury, if any, to plaintiff was not caused by the gross negligence of the defendant or as a result of defendant being under the influence of alcoholic liquor, plaintiff would not be entitled to recover." We find no prejudicial error in the giving of this instruction.

The plaintiff attacks instruction No. 8. This instruction contains definitions such as "negligence," "contributory negligence," "gross negligence," and "proximate cause." The plaintiff's contention is that in this instruction the trial court failed to instruct the jury to find for the plaintiff that the accident was the proximate cause of the injuries to the plaintiff. In the light of all of the evidence we fail to find prejudicial error in the giving of this instruction.

The plaintiff complains that the trial court failed to properly instruct the jury upon all of the material issues presented by the pleadings and the evidence, and that the trial court failed to give any instructions on the speed or rules of the road and the requirement of the use of lights and signal lights. There is no allegation in the plaintiff's petition concerning the defendant's failure to have his vehicle properly lighted. There is no evidence in the record that the speed of the defendant's car was violative of any statute. There is no evidence of the speed of the defendant's car during the 750 feet of the underpass from the bottom to the place where the accident happened. And, there is no evidence that the defendant failed to decrease his speed as he traveled the last 750 feet of the underpass to the place where the accident happened. We find no prejudicial error as contended for by the plaintiff.

The plaintiff contends that the trial court erred in

giving instruction No. 12 on the assumption of risk, when the instruction did not include that the assumption of risk does not apply to unknown or hidden dangers.

In Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041, this court said that guests who accept the hospitality of the driver of an automobile accept whatever risk attends the degree of proficiency of such driver and his usual and customary habits of driving with which they are familiar. See, also, Swengil v. Martin, 125 Neb. 745, 252 N. W. 207; McGrath v. Nugent, 133 Neb. 237, 274 N. W. 549. The court further said that one who knows, appreciates, and deliberately exposes himself to a danger assumes the risk thereof. One cannot deliberately incur an obvious risk of personal injury, especially when preventive measures are at hand, and then hold the author of the danger for the ensuing injury. See 38 Am. Jur., Negligence, § 171, p. 845. This court held in Landrum v. Roddy, *supra:* "The maxim 'volenti non fit injuria' means: If one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom. The maxim is predicated upon the theory of knowledge and appreciation of the danger and voluntary assent thereto. * * * Within the limits of its terms the maxim of 'volenti non fit injuria' is applicable to negligence actions in this jurisdiction. * * * In actions based on negligence the defense of assumption of risk under the maxim 'volenti non fit injuria' is not inconsistent with the defense of contributory negligence."

Under the facts as heretofore set forth we conclude that the trial court did not commit prejudicial error in giving an instruction on the assumption of risk.

The defendant moved for a directed verdict at the close of the plaintiff's case and at the close of all of the evidence. The facts are sufficient to warrant the court

in overruling the motions for directed verdict and taking the case to the jury.

With reference to the instructions, the rule is: "Instructions given to a jury must be construed together, and if when considered as a whole they properly state the law they are sufficient." Price v. King, 161 Neb. 123, 72 N. W. 2d 603.

"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 that is done, the judgment will not ordinarily be reversed for such defects." Tate v. Borgman, 167 Neb. 299, 92 N. W. 2d 697. See, also, Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

From an examination of the entire record we conclude that the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD KOZIOL, APPELLANT.

130 N. W. 2d 557

Filed October 9, 1964. No. 35731.

Criminal Law. 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.

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

Kelly & Kelly, 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.

CARTER, J.

Defendant was charged in the district court for Nance County with unlawfully and willfully operating a motor vehicle upon the highways in said county while under the influence of alcoholic liquor. Defendant entered a plea of guilty and he was thereupon sentenced to serve 30 days in the county jail of Nance County and to pay a fine of $100 and costs. It was also ordered that the operator's license of defendant be revoked for a period of 6 months from the date of his release from the county jail. The only assignment of error is the contention of defendant that the sentence is excessive.

The record discloses that defendant was called to the stand and testified before sentence was imposed. He testified that he was 24 years of age and unmarried. He had employed legal counsel. The court was advised by the defendant, upon inquiry, that he was guilty. He admitted that he had previously been twice convicted for reckless driving and once for speeding. The sentence imposed was within the limits prescribed by section 39-727, R. S. Supp., 1963. There is nothing in the record to indicate that the sentence is excessive. The record discloses no extenuating circumstances of any kind.

The case is controlled by our holding in State v. Ohler, *ante* p. 418, 129 N. W. 2d 116, wherein we said: "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."

Since there is nothing in the record indicating an abuse of discretion on the part of the trial court in imposing the sentence that it did, the judgment of the trial court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. PAUL E. RHODES, RESPONDENT.

131 N. W. 2d 118

Filed October 23, 1964. No. 35399.

1. **Attorney and Client.** It is the duty of this court to maintain the integrity of the legal profession by disciplining lawyers who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate fraud on the courts, or to corrupt or defeat the administration of justice.
2. ———. The evidence adduced in a disciplinary proceeding is reviewed de novo in this court to determine if discipline should be imposed, and, if it should, the extent thereof.
3. ———. While a disciplinary proceeding is not criminal in nature, in view of the momentous consequences to the person charged, the presumption of innocence applies, and his culpability must be established by a clear preponderance of the evidence. That is, the court must be satisfied to a reasonable certainty that the charges are true.
4. ———. A license to practice law in this jurisdiction is granted on the implied understanding that the party receiving it shall at all times demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit to himself, the profession, and the courts.
5. ———. The purpose of a disbarment proceeding is not so much to punish an attorney as it is to determine, in the public interest, whether he should be permitted to continue to practice law.
6. ———. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitute grounds for suspension or disbarment.
7. ———. Regardless of an attorney's frame of mind, his conduct in a courtroom must at all times conform to his oath as a lawyer, the provisions of section 7-105, R. R. S. 1943, and the Canons of Professional Ethics in full force and effect in this state.
8. **Judges: Attorney and Client.** Abuse of a former judge, directed toward his action as a judge, is conduct which would tend to bring discredit on the judiciary.
9. ———: ———. The terms "Kangaroo Court" and "Kangaroo Judge" are terms of contempt and utter disrespect, and their use tends to bring discredit on the judiciary.
10. ———: ———. The fact that an attorney believes a charac-

terization of a court as a "Kangaroo Court" to be correct is no defense in a disbarment action, because a lawyer is presumed to know the proper method of securing redress if he feels aggrieved by the actions of a court.

11. **Attorney and Client. Where an attorney acts pro se, he is charged with the same responsibility as if acting for a client, and as such must avoid the violation of the Canons of Professional Ethics governing that relationship.**

Original action. Judgment of disbarment.

Clarence A. H. Meyer, Attorney General, and Peter E. Marchetti, for relator.

Paul E. Rhodes, pro se.

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

SPENCER, J.

This is an original disciplinary proceeding initiated in conformity with the rules of this court, against the respondent Paul E. Rhodes, a lawyer duly admitted and licensed in 1943 to practice his profession in this state. The proceeding was filed in the name of the State of Nebraska ex rel. Nebraska State Bar Association as relator. The parties will hereinafter be referred to as relator and respondent.

The matter was referred for hearing, report, and recommendation to Elbert H. Smith as referee, and is before this court on his report finding the respondent guilty of unprofessional conduct, and the respondent's exceptions thereto.

The duty rests on this court to maintain the integrity of the legal profession by disciplining lawyers who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate fraud on the courts, or to corrupt or defeat the administration of justice. We therefore review the evidence adduced in this proceeding de novo to determine if discipline should be imposed, and, if it should, the extent thereof. See State

ex rel. Nebraska State Bar Assn. v. Fisher, 170 Neb. 483, 103 N. W. 2d 325.

After the briefs were filed herein, and shortly before the oral argument, respondent filed a motion to disqualify all of the members of this court from participating herein because the Associate Justices had been defendants in Rhodes v. Houston, 202 F. Supp. 624, an action filed by him in the federal district court, and because the Chief Justice, while a district judge, had ruled against the respondent on a petition for habeas corpus, and for the further reason that they are members of the Nebraska State Bar Association. This motion will be discussed hereafter.

The complaint herein embraced five counts, but by amendment Count IV was withdrawn. The remaining four will be summarized in as abbreviated a form as possible to an understanding of the complaint herein.

Count I generally charges the respondent with having been charged with contempt in the district court for Morrill County, Nebraska, on July 29, 1960, because while a defendant in a criminal case he intentionally attempted to obstruct and hinder the administration of justice and to intimidate the judge of the district court by conspiring with and procuring the county judge of Morrill County to issue a bench warrant and a complaint for the arrest of the district judge in an attempt to bring about his incarceration for the purpose of preventing him from performing his official duties. The count then alleges that after trial, respondent was found guilty of contempt, and that said judgment has become final. It also alleges that said unprofessional conduct was a violation of subdivisions (1), (5), and (6) of section 7-105, R. R. S. 1943. It further alleges that said act was in violation of the obligations implicit in the lawyer's oath provided for by section 7-104, R. R. S. 1943; and further, that all of the said acts were a violation of Canons 1, 22, 29, and 32 of the Canons of Professional Ethics of the American Bar Association, which

are the ethical standards governing Nebraska lawyers in the practice of their profession.

Count II substantially alleges that for the same purposes mentioned in Count I, respondent obtained from the county judge of Morrill County bench warrants and complaints for the arrest of Rush C. Clarke, special assistant attorney general of the State of Nebraska, James L. Macken, county attorney of Morrill County, and Norval E. Houston, sheriff of Morrill County, and personally delivered said warrants to the county clerk with instructions to execute said warrants by incarcerating the individuals named; and that said acts constituted unprofessional conduct, in violation of the provisions of section 7-105, R. R. S. 1943.

Count III substantially alleges that respondent, in pursuance of a calculated and contumacious disregard for the authority, integrity, and dignity of the courts of this state, filed an action against the trial judge in the criminal contempt action, the Attorney General, the assistant attorney general, the county attorney, the sheriff of Morrill County, and others, attempting to obtain a permanent injunction against the confinement of a witness being held in the county jail for willful refusal to answer questions propounded to him in the contempt action. Said count further alleges that said respondent, knowing the district judge planned to be in Morrill County, filed an affidavit that said judge was absent from the county, and, by threats and intimidation, induced the acting county judge to sign an order restraining the district judge from keeping the witness in the county jail. That thereafter, by threats and intimidation, respondent induced the clerk of the district court to issue a certified copy of the restraining order drafted by the respondent for service on the trial judge. That thereafter, respondent filed an affidavit and a motion for disqualification of said trial judge, alleging the pendency of an action involving a pecuniary and monetary difference between the trial judge and the

respondent in the action in which the alleged contempt occurred.

Count V alleges three specific instances in which respondent, by personal acts, conduct, and attitude, repeatedly exhibited a pronounced disrespect for the courts of Nebraska, to wit: a. On January 11, 1960, while being arraigned on a criminal complaint, respondent assumed a full-length, reclining position on a spectator's bench in the courtroom, and advised the district judge it would be necessary for the court to have the sheriff drag him before the bench if the court wanted him there; b. that in the early morning hours of the day after district judge R. M. Van Steenberg retired from the district bench, respondent called him by long distance, addressed him as an "Old Kangaroo" and subjected him to a tirade of abuse; and, c. that on September 7, 1962, and at various other times, respondent has referred to the courts of Nebraska as "Kangaroo Courts."

Respondent filed a lengthy, repetitious answer and a supplemental amendment to his answer, which we summarize as briefly as possible. As to Count I, the answer alleges lack of jurisdiction. It contains a general denial of all of the allegations of the complaint, and specifically denies violations of the Canons of Professional Ethical Standards or the statutes of Nebraska. It alleges that the judgment in the contempt action is absolutely void, and, quoting from respondent's answer, "to base a complaint against respondent based on such a void judgment Kangaroo Court, is a violation fo (of) due process and equal protection of law to this respondent, * * *." It alleges that the contempt judgment is void as a violation of constitutional provisions, "trial in absentia," and the calling of a witness without notice to respondent, and the pronouncing of sentence of imprisonment for 9 months in the Nebraska State Penitentiary at hard labor; and for the further reason that the respondent was subpoenaed as a witness and forced to testify against himself. It alleges that the charges and the complaint

are aiding and abetting in the deprivation of respondent's federal civil rights; and alleges that the advisory committee of the Nebraska State Bar Association has violated the rules of the Supreme Court. It further alleges that the district court for Morrill County determined that the county court had jurisdiction in the habeas corpus action out of which the case at bar grows; alleges that it is customary procedure for attorneys to prepare orders and papers for signature by the judge; and finally, alleges that a court of competent jurisdiction has adjudged the judgment embraced in the complaint to be void.

As to Count II, the answer contains a general denial, and alleges that all acts done by the respondent were done with the aid, assistance, and on the advice of a duly-licensed attorney of the State of Nebraska; and further alleges that Rush C. Clarke, special assistant attorney general of the State of Nebraska, James L. Macken, county attorney, and Norval E. Houston, sheriff of Morrill County, had complaints against themselves dismissed at a time they had the county court of Morrill County under a writ of prohibition from the district court, "their Kangaroo Judge, R. M. Van Steenberg, entering the order, * * *"; and alleges violation of the Fourteenth Amendment to the Constitution of the United States.

As to Count III, respondent denies generally and for further answer alleges "that Rush Clark, special assistant Attorney General, Kangaroo Judge R. M. Van Steenberg in a case in which he was disqualified to act as judge because of common law Bias passion and Prejudice and James L. Macken County Attorney of Morrill County, Nebraska, had caused the County Judge of Morrill County, Nebraska to be imprisoned in the County Jail of Morrill County, Nebraska, for his efforts to protect the County Court of Morrill County, Nebraska, and the judge thereof from the Kangaroo action of the Last above named parties, * * *"; and alleges that said

actions and parties interfered with the due administration of justice in Morrill County, Nebraska.

As to Count V, respondent denies generally and alleges that said count refers to the contempt action which is still pending, that respondent is a party to said action, and that there is no power or authority to proceed in a disciplinary action.

Further answering to Counts I, II, III, and V, respondent alleges that R. M. Van Steenberg was disqualified to act in all of the cases alleged in the amended complaint, and that Albert W. Crites was an imported "Kangaroo judge," imported by the State of Nebraska through its agents, representatives, James L. Macken, Rush Clarke, C. S. Beck, and R. M. Van Steenberg, "to Kangaroo this respondent, and prevent this respondent from having a fair trial, * * *."

The supplemental amendment to the answer of the respondent is in the nature of a confession and avoidance and alleges substantially that if respondent is guilty of any of the alleged offenses, he should not be disciplined because all of the said facts and circumstances were brought about by the violation of his state and federal constitutional rights and civil rights, "and was deliberately done by the relator and relator members of the Nebraska State Bar Association to entrap this respondent * * *." Respondent then sets out nine alleged violations of his rights, which he alleges constitute sufficient harassment and entrapment to be a complete defense.

Section 7-105, R. R. S. 1943, provides as follows: "It is the duty of an attorney and counselor: (1) To maintain the respect due to the courts of justice and to judicial officers; (2) to counsel or maintain no other actions, proceedings or defenses than those which appear to him legal and just, except the defense of a person charged with a public offense; (3) to employ, for the purpose of maintaining the cause confided to him, such means only as are consistent with the truth; (4) to

maintain inviolate the confidence, and, at any peril to himself, to preserve the secrets of his clients; (5) to abstain from all offensive practices and to advise no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged; (6) not to encourage the commencement or continuance of an action or proceeding from any motive of passion or interest."

Section 7-104, R. R. S. 1943, provides as follows: "Every attorney upon being admitted to practice in the Supreme Court or district courts of this state, shall take and subscribe an oath substantially in the following form: 'You do solemnly swear that you will support the Constitution of the United States, and the Constitution of this state, and that you will faithfully discharge the duties of an attorney and counselor, according to the best of your ability.' "

In State ex rel. Nebraska State Bar Assn. v. Palmer, 160 Neb. 786, 71 N. W. 2d 491, we held that this oath requires a lawyer to faithfully discharge his duties; uphold and obey the Constitution and laws of this state; observe established standards and codes of professional ethics and honor; maintain the respect due to courts of justice; and abstain from all offensive practices which cast reproach on the courts and the bar.

The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association, and those which may from time to time be approved by the Supreme Court. State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583.

The Canons of Professional Ethics which the respondent has been charged with violating, so far as material here, read as follows: "1. It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend them-

selves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected. * * *

"22. The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

"It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, * * *. * * *

"These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice. * * *

"29. * * * He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice. * * *

"32. No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. * * *."

We first consider respondent's motion to disqualify all of the members of this court. We assume it is premised on the assumption that they are interested in the outcome of this disciplinary proceeding because they were joined in alleged civil rights actions in the federal district court, in which actions they were held to be immune to suits for any acts done in the performance of the duties of their office. It is of interest to note that respondent, previous to his arraignment in the district court for Morrill County on the original criminal complaint, and again previous to his trial for contempt, attempted to disqualify the two district judges involved in the same manner. If the respondent, by the mere expedient of filing an action against any judge before whom he must appear, could disqualify the judge, our judicial system would soon become a hollow mockery. The joinder of the members of this court in the actions filed is not in any way involved in the proceedings herein.

With specific reference to the fact that all of the members of the court are members of the Nebraska State Bar Association, that is also true of any attorney practicing before the courts in this state as well as of the district judges who would need to be called to hear his case if the members of this court were disqualified. There is no merit to respondent's position, but even if there were, by the great weight of authority, the rule of necessity would be applicable. See Annotation, 39 A. L. R. 1476.

We have stated many times that while a disciplinary proceeding is not criminal in nature, in view of the momentous consequences to the person charged, the presumption of innocence applies, and his culpability must be established by a clear preponderance of the evidence. See State ex rel. Nebraska State Bar Assn. v. Pinkett, 157 Neb. 509, 60 N. W. 2d 641. That is, the court must be satisfied to a reasonable certainty that the charges are true. State ex rel. Nebraska State Bar Assn. v. Jensen,

171 Neb. 1, 105 N. W. 2d 459. A license to practice law in this jurisdiction is granted on the implied understanding that the party receiving it shall at all times demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit on himself, the profession, and the courts. See State ex rel. Sorensen v. Scoville, 123 Neb. 457, 243 N. W. 269.

The purpose of a disbarment proceeding is not so much to punish an attorney as it is to determine, in the public interest, whether he should be permitted to continue to practice law. State ex rel. Nebraska State Bar Assn. v. Wiebush, 153 Neb. 583, 45 N. W. 2d 583.

Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitute grounds for suspension or disbarment. See State ex rel. Nebraska State Bar Assn. v. Richards, 165 Neb. 80, 84 N. W. 2d 136.

Respondent strenuously contends that an unreported judgment rendered in Rhodes v. Edmondson, T-3405, a case in the United States District Court for Kansas, found the contempt judgment to be void, and is controlling herein. A certified copy of the instructions to the jury in that case was offered in the hearing before the referee, and said instructions are included in the respondent's brief herein. They disclose that the action was one against Harry W. Edmondson, a penitentiary guard, who permitted a default judgment to be entered against him. Without speculating on the questions which immediately arise, it is sufficient to observe that this judgment could not possibly have any effect herein. While we cannot consider it in this matter, it is of interest to note the observation of Judge Delehant at page 111 in Rhodes v. Meyer, 225 F. Supp. 80, on the relationship between respondent and Edmondson.

Essentially, respondent's exceptions to the report of the referee are based on his contention that his con-

viction of contempt of court is void because his constitutional rights were violated, particularly by what he terms his "trial in absentia." In this proceeding, we concern ourselves not so much with the conviction as such, but rather with the conduct of the respondent which culminated in his conviction of contempt of court. Respondent does not attempt to seriously challenge the testimony adduced on this phase. However, we note that respondent's position as to the alleged invalidity of the judgment has been the basis of many civil actions brought against every official even remotely connected with the proceedings. These cases effectively demonstrate the lack of any merit in respondent's contention. We refer specifically to Rhodes v. Houston, 202 F. Supp. 624, affirmed 309 F. 2d 959, certiorari denied 372 U. S. 909, 83 S. Ct. 724, 9 L. Ed. 2d 719; Rhodes v. Meyer, 225 F. Supp. 80, affirmed 334 F. 2d 709; Rhodes v. Van Steenberg, 225 F. Supp. 113, affirmed 334 F. 2d 709. These cases thoroughly detail the extensive history of the litigation and respondent's allegations. No useful purpose will be served herein by further elaboration.

Judge Van Oosterhout, in Rhodes v. Meyer, *supra*, and Rhodes v. Van Steenberg, *supra*, at page 713 of 334 F. 2d 709, summarizes and clearly and briefly categorizes the respondent's allegations in the following language: "The cases we are here considering and Houston allege similar conspiracies under the same Civil Rights Act. These conspiracies allegedly generated from the same source—a trial in state court for contempt of court in which the plaintiff herein was the defendant. The core of plaintiff's alleged wrongful treatment or handling by the various officials named as defendants in these cases stems from what plaintiff terms his trial in absentia. Indeed, were this an issue yet to be determined, we would certainly be inclined to drop the axe on this litigation less quickly; but the issue concerning the denial of the motion for continuance and the termination of the contempt trial without the presence of plaintiff was

thoroughly discussed by Judge Van Pelt in Houston and adequately and correctly determined by him to be no basis for a claim against these defendants, 202 F. Supp. 624, 630-633. This finding reams the core out of plaintiff's complaints."

The referee made detailed findings of fact of each of the allegations embraced in the four counts of the amended complaint as well as on each of the allegations and denials contained in respondent's answer. No purpose will be served by incorporating those findings herein, or by detailing the evidence, most of which is undisputed and which we determine clearly and with reasonable certainty establishes the finding of the referee. We therefore summarize those findings of the referee which we deem pertinent herein.

First: Respondent had been bound over to the district court for Morrill County on a criminal complaint charging arson. While his arraignment was still pending, respondent, in an attempt to prevent his arraignment, procured the issuance of a bench warrant for the arrest of the district judge in the county court of Morrill County for ignoring a void order of the county court and proceeding with respondent's arraignment. This is the activity which culminated in his conviction of contempt of court. We have previously indicated that there is no merit to respondent's contention that this conviction is void. We have also determined that this judgment of conviction became final.

Second: Respondent contends that his actions in obtaining a bench warrant from the county court of Morrill County for the arrest of the district judge were justified because of the violation by the district judge of a writ of habeas corpus issued by the county court. We specifically found that writ of habeas corpus to be void in McFarland v. State, 172 Neb. 251, 109 N. W. 2d 397. In that case we said: "When a judge collaborates with one charged with crime to secure his release by the issuance of a void writ of habeas corpus and thereafter cites

the judge of the court having jurisdiction of the criminal proceeding for criminal contempt for disregarding the void writ, such judge, under proper evidence, may be punished for criminal contempt." We find respondent's actions to be a violation of subdivisions (1), (5), and (6) of section 7-105, R. R. S. 1943; of his oath as an attorney; and of Canons 1, 22, 29, and 32 of the Canons of Professional Ethics of the American Bar Association which are in full force and effect in this state.

Third: On January 11, 1960, when the respondent appeared for arraignment on the information charging arson, he saw fit to lay stretched out on a spectator's bench in the courtroom and to inform the court, "If you want to have me up there, you'll have to have the Sheriff bring me up there, your honor." The referee suggests that the fact that respondent had obtained a void writ of habeas corpus may have contributed to his frame of mind. Our observation is that regardless of respondent's frame of mind, such conduct in a courtroom is a flagrant and reprehensible violation of his oath as a lawyer, subdivisions (1) and (5) of section 7-105, R. R. S. 1943, and Canon 1 of the Canons of Professional Ethics of the American Bar Association, in full force and effect in this state.

Fourth: On September 6, 1960, the day the contempt trial was scheduled to begin, the respondent, with the intent to obstruct the orderly processes of the district court for Morrill County and to harass and embarrass the prosecuting attorneys and the sheriff who had taken him into custody, procured and had served warrants for the arrest of the special assistant attorney general, the county attorney, and the sheriff of Morrill County. These warrants were quashed and the trial was commenced. There can be no question respondent's conduct was intended to impede and obstruct the administration of justice. It is even more reprehensible, if such is possible, when we consider that he was his own client. We find this conduct to be a violation of Canons 15 and 16,

set out hereafter, and of Canon 29, set out heretofore, as well as subdivisions (1), (5), and (6) of section 7-105, R. R. S. 1943.

Fifth: On September 8, 1960, during the trial for contempt, respondent, in a calculated and contumacious disregard for the authority, integrity, and dignity of the district court for Morrill County, obtained a temporary restraining order from the acting county judge against the district judge presiding at the contempt hearing. The restraining order purported to restrain the district judge from confining the county judge, Robert D. McFarland, in the county jail for contempt of court for his refusal to answer questions propounded to him in the contempt hearing. The county judge was in jail on September 8, 1960. Respondent then filed an affidavit and motion for the disqualification of the judge to continue in his contempt hearing. We determine his conduct to be a violation of the same provisions referred to in the preceding paragraph.

Sixth: On November 15, 1960, the respondent was served with a notice of a hearing that the contempt trial, which had been adjourned, would be continued on November 21, 1960, and on that date filed a motion for a continuance but did not appear, to which finding of the referee we add that the evidence in the record is overwhelming that respondent had ample notice of the hearing and deliberately stayed away, probably in the mistaken belief that the trial could not be continued in his absence. Respondent's conduct in this instance well illustrates his utter disregard for his obligation as a member of the bar of this state.

Seventh: On January 6, 1961, the day after his term expired, respondent called the former district judge, Richard M. Van Steenberg, by telephone, and after identifying himself, said: "Is this the old Kangaroo himself," and proceeded to verbally abuse him. Respondent offered no evidence to refute this charge. While it is true Van Steenberg was no longer a district judge, the abuse

was directed toward his action as a judge and would certainly tend to bring discredit on the judiciary.

Eighth: On April 8, 1963, the respondent filed his answer herein, which answer in 12 separate instances refers to the district court for Morrill County as "Kangaroo Court" and the judges thereof as "Kangaroos." Webster's New International Dictionary (2d Ed.), p. 1352, defines "kangaroo court," as follows: "An irresponsible, unauthorized, or irregular tribunal, or one in which, although conducted under some authorization, the principles of law and justice are disregarded or perverted; * * *." It is obvious that the term is one of contempt and utter disrespect. There is no doubt that it was so intended by respondent. Its continued use at the hearing before the referee is conclusive proof of the intent of respondent.

The referee concluded that respondent believed the characterization of the courts assailed by him to be correct. This certainly could be no defense. A lawyer, of all people, should know the proper procedures if he feels aggrieved. He is entitled to the full protection of the law so long as he seeks his relief in accordance with those procedures. Canon 1, set out heretofore, outlines the procedure to be followed. Respondent's actions clearly violate subdivisions (1) and (5) of section 7-105, R. R. S. 1943, and Canons 1 and 16 of the Canons of Professional Ethics, in full force and effect in this state.

Ninth: The respondent, in the supplemental amendment to his answer, pleaded entrapment. The respondent introduced no evidence even remotely bordering on entrapment and the referee so found. To constitute entrapment, respondent would need to show that he had no intent to violate his obligations as an attorney and that the purpose to do so was instilled by his accusers. Even if this could be proved, it would do no more than demonstrate the unfitness of the respondent to continue in the practice of his profession.

In many of the instances charged, respondent was act-

ing as his own attorney. When so acting he is charged with the same responsibility as if acting as attorney for a client and as such must avoid the violation of the Canons of Professional Ethics governing that relationship. See State ex rel. Nebraska State Bar Assn. v. Palmer, 160 Neb. 786, 71 N. W. 2d 491. In this respect, we call attention to Canons 15 and 16 of the Canons of Professional Ethics, so far as material herein: "15. Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

"It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

"The lawyer 'owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

"16. A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which

the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation."

These findings amply justify the conclusion that the respondent's conduct has been such that he has disqualified himself for continuance as a member of the bar of the State of Nebraska. This conclusion is further strengthened by a review of respondent's conduct at the hearing before the referee, which clearly indicates his lack of respect for the courts and for the proprieties of the legal profession. His conduct at the hearing, in and of itself, was sufficient to indicate that respondent is no longer qualified to continue as a member of the bar of this state.

His attempt to subpoena the former Chief Justice of this court with the statement that he would expect him to testify that at the time the opinion in Rhodes v. Sigler, 172 Neb. 439, 109 N. W. 2d 731, was written he was not aware of the record that was before the court and in the files, and that the opinion was written to protect the good name of the bar and of certain judges, without regard to the rights of the respondent, is but one of the many indications of respondent's irresponsible indulgences in practices designed to bring the courts of this state into disrepute.

For the reasons indicated above, we sustain the findings of the referee that respondent is guilty of unprofessional conduct. We find respondent's conduct clearly violates his oath as an attorney, as well as the specific provisions of subdivisions (1), (5), and (6) of section 7-105, R. R. S. 1943, and Canons 1, 22, 29, and 32, as well as Canons 15 and 16 of the Canons of Professional Ethics of the American Bar Association, which ethical standards are in full force and effect in Nebraska.

Respondent has been actively engaged in the practice of law in this state since 1943. In that time he could

not help but become fully aware of the ethical standards relating to the practice of law in this state. The aggravated nature of respondent's consistent and continued disrespect for and misconduct towards the courts of this state, and the extremes to which he saw fit to resort to avoid a legal hearing clearly and conclusively evidence his unfitness to continue as a member of the bar of this state.

We find that the respondent's conduct has been such that his license to practice the profession of law should be and hereby is revoked and he is disbarred from the further practice of the profession of law in the State of Nebraska.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL PAUL, APPELLANT.

131 N. W. 2d 129

Filed October 23, 1964. No. 35702.

1. **Criminal Law.** The Supreme Court has the right to reduce a sentence rendered by the district court in a criminal case when in its opinion it is excessive, and to render such sentence against the accused as in its opinion may be warranted by the evidence.
2. ———. Where a sentence has been imposed by the district court within statutory limits it will not be disturbed in the absence of abuse of discretion.

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

Paul E. Galter, 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 prosecuted in the name of

the State of Nebraska, plaintiff, in the district court for Lancaster County, Nebraska, on information filed by William D. Blue, chief deputy county attorney, charging that Michael Paul, defendant, appellant herein, was guilty of the offense of grand larceny which was committed in the County of Lancaster and the State of Nebraska. On November 13, 1963, he was duly and regularly arraigned on the charge and at that time entered a plea of nolo contendere. At that time on this plea the court found him guilty of the charge and deferred action pending presentence investigation by the adult probation officer of the district court.

Thereafter on November 27, 1963, the court considered, ordered, and adjudged that he was guilty of the charge contained in the information and that he be imprisoned and confined in the Nebraska Penal and Correctional Complex in Lancaster County, Nebraska, for a period of 18 months from the date of sentence, and pay the costs of prosecution.

On the same day the defendant gave notice of appeal and was duly and regularly released on a bail bond pending the appeal.

By the assignments of error on appeal no contention is made that the judgment of conviction of the crime charged should be reversed and set aside. The only assignments of error are that the sentence is excessive under the circumstances and the facts established, and that the court erred in refusing to make the report of the adult probation officer a part of the record.

Based on these assignments of error the appellant contends only that the sentence should be, as stated in his brief, "reduced to one year, the minimum provided by law." This minimum is 1 year and the maximum is 7 years. § 28-506, R. R. S. 1943.

This court has the right to reduce a sentence rendered by the district court when in its opinion a sentence is excessive, and to render such sentence against the accused as in its opinion may be warranted by the evi-

dence. § 29-2308, R. R. S. 1943; State v. Eggers, 175 Neb. 79, 120 N. W. 2d 541. Other cases sustaining this rule are numerous.

It is to be assumed from the brief that the theory of the defendant is that the failure of the court to cause the probation officer's report to be made a part of the record improperly deprives this court of the right to consider possible information which would have a bearing on the propriety of the sentence imposed, in the light of which it must be presumed that detriment resulted to the defendant.

Under section 29-2235, R. S. Supp., 1963, the theory is without merit.

In a situation where sentence has been imposed within statutory limits it will not be disturbed in the absence of abuse of discretion. Taylor v. State, 159 Neb. 210, 66 N. W. 2d 514; Salyers v. State, 159 Neb. 235, 66 N. W. 2d 576.

The record in this case contains no showing of any kind or character that the sentence was excessive. In particular the report of the adult probation officer is not in the record, it was never properly offered in evidence, and no foundation was made for the offer of it or its contents. The record discloses in this connection only that the following question was asked by the attorney for the defendant: "Your Honor, is it appropriate at this time to ask that the adult probation report be marked in evidence?" To which the court replied: "No. There is no need to do that."

An examination of the entire record which is presented on this appeal fails to indicate that the district court abused its discretion in the imposition of the penalty on the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

ARTHUR FULMER ST. LOUIS, INC., APPELLEE, V. AUTO-RE-NU-INC. ET AL., APPELLANTS.

131 N. W. 2d 89

Filed October 23, 1964. No. 35705.

1. **Bills and Notes.** Presentment for payment is not necessary in order to charge the person primarily liable upon a promissory note.
2. **Guaranty.** Where a guaranty agreement contains an absolute promise to pay the debt of another upon written demand, the petition satisfies the requirement of a written demand and the plaintiff is not required to allege or prove a written demand.
3. **Appeal and Error.** A litigant may not change his position in this court and set up issues not raised in the trial court.

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

Webb, Kelley, Green & Byam, for appellants.

Crawford, Garvey, Comstock & Nye, for appellee.

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

BOSLAUGH, J.

This is an action at law to recover amounts due the plaintiff, Arthur Fulmer St. Louis, Inc., for merchandise sold to the defendant, Auto-Re-Nu-Inc. The defendant, James D. Borland, Jr., is the president of Auto-Re-Nu-Inc. The defendant, M. J. Flannigan, is a stockholder of Auto-Re-Nu-Inc.

The first cause of action arose out of a $12,000 order sold to Auto-Re-Nu-Inc., on or about April 1, 1961. As a part of this transaction Auto-Re-Nu-Inc., and Borland and Flannigan executed separate promissory notes payable in installments. There was a balance due on these notes of $8,000 with interest.

The second cause of action was for the balance due the plaintiff for merchandise sold to Auto-Re-Nu-Inc. on open account after April 1, 1961. Borland and Flannigan had executed separate written guaranty agree-

ments which provided that if invoices to Auto-Re-Nu-Inc. from the plaintiff were not paid when due, Borland and Flannigan would pay them "on receipt of written demand therefor." The balance due the plaintiff on open account was $3,275.26 with interest.

The jury returned a verdict for the plaintiff and against all defendants on both causes of action. The defendants' motion for new trial was overruled and they have appealed.

The assignments of error relate to the plaintiff's failure to plead and prove written demand upon the promissory notes and guaranty agreements and a contention that the promissory note of Auto-Re-Nu-Inc., referred to in the first cause of action, contained words of cancellation upon its face. These are the only matters which need to be considered by this court in disposing of the appeal.

The liability of each defendant to the plaintiff upon the promissory notes was that of a maker. Presentment for payment is not necessary in order to charge the person primarily liable upon a promissory note. § 62-170, R. R. S. 1943. Furthermore, the notes provided that demand was expressly waived by all makers and guarantors. Thus, the plaintiff was not required to plead or prove any demand upon the promissory notes.

The guaranty agreements signed by Borland and Flannigan each provided as follows:

"* * * I hereby guarantee to you payment of all sums which shall hereafter become due to you for invoices for merchandise sold to Auto-Re-Nu-Inc. - Omaha - Nebraska, and I further agree that if said invoices shall not be paid when due I will pay same promptly on receipt of written demand therefor."

There is no issue in this case with respect to notice of default. Borland and Flannigan do not contend that they did not have notice of the failure of Auto-Re-Nu-Inc. to pay its invoices when due or that they should be released from liability because they were damaged

by a failure of the plaintiff to give notice of default within a reasonable time.

The issue here is whether the plaintiff was required to allege and prove a written demand upon Borland and Flannigan because the contract contained an express provision for written demand. The defendants rely upon First Nat. Bank of Waterloo v. Story, 200 N. Y. 346, 93 N. E. 940, 34 L. R. A. N. S. 154, 21 Ann. Cas. 542, which held that a demand is necessary to enforce a collateral promise to pay the debt of another where the agreement is to pay upon demand.

The guaranty agreement involved in this case was an absolute promise to pay the amounts due the plaintiff for merchandise sold to Auto-Re-Nu-Inc. A written demand made simultaneously with the filing of the action would be a full compliance with the written demand requirement of the guaranty agreement. In such a situation we believe that the better rule is that the petition of the plaintiff satisfies the requirement of a written demand and that the plaintiff is not required to allege or prove a written demand. See Texas Water Supply Corp. v. Reconstruction Finance Corp., 204 F. 2d 190.

The last assignment of error refers to the notation, "Void 4-13," which appears in the lower margin of the promissory note of Auto-Re-Nu-Inc. The defendant Auto-Re-Nu-Inc. contends that the notation amounted to a cancellation and that the plaintiff cannot recover upon the note in the absence of proof that the cancellation was inoperative.

The notation appears to have been made with a pencil and the marking is very faint. The notation appears at the extreme lower edge of the document, and it is doubtful whether it could be considered to be a cancellation of the instrument.

Auto-Re-Nu-Inc. made no contention in the trial court that its promissory note had been canceled. Its answer admitted the execution of both promissory notes

as alleged by the plaintiff and alleged that the promissory note and guaranty agreements executed by Borland and Flannigan were "in fact secondary to and in guaranty of the purported obligation of this answering defendant." This allegation is binding upon Auto-Re-Nu-Inc., and it cannot now contend that its note was canceled. A litigant may not change his position in this court and set up issues not raised in the trial court. Maryland Casualty Co. v. Munnelly, 172 Neb. 827, 111 N. W. 2d 772.

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

AFFIRMED.

CARTER, YEAGER, and BROWER, JJ., dissenting.

We are in accord with the view that presentment for payment is not necessary in order to charge a person primarily liable upon a promissory note. But we are not in agreement that a guarantor is subject to the same rules as one primarily charged because of the nature of his relation to the creditor and his right to contract as to the extent of his guaranty.

Where a guaranty contract provides "if said invoices shall not be paid when due I will pay same promptly on receipt of written demand therefor," a written demand is necessary to put the guarantor in default and, consequently, it is a condition precedent to the arising of the cause of action. The reasoning supporting this position is well stated in First National Bank of Waterloo v. Story, 200 N. Y. 346, 93 N. E. 940, 34 L. R. A. N. S. 154, 21 Ann. Cas. 542, as follows: " 'There are several errors for which this judgment must be reversed. A prominent one is, the failure to prove a demand of Shumway. The condition of the bond means an actual, not a mere constructive demand, such as the bringing of a suit, or the issuing of an execution. * * * There was no precedent duty upon him independently of the words of the condition, and he might prescribe such preliminaries to his liability as he pleased. A bond to pay a

precedent debt, on demand, is satisfied by the commencement of the suit itself, which is considered a sufficient demand; but in case of any engagement to pay a sum on demand, or on request, not itself due independently of the contract, the terms of the contract must be pursued. A demand, with time and place, must then be averred, and the averment cannot be satisfied without proof of an actual demand.' * * * The promise in the case before us was neither to pay nor to guarantee the payment of a specific sum of money, for no amount was mentioned except to limit the liability. The obligations upon which the recovery was based did not belong to the plaintiff at the date of the bond. While then in existence as valid obligations of the organ company, they did not become the property of the bank until about five months after the bond was given and did not become due until several years later. Without a demand, therefore, the defendant could not know what, or how much he was to pay, unless he learned by inquiry or accident. Nor could he know, except as aforesaid, when he was to pay, for the promise was to 'guarantee the prompt payment at maturity of' all checks, notes, etc., and 'other obligations in writing' of the principal debtor, as well as any 'lawful claim' against him. While there was an absolute promise to guarantee prompt payment at maturity, still the guarantor had the right to contract that his liability should not mature until a demand had been made upon him, which would make the demand a condition precedent to the right to recover. A surety may desire to have notice of the amount of his principal's default and a chance to pay without suit, and he may so stipulate. The promise to guarantee prompt payment at maturity should be read with the promise in case of default by the principal to pay 'upon demand,' and while there is an absolute promise to guarantee payment at maturity, there is no promise to pay 'in case of default,' except 'on demand.' " The foregoing states the general rule in this country. 24 Am. Jur., Guaranty, § 120, p.

951; 38 C. J. S., Guaranty, § 62, p. 1222; Restatement, Contracts, § 264a, p. 379.

A textwriter states the rule as follows: "A conditional guaranty expressly or impliedly contemplates, as a condition precedent to the guarantor's liability, the happening of some contingent event or the performance of some act on the part of the creditor. Accordingly, where there is a conditional guaranty, mere failure of the debtor to pay at maturity does not make the guarantor liable, and enforcement may not be secured against the guarantor until the event has occurred or the act performed. It may be that the guaranty stipulates merely notice or demand on the debtor or the guarantor or both." Stearns, Law of Suretyship, § 4.6, p. 66.

In W. T. Rawleigh Co. v. Smith, 142 Neb. 527, 7 N. W. 2d 80, this court said: "A surety cannot be held beyond the precise terms of his contract. Any intention on the part of the surety to assume a further and continued liability must be found in the words of the contract made. It is not a matter of inference, but of express statement. The liability of a surety, therefore, is measured by, and will not be extended beyond, the strict terms of his contract." See, also, Hopewell v. McGrew, 50 Neb. 789, 70 N. W. 397. The liability of a guarantor is the same as that of a surety on this question. Restatement, Security, § 82g, p. 231.

"Furthermore, by the great weight of authority, the guarantor of the performance of a definite existing obligation, due at specified future time, is not released by want of demand upon his principal or notice of the latter's default, unless demand and notice are specially stipulated for in the contract, for his promise is absolute, and he is in default the moment the principal is in default by the very terms of his undertaking." Spencer, Suretyship, § 184, p. 254. See, also, Huff v. Slife, 25 Neb. 448, 41 N. W. 289, 13 Am. S. R. 497; Flentham v. Steward, 45 Neb. 640, 63 N. W. 924; Lemmert v. Guthrie

Bros., 69 Neb. 499, 95 N. W. 1046, 111 Am. S. R. 561, 62 L. R. A. 954.

The majority opinion relies on Texas Water Supply Corp. v. Reconstruction Finance Corp., 204 F. 2d 190. But in that case the court cited the terms of the contract of guaranty to the effect that guarantor would pay "in like manner as if such amount constituted the direct and primary obligation of the undersigned" and applied the rule applicable to one primarily liable on the obligation. Even so, we have found no other authority that supports the principle of that case.

We concede that a relaxation of the rule might be proper where the creditor pleads and proves notice or knowledge, the want of prejudice to the guarantor, and that the making of a demand would be a vain thing. See Pennsylvania Coal Co. v. Blake, 85 N. Y. 226. But the rule here announced by the majority goes far beyond any such exception. It makes a guarantor's conditional guaranty an absolute guaranty by judicial fiat.

We submit that the majority opinion ignores the fundamental differences between a primary and secondary liability, deprives a guarantor of his right to contract the conditions of his liability, and changes a fundamental rule of long standing without logical reason or the citation of controlling authority.

STATE EX REL. HARRISON MCILVAIN, APPELLEE AND CROSS-APPELLANT, V. CITY OF FALLS CITY, A MUNICIPAL CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES.

131 N. W. 2d 93

Filed October 23, 1964. No. 35714.

1. **Mandamus: Pensions. Mandamus is a proper remedy to require a city of the first class having a paid fire department to place a fireman on the retired list after he has served 21 years**

and elects to retire from active service, as provided by section 35-201, R. R. S. 1943.

2. **Mandamus: Officers.** The discretion of a public officer cannot be controlled by mandamus, but when a specific duty is made plain by statute, and the officer is not given any discretion in the matter, one for whose benefit the duty is performed may compel its performance by mandamus, even though such officer may have to satisfy himself that the state of facts exists under which it is his duty to perform the act.
3. **Pensions: Officers.** An election to retire from active service occurs, under the provisions of section 35-201, R. R. S. 1943, when the employee quits work, resigns, or in any manner indicates a severance of the relationship of employer and employee.
4. **Pensions: Limitations of Actions.** An action brought to enforce the provisions of section 35-201, R. R. S. 1943, is an action upon a liability created by statute and, in the absence of a limitation in the act itself, is barred in 4 years from the time a suit may be maintained thereon.

Appeal from the district court for Richardson County: WILLIAM F. COLWELL, Judge. Affirmed as modified.

Paul P. Chaney, for appellants.

Dwight Griffiths and Archibald J. Weaver, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, BOSLAUGH, and BROWER, JJ., and DIERKS, District Judge.

CARTER, J.

This is an action in mandamus brought by Harrison McIlvain, the relator, to compel the city of Falls City, the respondent, to place the former on the pension rolls of the city as a retired fireman. The trial court found for the relator and the city has appealed.

Relator was first employed by the city as a paid member thereof on October 1, 1928. The city is one of the first class. On May 6, 1959, relator became ill and was unable to report for work. The city paid sick leave and vacation pay thereafter to June 9, 1959, at his regular rate of pay of $235 per month. Relator filed his action for a writ of mandamus on June 6, 1963. The city contends that the claim for pension is barred by the 4-year

statute of limitations and that a writ of mandamus is not a remedy available to the relator.

The parties stipulated that relator had served as a paid fireman for more than 21 years. It is provided by section 35-201, R. R. S. 1943, that cities of the first class having a paid fire department, other than home rule charter cities, shall pension all firemen having 21 years of service who shall elect to retire from active service and go upon the retired list. The primary issue in this case is the date when the relator elected to retire.

It is the contention of the city that relator retired under this section of the statute on May 6, 1959, when he became ill and failed to report for work. Relator contends that his election to retire was June 9, 1959, after receipt of his sick leave and vacation pay. Relator was an employee during the time he was on sick leave and vacation. During that time he had the right to return to work. When he failed to return to work on June 9, 1959, the relation of employer and employee terminated and he became eligible for pension. The general statute of limitations, section 25-206, R. R. S. 1943, applies. In Barney v. City of Lincoln, 144 Neb. 537, 13 N. W. 2d 870, this court said: "We conclude therefore that, if a city within the scope of the pension statute here involved refuses or neglects to place an employee on the pension rolls after the event is alleged to have happened which brings him within the act, the statute of limitations commences to run against the employee and will constitute a complete bar at the end of four years." Since the act which brought relator within the act was his failure to report for work on June 9, 1959, he had 4 years from such date to commence his action against the city. The action having been brought on June 6, 1963, it was within the 4-year period and the statute of limitations is not a defense.

Under section 35-201, R. R. S. 1943, it is the duty of the city to place firemen on the pension roll "whenever such firemen shall have first served in such fire depart-

ment for the period of twenty-one years and shall elect to retire from active service and go upon the retired list." No duty is imposed upon the fireman to give notice or to make or establish his claim. The election of the employee to retire from active service occurs when he quits work, resigns, or in any way indicates a severance of the employer-employee relation. State ex rel. Herman v. City of Grand Island, 145 Neb. 150, 15 N. W. 2d 341; State ex rel. Haberlan v. Love, 95 Neb. 573, 145 N. W. 1010, Ann. Cas. 1915D 1078.

The city contends that mandamus is not a proper remedy. It is argued that the city is required to make a judicial determination of the amount of the pension in view of the language of section 35-201, R. R. S. 1943, that such pension shall be at least 50 percent of the amount of salary such retiring employee is receiving at the time he goes on the pension list, and in no case less than $50 per month. There is no evidence in the record that the city has provided for pensions in excess of these amounts. Under such a situation the city is required by statute to pay a pension of 50 percent of the fireman's salary, but not less than $50 per month. In such a case there is no judicial determination to be made as might be necessary in a pension case based on a fireman's disability incurred in line of duty. See State ex rel. Gaddis v. Bryan, 102 Neb. 506, 167 N. W. 783.

The correct rule is: "Where the duty is such as necessarily requires the examination of evidence and the decision of questions law and fact, such a duty is not ministerial; but an act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act." 38 C. J., Mandamus, § 73, p. 598, approved in State ex rel. Herman v. City of Grand Island, *supra*. See, also, 55 C. J. S., Mandamus, § 63, p. 101.

In the case of State ex rel. Haberlan v. Love, *supra*,

the court held: "We are unable to see that the judgment of the district court is wrong. We find much in this case to sustain it. The judgment of the district court properly granted a peremptory writ of mandamus, but improperly awarded a money judgment."

In State ex rel. Herman v. City of Grand Island, *supra,* this court said: "Therefore, it has been the law of this state for more than 30 years that mandamus is a proper remedy to require a city of the first class having a paid fire department to place a fireman upon the retired list and pay him a pension after he has served 21 years and elects to retire from active service, as provided by section 2439, Comp. St. 1922, and we find no valid reason within the law for changing the rule at this time." The foregoing case properly distinguishes State ex rel. Gaddis v. Bryan, *supra.*

We conclude that mandamus is a proper remedy to require a city of the first class having a paid fire department to place a fireman upon the retired list after he has served 21 years and elects to retire from active service as provided by section 35-201, R. R. S. 1943.

The city asserts that relator is estopped to make claim for his pension rights. We find nothing in the record to sustain a finding that relator has estopped himself from pursuing his claim for a pension.

We think the trial court was in error in holding that relator's right to a pension became absolute on July 6, 1959, rather than June 9, 1959. We modify the judgment of the district court to this extent. The judgment is otherwise correct. We affirm the judgment as modified.

AFFIRMED AS MODIFIED.

UNITED BENEFIT LIFE INSURANCE COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. NATHAN C. HOLMAN ET AL., APPELLANTS.

130 N. W. 2d 593

Filed October 23, 1964. No. 35720.

1. **Mortgages.** Where the acceleration of the maturity of a mortgage debt on default is made optional with the mortgagee, some affirmative action must be taken by the mortgagee evidencing his election to take advantage of the accelerating provision, and until such action has been taken, the provision for acceleration has no operation.
2. ———. The exercise of the option to accelerate the maturity of a debt provided for in an acceleration clause must be made in a manner clear and unequivocal, so as to leave no doubt as to the mortgagee's intention.
3. ———. The option is effectively exercised by manifesting the fact in such a manner as to apprise the mortgagor of the mortgagee's intention.
4. ———. The institution of a suit is not an exclusive method of exercising the option provided in an acceleration clause.
5. ———. If a default exists in the payments due on a mortgage and the option to accelerate is exercised by the mortgagee, the effect thereof cannot be defeated by the mortgagor without the concurrence of the holder of the mortgage.
6. ———. The rightful exercise of the option, to accelerate the maturity date of the mortgage, terminates the right of the mortgagor to compel acceptance by the mortgagee of the defaulted monthly payments in arrears.
7. ———. A provision in a mortgage for the acceleration of the maturity date is not a forfeiture, not forbidden by statute, not contrary to public policy, and may be enforced.
8. ———. It is necessary for a mortgagee to plead and prove that no proceedings at law have been had for the recovery of the mortgage indebtedness.
9. ———. This allegation, although a negative one, unless admitted, must be proved in order to entitle the plaintiff to a decree of foreclosure.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Reversed and remanded.

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

Fraizer & Fraizer, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, BOSLAUGH, and BROWER, JJ., and DIERKS, District Judge.

WHITE, C. J.

This is a mortgage foreclosure action. Defendants appeal from a decree of foreclosure for the full amount of the balance due, interest, and costs. The questions raised concern the effect of the acceleration clause in the mortgage and the necessity of proof that no action at law was pending to collect the mortgage indebtedness.

The defendants executed the note and mortgage in question on Lot 6, Block 6, Woodsdale, an Addition to Lincoln, Nebraska, on September 19, 1955, in the sum of $16,200. Payments were made and accepted until October 1962. The defendants were in default of the October and November 1962 payments of $136.95 each. On December 4, 1962, the plaintiff owner of the mortgage, by certified mail, notified the defendants that in accordance with the terms of the mortgage, the plaintiff United Benefit Life Insurance Company was thereby exercising its right to declare the entire loan due and payable and further gave notice that no payments would be accepted except payment of the loan in full. Subsequent tenders of payment of the delinquent monthly installments, or the aggregates thereof, were rejected by the plaintiff. On October 18, 1963, decree was entered by the court in the sum of $12,810.11, the balance due on the whole mortgage indebtedness, together with interest, and costs.

Defendants argue that the letter of December 4, 1962, was ineffective to exercise the rights of the plaintiff under the acceleration clause of the mortgage. This letter stated: "In accordance with the terms of the mortgage covering your property, *we are exercising our right to hereby* declare the entire loan due and payable. We will not accept any payments except payment of your loan in full." (Emphasis supplied.) Defendants argue that the only effective method of exercise of the option

is by bringing suit thereon, citing McCarthy v. Benedict, 89 Neb. 293, 131 N. W. 598; Moorehead v. Hungerford, 110 Neb. 315, 193 N. W. 706; Morling v. Bronson, 37 Neb. 608, 56 N. W. 205; and Wentland v. Stewart, 236 Iowa 661, 19 N. W. 2d 661, 161 A. L. R. 1206. The effect of the above holdings is that the institution of suit effectively exercises the option regardless of previous actions of the parties. This court has never held that it is an exclusive method or that it is a condition precedent to the right of exercising the option. It is clear, moreover, that mere default and the declaration thereof, does not effectively exercise the acceleration right. We think the true and correct rule is stated in 36 Am. Jur., Mortgages, § 393, p. 884, as follows: "* * * that where the acceleration of the maturity of a mortgage debt on default is made optional with the mortagee, some affirmative action must be taken by him evidencing his election to take advantage of the accelerating provision, and that until such action has been taken, the provision has no operation. The exercise of the option should be made in a manner clear and unequivocal, so as to leave no doubt as to the mortgagee's intention. The option is effectively exercised by manifesting the fact in such manner as to apprise the mortgagor."

The validity and enforceability of an acceleration clause in a mortgage, such as this, are not questioned. It is difficult to see what further action than that taken in this case could be reasonably required of a mortgagee to ripen his option into an established right.

The letter of December 4, 1962, was clear and unequivocal and left no doubt as to the mortgagee's intentions. It was effective affirmative action establishing plaintiff's right to collect the full amount due. There is no merit to this contention.

Defendants argue that they tendered the amount of monthly payments in arrears before the action was filed and this should defeat the foreclosure. After valid exercise of the right to accelerate the maturity of the

whole debt, the amount in default was the full amount due on the mortgage, and such tender is ineffective. If a default exists, and the option to accelerate is exercised by the mortgagee, the effect thereof cannot be defeated by the mortgagor without the concurrence of the holder of the mortgage. Gasper v. Mazur, 157 Neb. 857, 62 N. W. 2d 117. The exercise of the option terminates the right of the mortagor to compel acceptance by the mortgagee of the defaulted monthly payments. See, 36 Am. Jur., Mortgages, § 401, p. 888; Graf v. Hope Bldg. Corp., 254 N. Y. 1, 171 N. E. 884, 70 A. L. R. 984; Annotations, 70 A. L. R. 993, 31 A. L. R. 734.

Defendants argue a waiver of the right to foreclose because the plaintiff, over a period of years, accepted late payments. The defendants did not plead either estoppel or waiver, and the record is devoid of any evidence in this respect, except for the mortgagee's tolerance of or acquiescence in the late payments over a period of years. Defendants argue that the court should relieve against a forfeiture. Acceleration of the maturity date of a mortgage is not a forfeiture, not forbidden by statute, not contrary to public policy, and may be enforced. Matthews v. Guenther, 120 Neb. 742, 235 N. W. 98; Beisel v. Artman, 10 Neb. 181, 4 N. W. 1011. There is no merit to these contentions.

Plaintiff alleged, pursuant to the requirements of section 25-2142, R. R. S. 1943, that no proceedings at law had been had for the recovery of said mortgage indebtedness. The defendants denied this allegation. We have carefully examined the bill of exceptions in this case and there is an entire failure of proof in this respect. The witness for the plaintiff offered no testimony to support this allegation. It has been repeatedly held by this court that the allegation, although a negative one, unless admitted, must be proved in order to entitle the plaintiff to a decree of foreclosure. Beebe v. Bahr, 84 Neb. 191, 120 N. W. 1021; Jones v. Burtis, 57 Neb. 604, 78 N. W. 261; McMonies v. Lindgren, 115 Neb. 207, 212

N. W. 45; Hill v. Hinky-Dinky Stores Co., 133 Neb. 147, 274 N. W. 455; Reed v. Good, 114 Neb. 777, 209 N. W. 619.

This has long been the rule in this state. We cannot speculate as to compliance therewith. It is required by statute and the Legislature, over the years, has not seen fit to alter it. For this reason, the judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

ARROW CLUB, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES, V. NEBRASKA LIQUOR CONTROL COMMISSION ET AL., APPELLANTS.

131 N. W. 2d 134

Filed October 30, 1964. No. 35803.

1. **Constitutional Law: Statutes.** The Legislature while in special session can transact no business except that for which it was called together.
2. ———: ———. The proclamation may state the purpose for which the Legislature is convened in broad, general terms or it may limit the consideration to a specified phase of a general subject. The Legislature is free to determine in what manner the purpose shall be accomplished, but it must confine itself to the matters submitted to it by the proclamation.
3. ———: ———. The Legislature while in special session may enact legislation relating to, germane to, and having a natural connection with the purpose for which it was convened.
4. ———: ———. The purpose or subject as stated in the proclamation is to be determined by an analysis and construction of the proclamation as in the case of any written instrument.
5. ———: ———. The presumption is always in favor of the constitutionality of legislation and an act should be held to be within the call if it can be done by any reasonable construction.
6. **Statutes: Municipal Corporations.** Where there is a direct conflict between a city ordinance and a state statute, the statute is the superior law.
7. ———: ———. A city ordinance is inconsistent with a statute if it is contradictory in the sense that the two legislative provisions cannot coexist.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, Robert R. Camp, Ralph D. Nelson, and Arlyss W. Spence, for appellants.

Barney, Carter & Buchholz and Herbert M. Brugh, for appellees.

Heard before WHITE, C. J., MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. SMITH, District Judge.

BOSLAUGH, J.

The plaintiffs, Arrow Club, Inc., Anthony M. Alesio, and Eugene L. Cottier, brought this action to declare Legislative Bill 23 enacted by the Seventy-fourth (Extraordinary) Session of the Legislature of Nebraska, 1963, and ordinances Nos. 8261 and 8262 of the City of Lincoln, Nebraska, void and to enjoin their enforcement. The defendants are the Nebraska Liquor Control Commission, its members and secretary, the City of Lincoln, Nebraska, and its mayor.

The trial court found that sections 1, 2, and 4 of L. B. 23 and ordinances Nos. 8261 and 8262, as they relate to bottle clubs, were void and enjoined the defendants from enforcing them against the plaintiffs. The motions for new trial filed by the defendants were overruled and they have appealed.

The background for this litigation is found in legislation enacted by the Seventy-third Session of the Legislature of Nebraska. In 1963 the Liquor Control Act was amended to provide for the licensing of bottle clubs and nonprofit corporations by the Nebraska Liquor Control Commission. Laws 1963, c. 310, p. 918. That act defined a nonprofit corporation as a corporation organized under the laws of this state, not for profit, which had been exempted from the payment of federal income taxes, as provided by section 501 (c) (7) and (8), In-

ternal Revenue Code of 1954. On October 14, 1963, the Governor of Nebraska issued a proclamation calling the Legislature to convene in extraordinary session for the purpose of considering legislation relating to certain subjects, one of which was as follows:

"6. To amend subdivision (21) of section 53-103, Revised Statutes Supplement, 1961, as amended by section 1, Legislative Bill 21, Seventy-third Session, Nebraska State Legislature, 1963, by including those nonprofit corporations which have been exempted from the payment of federal income taxes, as provided by section 501 (c) (4), Internal Revenue Code of 1954, within the definition of a nonprofit corporation, thus redefining nonprofit corporations eligible for licensing for the sale of alcoholic liquors for consumption on the premises to include the above described corporations."

At the special session, the definition of a nonprofit corporation as contained in the Liquor Control Act was amended to include corporations exempt from the payment of federal income taxes as provided by section 501 (c) (4), (7), or (8), Internal Revenue Code of 1954. Laws 1963, Spec. Sess., c. 4, p. 66. By a separate bill, L. B. 23, certain provisions of the Liquor Control Act relating to bottle clubs were amended. Laws 1963, Spec. Sess., c. 5, p. 71. The trial court held that sections 1, 2, and 4 of L. B. 23 were void because they did not relate to a subject included in the proclamation which called the Legislature to convene in special session and, therefore, were in violation of Article IV, section 8, of the Constitution of Nebraska. This is the first question that is presented by this appeal.

Article IV, section 8, of the Constitution of Nebraska, provides as follows: "The Governor may, on extraordinary occasions, convene the legislature by proclamation, stating therein the purpose for which they are convened, and the legislature shall enter upon no business except that for which they were called together." Simi-

lar provisions are found in the constitutions of many other states.

It is well established that the Legislature while in special session can transact no business except that for which it was called together. Chicago, B. & Q. R.R. Co. v. Wolfe, 61 Neb. 502, 86 N. W. 441. The proclamation may state the purpose for which the Legislature is convened in broad, general terms or it may limit the consideration to a specified phase of a general subject. The Legislature is free to determine in what manner the purpose shall be accomplished, but it must confine itself to the matters submitted to it by the proclamation.

In Commonwealth ex rel. Schnader v. Liveright, 308 Pa. 35, 161 A. 697, in construing a similar provision in the Constitution of Pennsylvania, the court said: "This constitutional provision contemplates that there shall first exist in the executive mind a definite conception of the public emergency which demands an extraordinary session. His mental attitude or intention is expressed in his proclamation, the purpose of which is to inform the members of the legislature of subjects for legislation, and to advise the public generally that objections may be presented if desired. It is not only a guide or chart with respect to which the legislature may act, but also a check restricting its actions so that rights may not be affected without notice. The proclamation may contain many or few subjects according to the governor's conception of the public need. While the subjects may be stated broadly or in general terms, the special business, as related to the general subject on which legislation is desired, should be designated by imposing qualifying matter to reduce or restrict. Although the subjects should be sufficient to evoke intelligent and responsive action from the legislature, it is not necessary that they include all the methods of accomplishment. The guiding principle in sustaining legislation of a special session is that it be germane to, or within, the apparent scope of the subjects which have been desig-

nated as proper fields for legislation. In construing a call the words of any portion thereof must be interpreted not only as commonly and universally understood, but also as applicable to the subject intended to be affected by legislation.

"While the legislature must confine itself to the matters submitted, it need not follow the views of the governor or legislate in any particular way. Within the special business or designated subjects submitted, the legislature cannot be restricted or dictated to by the governor. It is a free agent, and the governor, under the guise of definition, cannot direct or control its action."

The Legislature while in special session may enact legislation relating to, germane to, and having a natural connection with the purpose for which it was convened. Blackford v. Judith Basin County, 109 Mont. 578, 98 P. 2d 872, 126 A. L. R. 639. The purpose or subject as stated in the proclamation is to be determined by an analysis and construction of the proclamation as in the case of any written instrument. State ex rel. Nat. Conservation Exposition Co. v. Woollen, 128 Tenn. 456, 161 S. W. 1006, Ann. Cas. 1915C 465. The presumption is always in favor of the constitutionality of legislation, and an act should be held to be within the call if it can be done by any reasonable construction.

The legislation in question in this case, L. B. 23, relates to the regulation and operation of bottle clubs. It was enacted by the Legislature while convened in special session to consider amendments to the Liquor Control Act relating to the licensing of nonprofit corporations. Thus, the question is whether the regulation and operation of bottle clubs relates to, is germane to, or has a natural connection with the definition of nonprofit corporations. The question is to be determined by the consideration and analysis of the provisions of the Liquor Control Act.

There is a fundamental difference between a nonprofit

corporation license and a bottle club license under the Liquor Control Act. A bottle club license authorizes the storage and consumption of liquor upon the premises of the licensee by persons who have made their own purchase of liquor. §§ 53-103 and 53-123.08, R. S. Supp., 1963. A nonprofit corporation license is a retail license for the sale of alcoholic liquors, including beer. §§ 53-123 and 53-124, R. S. Supp., 1963. In view of this difference, we think the regulation and operation of bottle clubs does not relate to, is not germane to, and has no natural connection with the definition of nonprofit corporations.

The defendants argue that the purpose or subject of the special session as stated in paragraph 6 of the proclamation was the classification in the Liquor Control Act of those civic leagues or organizations which are exempt from federal income tax under section 501 (c) (4) of the Internal Revenue Code of 1954, and that the Legislature might consider what effect the inclusion of this group in the definition of nonprofit corporations might have upon bottle club licensees. The difficulty with this argument is that the amendment of the definition of nonprofit corporations does not appear to have any effect upon bottle club licensees.

The amendment of the definition of nonprofit corporations enlarged the group which is eligible to apply for a nonprofit corporation license. The effect was cumulative rather than exclusionary. It was not a classification in the Liquor Control Act of the civic leagues and organizations which are exempt from federal income tax under section 501 (c) (4) of the Internal Revenue Code of 1954 in the sense that such organizations are eligible for only a nonprofit corporation license. These organizations are now eligible to apply for a nonprofit corporation license in addition to the other types of licenses for which they may have been eligible previously.

We conclude that sections 1, 2, and 4 of Chapter 5,

Laws 1963, Special Session, did not relate to a subject included in the proclamation which called the Legislature to convene in special session, and that they are, therefore, in violation of Article IV, section 8, of the Constitution of Nebraska, and void.

The validity of ordinances Nos. 8261 and 8262 remains for consideration. These ordinances place several restrictions upon bottle clubs which are not contained in the Liquor Control Act.

The Nebraska Liquor Control Act, as amended, excepts nonprofit corporations and bottle club licensees from restrictions upon the sale or dispensing of alcoholic liquors upon Sunday. § 53-179, R. S. Supp., 1963. Ordinance No. 8262 of the City of Lincoln, Nebraska, prohibits the sale or dispensing of alcoholic liquors upon Sunday by all licensees except nonprofit corporations.

The Liquor Control Act defines a bottle club as follows: "The words bottle club shall mean an operation, whether formally organized as a club having a regular membership list, dues, officers, and meetings or not, keeping and maintaining premises where persons who have made their own purchases of alcoholic liquors congregate for the express purpose of consuming such alcoholic liquors upon the payment of a fee or other consideration, including among other services the sale of foods, ice, mixes, or other fluids for alcoholic drinks and the maintenance of space for the storage of alcoholic liquors belonging to such persons and facilities for the dispensing of such liquors through a locker system, card system, or any other system." § 53-103 (22), R. S. Supp., 1963.

Ordinance No. 8261 of the City of Lincoln, Nebraska, defines a bottle club as follows: "The words 'bottle club' mean an operation organized as a club having a membership committee and a regular membership list, keeping and maintaining premises where persons who have made their own purchases of alcoholic liquors congregate for the express purpose of consuming such alco-

holic liquors upon the payment of a fee or other consideration, including among other services the sale of foods, ice, mixes, or other fluids for alcoholic drinks and the maintenance of space for the storage of alcoholic liquors belonging to such persons and facilities for the dispensing of such liquors through a locker system, or card system; provided, that no person shall be a member of a club until at least five days after submitting his name for membership. Such operation may be conducted by a club as defined in subsection (18) of this section, an individual, partnership, or corporation; as an incident to the operation an accurate and current membership list must be maintained at all times which contains the names and residences of its members, and copies thereof must be filed with the City of Lincoln annually on May 1 and kept available for inspection by duly authorized law enforcement officers and representatives of the Liquor Control Commission. Such club premises shall not be open to the public and shall be available only to club members and their guests."

The trial court found both ordinances, as they relate to bottle clubs, to be inconsistent with existing state laws and, therefore, void.

The City of Lincoln, Nebraska, operates under a home rule charter which authorizes the city to enact ordinances not inconsistent with the laws of the state to maintain the peace, good government, and welfare of the city. Art. 2, Sec. 2, subsection 50, Charter of the City of Lincoln, Nebraska. This court has held that such a provision is sufficient to authorize an ordinance prohibiting the sale of liquor to minors. Bodkin v. State, 132 Neb. 535, 272 N. W. 547.

The problem here is to determine whether the ordinances in question are inconsistent with the statute. Where there is a direct conflict between a city ordinance and a state statute, the statute is the superior law. Phelps, Inc. v. City of Hastings, 152 Neb. 651, 42 N. W. 2d 300. A city ordinance is inconsistent with a statute

if it is contradictory in the sense that the two legislative provisions cannot coexist. State v. Kubik, 159 Neb. 509, 67 N. W. 2d 755. Generally, an ordinance cannot prohibit what the Legislature has expressly licensed, authorized, or permitted. See 37 Am. Jur., Municipal Corporations, § 165, p. 787.

The defendants cite Phelps, Inc. v. City of Hastings, *supra,* as authority that the ordinances in question in this case are not inconsistent with the statute. The ordinance in the Phelps case prohibited the sale of beer and alcoholic liquors other than beer upon the same premises. This court held that the ordinance was valid even though the statute provided for the licensing of the sale of both upon the same premises. Apparently that decision was based upon a specific delegation of authority to municipalities to regulate the sale of beer. In any event, we do not consider the decision in the Phelps case to be controlling in this case.

The effect of ordinance No. 8262 is to prohibit the dispensing of liquor on Sunday by a bottle club licensee while the statute permits that to be done. The effect of ordinance No. 8261 is to prohibit the operation of a bottle club by a licensee who has complied with the requirements of the statute but has not complied with the requirements of the ordinance. We conclude that ordinances Nos. 8262 and 8261 of the City of Lincoln, Nebraska, as they relate to bottle clubs, are inconsistent with the Liquor Control Act and are, therefore, void.

The judgment of the district court is affirmed.

AFFIRMED.

KATHRYN STACEY, APPELLANT, V. ANTHONY R. PANTANO, M.D., APPELLEE.

131 N. W. 2d 163

Filed October 30, 1964. No. 35648.

1. **Physicians and Surgeons.** **Malpractice may be defined as the**

treatment of a case by a surgeon or physician in a manner contrary to the accepted rules and with injurious results to the patient; hence, any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties.

2. ———. Mutual confidence and trust are essentials of the relationship between physician and patient.
3. ———. Postoperative treatment and advice by the physician to the patient are an interwoven and essential part of the physician-patient relationship.
4. ———. Generally, fraudulent representations by a physician as to previous negligence or as to the patient's condition do not alter or change the cause of action from one of malpractice to one of fraud or deceit.
5. **Limitations of Actions.** A special statute of limitations, where applicable, controls over a general statute of limitations because the special statute is the one that more properly expresses the legislative will.
6. **Appeal and Error.** Where an issue is relied upon by the parties at the trial, insisted upon as a defense, and relied upon by the trial court as an issue in the case, it may not be successfully asserted for the first time on appeal that it has been waived.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Affirmed.

Richard G. Stehno, for appellant.

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

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

WHITE, C. J.

On June 26, 1959, the defendant physician performed a partial thyroid removal operation on the plaintiff. A postoperative condition of tetany or faulty calcium metabolism resulted from the operation. Plaintiff alleged and testified that the defendant physician made certain false representations, both as to the nature and the cause of this postoperative condition of tetany. She asserted, among other things, that the physician represented that her condition of tetany was solely the result of her

mental or psychological condition. After a period of consultation and treatment lasting over the intervening period of time, the plaintiff finally consulted a new physician on April 6, 1960, and claims that at that date she finally discovered what her true postoperative condition was and the cause of it. She brings this action for damages alleged to have resulted from these false representations. She consulted the new physician on April 6, 1960, and this action was brought about 2 years and 4 months later, on August 16, 1962. The question in this case is whether the 2-year limitation period of malpractice actions, section 25-208, R. R. S. 1943, or the 4-year general limitation statute on fraud actions, section 25-207, R. R. S. 1943, applies. The district court, at the close of the plaintiff's evidence, dismissed the case on the grounds that it was a malpractice action and that the 2-year limitation period applied. We affirm.

Plaintiff's theory is that, independent of any claim of negligence in the original operation or treatment subsequent thereto, that she relied upon misrepresentation as to what her true condition was and its cause. She claims this is fraud, that it was not discovered until she consulted a new doctor on April 6, 1960, and that, therefore, she had 4 years from that date to bring this action under the general statute of limitations as to fraud, section 25-207, R. R. S. 1943.

The plaintiff's theory is an attempt to separate the actions of a physician in fraudulently concealing the cause and nature of a patient's condition from a claim for damages for earlier negligence in diagnosis and treatment. The record shows that all of the statements and the acts of the defendant claimed to be fraudulent occurred during the course of the physician-patient relationship. They occurred during the times when the plaintiff consulted with the defendant physician as to the treatment, cause, and nature of her condition. It would seem clear that postoperative treatment and necessary advice of the physician to the patient are an inter-

woven and essential part of a physician-patient relationship. Mutual confidence and trust are essentials of the relationship between physician and patient. Williams v. Elias, 140 Neb. 656, 1 N. W. 2d 121; Spath v. Morrow, 174 Neb. 38, 115 N. W. 2d 581. We do not think that the advice and the statements of a physician as to the nature and cause of a patient's condition, as a part of the necessities of treating and consulting with the patient, are separable. They are the essentials to the performance of the physician's whole duty to the patient. We do not think that the Legislature, when it enacted the special limitation statute of 2 years on malpractice intended to separate certain portions of the whole physician-patient relationship and apply a confusing standard of 2 and 4 years to different portions of that relationship, or to require the courts to make such a nebulous and difficult fact separation and determination. The comprehensive scope of a malpractice action is contained in the definition of malpractice given in Williams v. Elias, *supra,* wherein the court said: " 'Malpractice' is defined in Webster's New International Dictionary (2d ed.) as 'The treatment of a case by a surgeon or physician in a manner contrary to accepted rules and with injurious results to the patient; hence, *any professional misconduct* or any unreasonable lack of skill *or fidelity in the performance of professional or fiduciary duties.*' " (Emphasis supplied.) See, also, 41 Am. Jur., Physicians and Surgeons, §§ 70 to 73, pp. 192 to 195; Black's Law Dictionary (3d ed.), p. 1149; Swankowski v. Diethelm, 98 Ohio App. 271, 129 N. E. 2d 182.

Within the meaning of the above pronouncement, the allegations and proof here are that the fraudulent misrepresentations constituted a breach of his duty of fidelity to his patient. The treatment and advice were part of the duties that arose in law from the nature of his employment as a physician. The cause of action, therefore, accrued when the alleged breach of duty was discovered, namely, on April 6, 1960. Spath v. Morrow,

supra. Consequently, on August 16, 1962, the 2-year limitation had expired and the defense of the statute of limitations was good.

The special statute as to malpractice, section 25-208, R. R. S. 1943, being applicable, it controls over the general limitation statute on fraud, section 25-207, R. R. S. 1943. This is true because the special statute is the one that expresses the legislative will providing the acts complained of come within the meaning therein expressed. Neisius v. Henry, 143 Neb. 273, 9 N. W. 2d 163; Alexander v. Overton, 22 Neb. 227, 34 N. W. 629; Crum v. Johnson, 3 Neb. (Unoff.) 826, 92 N. W. 1054. This holding is in accord with the general rule that fraudulent representations as to previous negligence or as to the patient's condition do not alter or change the cause of action from one of malpractice to one of fraud or deceit. Tell v. Taylor, 191 Cal. App. 2d 266, 12 Cal. Rptr. 648; Stafford v. Shultz, 42 Cal. 2d 767, 270 P. 2d 1; McCoy v. Stevens, 182 Wash. 55, 44 P. 2d 797; Kleinman v. Lack, 6 App. Div. 2d 1046, 179 N. Y. S. 2d 194; Swankowski v. Diethelm, 98 Ohio App. 271, 129 N. E. 2d 182.

Plaintiff cites and argues several cases from other jurisdictions as supporting the theory of an independent fraud action. We have examined these cases, and they are not applicable. They deal with situations where the physician enters into a contract to cure a patient, performs a particular type of operation, or makes a special warranty. These cases point out that in the absence of a special warranty or contract, and if the deceit is with respect to the manner of performance of the physician's duties or of any incident thereto, that the action is a malpractice suit and the limitation statute relating thereto governs. Kozan v. Comstock, 270 F. 2d 839, 80 A. L. R. 2d 310; McAlpin v. Browne, 15 Misc. 2d 255, 181 N. Y. S. 2d 525. In Krestich v. Stefanez, 243 Wis. 1, 9 N. W. 2d 130, 151 A. L. R. 1022, cited by plaintiff, it was held that a physician's conduct in preventing a patient from

seeking new medical advice was independent of previous misrepresentations as to his condition for which previous conduct, "he was doubtless guilty of malpractice."

Plaintiff contends that the defendant has waived the defense of the statute of limitations because of failure to properly plead and present the issue to the trial court. The record shows that the defendant, in paragraph 4 of his answer, asserted the defense of the statute of limitations. It shows that in paragraph 13 of his motion for directed verdict, he raised the defense and insisted that there was a failure of proof on this issue and that the 2-year statute of limitations for malpractice actions had elapsed. This was the crucial issue in the trial court. The trial court disposed of the case on that issue and wrote a memorandum opinion holding that the plaintiff's case was barred by the 2-year statute of limitations. There was no contention in the district court that the defendant had waived this defense. It is asserted for the first time in this court. Where an issue is relied upon by the parties at the trial, insisted upon as a defense, and relied upon by the trial court as an issue in the case, it may not be successfully asserted for the first time on appeal that it has been waived. Bohmont v. Moore, 141 Neb. 91, 2 N. W. 2d 599; Hadley v. Corey, 137 Neb. 204, 288 N. W. 826; Latenser v. Misner, 56 Neb. 340, 76 N. W. 897. This contention is without merit.

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

AFFIRMED.

DELORES ODOM, A MINOR, BY AND THROUGH KENNETH ODOM, HER NATURAL FATHER AND NEXT FRIEND, APPELLEE, V. ORVILLE WILLMS ET AL., APPELLANTS.
131 N. W. 2d 140

Filed October 30, 1964. No. 35694.

1. **Negligence.** In an action for negligence the burden is on the

plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury, or a cause which proximately contributed to it.

2. **Automobiles: Negligence.** Until the driver of an automobile has notice of the presence, or likelihood, of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that others will do likewise; and until he has such notice the rule is the same as respects children and adults.
3. ———: ———. When the evidence shows that defects in the mechanism of an automobile did not contribute to an accident and that the accident would have occurred irrespective of such defects, such defects cannot be said to be the proximate cause of the accident or a cause which proximately contributed to it.
4. **Evidence.** Objections to questions on cross-examination, which range beyond the scope of the direct examination, are properly sustainable on that ground.
5. **Motor Carriers.** The relation of carrier and passenger ordinarily terminates when the passenger alights from the bus safely on the curb.
6. **Negligence.** While circumstances may exist that would warrant a jury in finding a duty to warn a child of obvious dangers, that question is not material to the decision of a case where there is no evidence of a failure to warn sufficient to take that question to the jury.
7. **Trial.** The burden of proving a cause of action or defense is not sustained by evidence from which the jury can arrive at its conclusion only by mere guess or conjecture.
8. **New Trial.** In a case where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, it is error for the trial court to set aside the verdict and grant a new trial.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Reversed and remanded with directions.

Herbert E. Story and Gross, Welch, Vinardi, Kauffman & Schatz, for appellants.

Francis A. McLane and Schrempp, Lathrop & Rosenthal, for appellee.

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

CARTER, J.

The plaintiff, Delores Odom, a minor, brought this action by her natural father and next friend, against the defendants Orville Willms and Gray Lines Bus Company, Inc., claiming damages for injuries sustained in an automobile accident. The jury returned a verdict for both defendants. The trial court entered an order sustaining plaintiff's motion for a new trial. Both defendants have appealed.

The accident occurred on September 4, 1959, on a county road in Douglas County designated as Highway 31, but generally referred to in the record as Q Street. The evidence shows that Q Street is an east-west road about 18 feet wide. It was paved with brick except that there was a concrete slab on each side of the road 1 foot in width. The road was level, the pavement dry, and visibility good at the time of the accident. The accident occurred between two roads which entered Q Street from the north. One was designated as Sixty-first Street, although a county road. It was a dirt-gravel road which entered but did not cross Q Street. To the east of Sixty-first Street, a distance of about 658 feet, was Sixtieth Street, also a county road, which entered and crossed Q Street. To the south of Q Street between Sixtieth and Sixty-first Streets was a cornfield. There were no public or private ways south of Q Street in this area. A few residences were located on the north side of Q Street and three private drives entered Q Street from the north. No sidewalks or crosswalks existed on Q Street between Sixtieth and Sixty-first Streets. The plaintiff lived with her parents in the immediate area north of Q Street.

The bus company operated a bus line between Ralston and Omaha under proper authority. The certificate of authority in no way restricted the operation of the company's buses in the area here involved. On September 4, 1959, the company's bus stopped at a Ralston school where it was boarded by 15 or more school chil-

dren, including plaintiff and Barbara Sedlak, all of whom were fare-paying passengers. The regular bus stop in the area was at the west edge of Sixty-first Street. The bus approached from the west, crossed Sixty-first Street without stopping and came to a stop approximately 140 feet east of the east line of Sixty-first Street. The evidence is in dispute as to where the bus stopped, but the evidence, including the physical facts existing after the accident, indicates the stated distance. The evidence shows that the bus stopped on the south edge of the pavement and let plaintiff and Barbara Sedlak out at the front door onto the 6-foot shoulder of the road. The two girls, then 8 years of age, proceeded west, plaintiff running north at the rear of the bus into the path of the Willms car approaching from the east. The bus proceeded on its way, the driver stating that he did not know at the time that an accident had occurred. The evidence shows that the bus was beginning to move when plaintiff darted into the path of the Willms car.

There is evidence by the manager of the bus lines that there were no regular stops, although the point immediately west of Sixty-first Street was generally considered a regular stop. He testified that the bus was ordinarily rerouted to pick up and discharge passengers in this area on the north side of Q Street after the Omaha public schools were opened in the fall as a protection to school children. School had taken up in Ralston 2 days before the accident, but no rerouting had been made because the Omaha schools had not reopened. He further testified that drivers were cautioned to be especially alert in loading and unloading school children, to try and watch where they cross the streets, and to be careful when they were stepping on or off a bus to avoid injury. It was stated that the safety of passengers, both school children and adult passengers, is always a topic of safety at safety meetings with the drivers. Other pertinent evidence will be discussed in connection with the

particular legal points to which they have application.

At the close of plaintiff's evidence, and at the close of all the evidence, each of the defendants moved for a directed verdict. A determination of the correctness of the rulings on these motions is required before the correctness of the court's instructions, which are questioned, need be considered.

The plaintiff alleged that Willms was guilty of negligence in failing to keep a proper lookout, in operating his automobile at an excessive rate of speed, in failing to turn or stop his automobile to avoid hitting the plaintiff, and in operating his vehicle with defective brakes contrary to section 39-773, R. R. S. 1943. Willms denied generally and alleged that he was not guilty of any act of negligence causing or contributing to the accident.

The evidence is undisputed that Willms approached the bus from the east on his right-hand side of the road. There is no evidence in the record in plaintiff's case-in-chief as to the speed Willms was traveling when he first saw the bus, or immediately prior to the accident. He stated that he saw no one leave the bus, although he recollects some movement at the front end of the bus that might indicate that a passenger had been discharged therefrom. He did not know that the two children had left the bus or that school children were riding this common carrier bus. He testified that he first knew of a child in the vicinity when plaintiff ran from behind the bus directly into the path of his automobile. He stated that plaintiff was from 6 to 8 feet from his car when he first saw her. His car struck the plaintiff and she was thrown or rolled 15 to 20 feet from the left front of his car. He stated that he immediately applied his brakes and stopped within 15 to 20 feet.

Clarence Fritz, Jr., was a witness for defendant Willms and testified that he had been following the Willms car for several blocks. He was approximately 3 carlengths back of the Willms car when the accident occurred. He saw the bus for several hundred feet as he

approached from the east. He did not see anyone leave the bus. He did not see the plaintiff until she ran out from behind the bus into the path of the Willms car. The Willms car stopped within 15 or 20 feet. He stated that he had been traveling at 25 to 30 miles per hour before the accident happened and it may be inferred from the evidence that Willms was traveling at about the same speed as he approached the bus.

Mrs. Bessie Stander was an eyewitness to the accident. She stated she was in her driveway visiting with a neighbor about 150 feet to the northwest when she saw plaintiff dart out from behind the bus directly into the path of the Willms car. She stated the Willms car was not traveling too fast because it stopped quickly.

There is no evidence in conflict with the version of the facts told by these three eyewitnesses. There is no evidence that Willms failed to keep a proper lookout under the circumstances shown. There is no evidence that he had any opportunity to turn to avoid the accident.

It is contended that the evidence will sustain a finding of negligence by Willms in that he had defective brakes on his automobile in violation of section 39-773, R. R. S. 1943. The evidence shows that two deputy sheriffs made tests with the Willms automobile in the evening following the accident and found that it required 165 feet to stop the car when traveling 25 miles per hour, and 145 to 150 feet to stop it when it was traveling 20 miles per hour.

Plaintiff offered expert evidence to the effect that the reaction time of a driver of an automobile is three-fourths of a second. The evidence was that an automobile traveling 25 miles per hour would travel 17 feet in three-fourths of a second. The expert evidence further showed that an automobile traveling 25 miles per hour on brick pavement with proper brakes could be stopped in 26 feet. It is evident, therefore, that Willms struck the plaintiff well within the reaction time and the condition of the brakes, even if defective, was not a con-

tributing cause of this accident. It is a fundamental rule of negligence that to be actionable the negligence charged must be the proximate cause of the injury. Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531, 82 A. L. R. 2d 714. In other words, the negligence must be such that the accident would not have occurred but for the existence of the negligence charged. It is clear that in the instant case the accident would have occurred whatever the condition of the brakes on the Willms automobile. As to the speed of the Willms car at the time of the accident, the evidence is fragmentary and unsatisfactory. When considered with the distance in which the Willms car was stopped, however, it is evident that the brakes on Willms' car operated more effectively than the evidence of the deputy sheriffs implies, or Willms was moving at a much lesser rate of speed when his car struck the plaintiff than plaintiff's expert assumed. Until the driver of an automobile has notice of the presence or likelihood of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that others will do likewise; and until he has such notice, the rule is the same as respects children and adults. The evidence shows that the sole proximate cause of this accident, so far as Willms was concerned, was the conduct of the plaintiff in running from behind the bus directly into the path of Willms' oncoming automobile. De Griselles v. Gans, 116 Neb. 835, 219 N. W. 235; Adams v. Welliver, 155 Neb. 331, 51 N. W. 2d 739; Pullen v. Novak, 169 Neb. 211, 99 N. W. 2d 16; Zoucha v. Northwestern Bell Tel. Co., 176 Neb. 408, 126 N. W. 2d 220.

Plaintiff relies upon Strode v. Campbell, 311 Ky. 525, 224 S. W. 2d 673. The case is similar in principle, although there are factual dissimilarities. The case was determined by a divided court and it has been criticized as to its correctness. See Strode v. Commercial Casualty Ins. Co., 102 F. Supp. 240. It is contrary to the law of

this jurisdiction and we do not accept it in support of the point on which it is cited.

Plaintiff asserts that the trial court erred in ruling on the admission of evidence. Plaintiff failed to offer any proof on the speed of the Willms automobile. Willms did not testify to the speed at which he was driving. Plaintiff sought such proof from Willms on cross-examination. Objections that such evidence was outside the scope of the direct examination were sustained. The rulings are correct. If plaintiff desired the evidence of Willms on this point, she should have called him as her own witness. It is fundamental that cross-examination should be limited to the scope of the direct examination.

We conclude that the trial court was in error in failing to direct a verdict for the defendant Willms.

Gray Lines Bus Company, Inc., also urges that the trial court erred in failing to direct a verdict in its favor. Plaintiff alleged in her petition that the bus company was negligent in failing to furnish plaintiff a reasonably safe place to alight, in stopping the bus in a dangerous and unsafe place for discharging plaintiff, in failing to warn plaintiff before leaving the bus of the dangerous traffic conditions in crossing Q Street, and to take care in crossing. The bus company in its answer denied generally and alleged that the accident was proximately caused by the negligence of Willms and the negligence and contributory negligence of plaintiff which was more than slight, and the actions and conduct of the plaintiff.

The crossing of streets by small children is inherently dangerous, particularly when no protection is afforded by mechanical signals or traffic police. The bus company and its driver in the instant case were aware of the dangers to small children in crossing Q Street. The primary question is the duty imposed upon the bus company in the unloading of small children from its bus on the south side of Q Street.

The bus company was operating as a common carrier

on a fixed route and schedule in the carriage of these 8-year-old children. There was no negligence on the part of the bus company in discharging the children from the bus on the south side of Q Street. We fail to see any negligence in the fact that they were discharged in the middle of the block rather than at Sixty-first Street, particularly in view of the driver's undisputed evidence that the signal to stop was made too late for him to stop the bus at Sixty-first Street without risking injury to his young passengers. The pertinent questions are whether or not the children were discharged from the bus in a safe place and whether or not there was a duty to warn the children of traffic danger and to use care in crossing the street. The driver of the bus knew that there were no residences south of Q Street and that the children would in all probability proceed north across Q Street.

It is the general rule that the discharge of passengers on the shoulder of a road is a discharge at a safe place; such passengers become pedestrians and the relation of common carrier and passengers for hire is terminated. Saab v. Omaha & C. B. St. Ry. Co., 170 Neb. 198, 102 N. W. 2d 59; Corrigan v. Portland Traction Co., 157 Or. 496, 73 P. 2d 378; Hudak v. Penn-Ohio Coach Lines Co., 73 Ohio App. 409, 57 N. E. 2d 93. There are cases holding that a safe place for an adult to alight from a bus under the foregoing rule might not be a safe place for a child to be discharged from a bus, and that a jury might be warranted in finding that a duty to warn existed on the part of the bus company. Taylor v. Patterson's Adm'r., 272 Ky. 415, 114 S. W. 2d 488; Houston Transit Co. v. Zimmerman (Tex. Civ. App.), 200 S. W. 2d 848; Gazaway v. Nicholson, 61 Ga. App. 3, 5 S. E. 2d 391; Ashley v. Ensley, 44 Wash. 2d 74, 265 P. 2d 829. We do not here determine if the evidence is sufficient to submit to the jury the question whether or not there was a duty on the part of the bus company to warn plaintiff of danger. This, for the reason that the evi-

dence does not support a finding that there was a failure to warn even if the jury could find that such a duty existed.

The driver of the bus testified that he could not remember whether or not he warned plaintiff and Barbara Sedlak when they left the bus. Plaintiff suffered from an amnesia as a result of the accident and had no recollection of any of the events leading to and following the accident. Barbara Sedlak, who was 11 years of age at the time of trial and 8 years old when the accident occurred, testified as follows: "Mr. McLane: Q. Barbara, when you and little Delores got off the bus did the bus driver say anything to you? A. No. * * * Mr. Welch: Well, Barbara, do you really remember whether he did or not? Do you at this time? Now, do you remember if you girls were playing there getting off the bus and talking and/or anything? Do you remember anything about that? The witness: No." This evidence is not sufficient to submit to the jury the question whether or not the driver of the bus failed in his duty to warn, assuming that such a duty was established.

The burden of proof is on the plaintiff, in order to recover in an action for negligence, to prove that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. Saab v. Omaha & C. B. St. Ry. Co., *supra;* Sipprell v. Merner Motors, 164 Neb. 447, 82 N. W. 2d 648. "The burden of proving a cause of action or defense is not sustained by evidence from which the jury can arrive at its conclusion only by mere guess or conjecture." Grosvenor v. Fidelity & Casualty Co., 102 Neb. 629, 168 N. W. 596. We conclude that there was no competent proof that the bus company failed to warn the plaintiff of possible danger, assuming only that such a duty existed. The trial court was therefore in error in not sustaining the bus company's motion for a directed verdict.

The jury found for each of the defendants. Its verdict

has the effect of correcting the error of the trial court in not directing verdicts for each of the defendants. Since defendants are entitled to a verdict as a matter of law, the correctness or incorrectness of the instructions is rendered immaterial and no basis exists for setting aside the verdict to which defendants were entitled as a matter of law. Everett v. Hening, 174 Neb. 573, 118 N. W. 2d 639.

The order of the trial court setting aside the verdict of the jury and granting a new trial is set aside with instructions to reinstate the verdict of the jury or, in the alternative, to sustain defendants' motions for a directed verdict and dismiss the actions.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM M. KENT ET AL., APPELLEES, V. DAIRYLAND MUTUAL INSURANCE COMPANY, APPELLANT.
131 N. W. 2d 146

Filed October 30, 1964. No. 35707.

1. **Insurance.** A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured.
2. ———. An insurance policy should be construed in the same manner as any other contract in order to give effect to the intent of the parties at the time it was made.
3. ———. The language therein used should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean.
4. ———. If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted.
5. **Contracts.** In the construction of a contract, the instrument must be construed as a whole giving force and effect to all of the provisions of the contract.
6. **Insurance.** By statute no policy of insurance shall be issued

upon any property except in the name of some party having an interest in the property.

7. ———. The recognized definition is that the insured, under a contract of insurance upon property, is the person in whose favor the contract is operative and who is indemnified against, or is to receive a certain sum upon, the happening of a specified contingency or event.

8. ———. Where property is owned jointly, and so insured, one owner cannot cancel the policy of insurance without the consent of the coinsured.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Tye, Worlock, Knapp & Tye, for appellant.

Dier & Ross, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. SMITH, District Judge.

MESSMORE, J.

This case arises from a contract of insurance on a 1952 Ford two-door sedan owned by the plaintiffs, for damages and attorneys' fees as a result of an accident occurring on February 18, 1960, at approximately 1:30 p.m. The case was submitted to the county court of Buffalo County and tried to the court, resulting in a finding for the plaintiffs under a statement of facts stipulated to by the parties. The county court rendered judgment in the amount of $397.95, allowed attorneys' fees in the amount of $50 to be charged as costs for the plaintiffs' attorneys, and other costs in the amount of $10.10, for a total of $458.05. The defendant appealed to the district court. The district court made findings that from the evidence there were two named insureds; that the cancellation of the insurance policy was done by one named insured; that no agency sufficient to establish authority on behalf of the one named insured to cancel the policy on behalf of the other insured was found from the evidence; and that the plaintiffs recover

the amount of $366 and costs of the action. The defendant filed a motion for new trial which was overruled. The court allowed attorneys' fees in the amount of $150 for services rendered in the district court by the plaintiffs' attorneys, and ordered that court costs in the county court go with the affirmance of the county court's decision, and that attorneys' fees allowed in the county court in the amount of $50 still stand. The defendant appealed.

The Dairyland Mutual Insurance Company is a corporation duly established by law and authorized to do business in the State of Nebraska as an insurance company.

The plaintiffs' amended petition alleged that the defendant issued to William and Stanley Kent a liability insurance policy No. 25-03227 on a 1952 Ford two-door custom automobile which was owned by William M. and Stanley Kent; and that according to the terms of the policy the defendant provided William M. and Stanley Kent with liability insurance on the said automobile from November 3, 1959, to February 3, 1960. The amended petition then recites paragraph 21 of the "Conditions" section of the insurance policy which will be noted later. The amended petition further alleged that the plaintiffs renewed the policy for a period of 3 months and received from the defendant a renewal certificate. Paragraph II of the policy is then set forth, which will be noted later. The amended petition then alleged that on February 18, 1960, at about 1:30 p.m., Stanley Kent was operating the Ford automobile and was involved in an accident with a 1959 Cadillac automobile operated by Russell R. Lehmanowsky; that as a result of said accident Russell R. Lehmanowsky filed suit on May 11, 1960, to recover for the alleged damages done to the 1959 Cadillac automobile; that the plaintiffs had complied with all the conditions of the policy, but the defendant claimed that it was not obligated to defend this action and that the policy had been canceled 12 hours

prior to the time of the accident; that as a result of the defendant's refusal to defend the action, William M. Kent and Stanley Kent retained a law firm to represent and defend them in such action; that the defense resulted in the dismissal of Russell R. Lehmanowsky's claim; and that subsequent to the dismissal of the claim, the law firm employed by the plaintiffs negotiated with the true owner of the automobile, Jerry Spady Pontiac-Cadillac, Inc., and settled the claim for $196 and obtained a release of all claims signed on June 9, 1961, by Jerry Spady, president of the above corporation. The amended petition further alleged that the defendant was informed of the fact that the Department of Motor Vehicles of the State of Nebraska, hereinafter referred to as the department, notified the plaintiffs that the department would suspend their operators' licenses unless security in the amount of $500 was deposited with the department; that the defendant neglected and refused to deposit the required security with the department; that as a result, the plaintiffs were required to commence an injunction action against the department in order to retain their licenses; that after securing the release of all claims from Jerry Spady Pontiac-Cadillac, Inc., the plaintiffs caused the release to be sent to the department and, as a result, the department rescinded its order revoking the licenses of the plaintiffs; and that as a result of the defendant's refusal to defend the suit filed by Russell R. Lehmanowsky on May 11, 1960, and as a result of the defendant's refusal to furnish, for filing with the department, a written notice that the plaintiffs had liability insurance in effect at the time of the accident, the plaintiffs were required to expend certain amounts incurred, which are set forth in the plaintiffs' amended petition. The plaintiffs prayed that the rights of the parties be determined; that a judgment be entered adjudging the defendant was obligated to reimburse the plaintiffs for all sums reasonably expended or incurred in the defense of the action brought

by Russell R. Lehmanowsky, in obtaining the release from Jerry Spady Pontiac-Cadillac, Inc., and in preserving their rights to operate a motor vehicle in the amount of $397.95; and that the defendant be required to pay such attorneys' fees in this action as the court deemed just and proper, and for other equitable relief as might be necessary.

The defendant's answer denied all allegations contained in the plaintiffs' amended petition except such as were admitted in the answer, which admission is that the defendant is a corporation established by law and authorized and licensed to do business in this state as an insurance company. The answer then alleged that any insurance policy either of the plaintiffs claimed to have held with this defendant was canceled at the express request of the plaintiff Stanley Kent prior to the accident of 1:30 p.m., February 18, 1960, and prayed for a dismissal of the plaintiffs' amended petition.

The plaintiffs' reply denied every allegation contained in the answer of the defendant except as expressly admitted by the allegations of the plaintiffs' amended petition; alleged that the plaintiff, Stanley Kent, was incompetent to cancel any insurance policy or otherwise contract on his own behalf; and further alleged that Stanley Kent had no authority to act on behalf of William M. Kent. The prayer was for a renewal of the prayer of the plaintiffs' amended petition.

William M. Kent testified that he was 62 years of age; that he was a farmer; that his son Stanley Kent was born on June 11, 1941, and was living with him between November 1959 and February 1962; that Stanley worked part time and had a separate income only from the work that he did; that during that period this witness owned a 1947 Chrysler; that about that time he bought a 1952 Ford automobile; that Stanley made application for the Ford automobile and this witness paid for it; that the Ford was used for transportaton to work and other purposes for which Stanley wanted to use it; that this

witness used the Ford automobile occasionally; and that the title to the Ford automobile was held in the names of William M. and Stanley Kent. This witness further testified that he decided to take out a policy of insurance on the Ford; that Stanley made out the application for the insurance; that the insurance policy was obtained through Dale Sautter; that Stanley made a payment of $20 when he made out the application to obtain the insurance; that there were further sums due on the premium and Stanley had to make application again to obtain the insurance; that this witness paid $57.10 for premium costs; and that this witness received the policy through the mail and had possession of it except when he turned it over to his attorney. The policy shows the names of the insured to be "William & Stanley Kent."

An exhibit in evidence discloses the renewal certificate taken by Dale D. Sautter Insurance Agency, in the names of "William & Stanley Kent," showing that the policy "did expire" February 3, 1960, and "now expires" May 3, 1960.

Another exhibit in evidence is a check dated January 26, 1960, payable to the defendant, in the amount of $57.75, signed by William M. Kent, a premium payment to the defendant on the insurance policy.

William M. Kent further testified that he knew that the Ford automobile was involved in an accident because Stanley told him; that at the time of the accident Stanley was 18 years of age; that legal action was brought against him as a result of the accident; that after the accident he did not notify anyone with refrence thereto, but that Stanley did; that this witness turned the matter over to his attorney; and that the defendant did not defend the action so he secured legal counsel to defend the case which resulted in a dismissal of the case. This witness further testified that Jerry Spady Pontiac-Cadillac, Inc., owned the car involved in the accident; and that later this witness paid Jerry Spady Pontiac-Cadillac, Inc., for damages to the car driven

by Russell R. Lehmanowsky by giving his personal check to his attorney in the amount of $196.

This witness further testified that there were other legal involvements as a result of this accident; that the state was after his driver's license; and that he received a notice through the mail, addressed to him from the Department of Motor Vehicles, notifying him that as a result of a motor vehicle accident in which a vehicle owned by him was involved he became subject to the requirements of the Safety Responsibility Act, and detailed what would be necessary for this witness to do to comply with the law, or his operator's license and privilege to operate a motor vehicle, his license plates, and registration certificate would be suspended as of May 12, 1960. He used the services of his attorney in connection with this matter.

This witness further testified that he did not know that Stanley intended to cancel the insurance policy; that Stanley was supposed to find out how to cancel the policy; that he never told Stanley at any time to cancel the policy; that he asked Stanley to wait until he was in the service so he could continue to use the Ford while he was still at home; that the first time he knew that Stanley attempted to cancel the policy was on the date of the accident; that he found out when Stanley told him about it; and that he was not aware that Stanley had written a letter to the defendant asking that the policy be canceled.

On cross-examination this witness testified that he was not with Stanley when he made application for the insurance policy, but requested Stanley to make the application, and knew that Stanley had done so.

Richard A. Dier testified that he was an attorney at law and William M. Kent was a client of his; that in February or March 1960, he had a request to do some legal work for William M. Kent; that William M. Kent called him with respect to insurance coverage on a 1952 Ford automobile which he and his son owned together,

and with respect to an accident that had occurred while his son was driving the automobile; and that the problem he presented was that the defendant informed him that the insurance policy was not in force. This witness wrote a letter to the defendant or its agent stating William M. Kent's position in the matter. Subsequently William M. Kent was notified by the Department of Motor Vehicles that his driver's license and license plates were to be taken because his insurance carrier had not filed a form SR 21 indicating its liability. Suit was filed for injunction in the district court for Buffalo County to enjoin the Department of Motor Vehicles, to preserve William M. Kent's right to drive pending the determination of the liability of the defendant, and to ascertain whether or not the defendant should have notified the department that it had insured William M. Kent and his automobile. This witness then detailed all the work done in behalf of his client with reference to the action taken by the department, the dismissal of the case brought by Russell R. Lehmanowsky against William M. Kent, and the negotiations had with the firm of Jerry Spady Pontiac-Cadillac, Inc., the title holder of the car with which the Kent car was in collision and from which he secured a release.

There is in evidence an exhibit which is a check dated June 1, 1961, payable to the order of Dier Barton and Barton, in the amount of $196, signed by William M. Kent for car damages. There is also an exhibit which is a check payable to the order of Jerry Spady Pontiac-Cadillac, Inc., in the amount of $196, drawn on the account of Richard A. Dier, attorney, and signed by Dorotha W. Wimberley, a bookkeeper of the firm with which Mr. Dier was associated.

An attorney testified that he was familiar with the legal fees charged in the community; and that he had occasion and opportunity to go through and examine the files of Mr. Dier in connection with the cases involving William M. and Stanley Kent. He gave as his

opinion that in the case of Kent v. The Department of Motor Vehicles, the legal services were worth a minimum of $115, and in the case of Lehmanowsky v. Kent the minimum fee would be $100.

Dale Sautter testified that in February 1960, he was self-employed, representing several insurance companies as agent; that the defendant was one of such companies; and that he was notified of an accident involving Stanley Kent. On cross-examination this witness testified that as agent for the defendant he took an application for insurance from Stanley Kent.

William J. Ross testified that he was one of the attorneys for William M. Kent in connection with his case against the defendant, and testified to the services rendered, that is, the preparation of the pleadings, the time involved in preparing for trial in the county court and district court and trials therein, and the preparation of the brief.

The defendant moved for a directed verdict, which was overruled.

Dale Sautter was called as a witness for the defendant. He testified that Stanley Kent came to see him before he applied for insurance, to get an idea of what the premium would be; and that later Stanley Kent did apply for a policy of insurance. The application is in evidence and shows the owner of the vehicle to be insured as "Kent William & Stanley LeRoy"; the operator to be Stanley LeRoy Kent, and the place for a second operator of the car is not filled in; the occupation to be farming; and the employer to be "(Father) William M. Kent." A premium deposit of $20 is also shown on the application. This application was signed by Stanley L. Kent.

There is also in evidence an exhibit which is an "office note" to the defendant dated November 17, 1959, stating: "Stanley Kent didn't get Premium to me untill (sic) tonight So am Reinstate With new application Im sending full Premium. You will probly (sic) send

me Rest of other premium of which 20.00 was sent in. thank you." This note is signed by Dale D. Sautter.

There is another exhibit in evidence which is an application for reinstatement of the policy in the name of Kent, William or Stanley LeRoy, dated November 17, 1959, and signed by Stanley Kent applicant.

Dale Sautter further testified that he did not believe that he had any conversations with William Kent from the time the applications were made by Stanley Kent up until the time of the accident.

There is a receipt book belonging to Dale Sautter in evidence which shows a payment of $20 by Stanley L. Kent dated October 29, 1959, and a receipt dated November 17, 1959, for $37.50 received from Stanley Kent by Dale Sautter as agent for the defendant.

Dale Sautter further testified that Stanley Kent contacted him with reference to the cancellation of the policy; that William M. Kent was not with him; that Stanley Kent asked this witness if he could cancel the policy because he was going into the service; that this witness said no, that the policy holder had to cancel it, told him how to cancel the policy, and advised him to cancel the policy a day or two after he left for the service; that Stanley Kent was the only one he ever saw driving the car; that he never saw William M. Kent driving the car; and that he was not sure that he had ever seen William M. Kent with Stanley Kent during any of the insurance transactions. On cross-examination this witness testified that he did not notify William M. Kent that Stanley Kent was canceling the policy.

Howard E. Brown testified that he was employed as branch manager of the Nebraska-Missouri service office for the defendant. He testified with reference to receiving the applications for insurance, and identified the insurance policy and a letter received by the defendant on February 18, 1960, with reference to the request of Stanley Kent that the insurance be canceled as of 12:01 a.m., February 18, 1960.

There is an exhibit in evidence which is a form used by the defendant to process cancellations and is called a cancellation memorandum. This exhibit shows all of the statistical information and coding for the defendant's accounting system, the amount of earned premium, unearned premium, unearned commission, the amount to be returned to the insured, and the amount due the insured by the agent. This exhibit shows the defendant's check No. 25080 dated February 19, 1960, in payment of the return premium due. There is also a copy of the defendant's check No. 25080, dated February 19, 1960, to the order of the Dale D. Sautter Insurance Agency, which is in connection with the cancellation memorandum.

The defendant assigns as error that the trial court erred in overruling the defendant's motion for a directed verdict at the close of the plaintiffs' evidence; and that the trial court erred in failing to sustain the defendant's motion for a new trial.

Certain provisions of the insurance policy involved are as follows:

"II Defense, * * *.

"With respect to such insurance as is afforded by this policy for bodily injury liability and for property damage liability, the Company shall:

"(a) Defend any suit against the Insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient; * * *."

"III Definition of Insured

"(a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'Insured' includes the named Insured and, if the named Insured is an individual, his spouse if a resident of the same household, and also includes any person while using the automobile and any person or orga-

nization legally responsible for the use thereof, provided the actual use of the automobile is by the named Insured or such spouse or with the permission of either. * * *"

"21. Renewal of Coverage

"All coverages afforded hereby shall expire at the expiration of the term of this policy or at the expiration of any renewal term thereof. In the event the Insured and the company agree to renew this policy, such renewal may be effected by means of a renewal certificate to be attached to this policy, or at the option of the company by issuance of a new policy, but no renewal term shall become effective prior to the actual receipt of the premium in payment for the same and acceptance thereof by the company at the company's office."

"24. Cancellation

"This policy may be cancelled by the named Insured by surrender thereof or by mailing to the company written notice stating when thereafter such cancellation shall be effective; if no specific cancellation date is requested by the named Insured, or his agent, cancellation will be effective as of 12:01 A.M. on the date of postmark of the cancellation request, or, if such request contains only a specific date of cancellation, the policy will be cancelled as of 12:01 A.M. on the requested date. This policy may be cancelled by the company by mailing to the named Insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named Insured or by the company shall be equivalent to mailing.

"If the named Insured cancels, earned premiums shall be computed in accordance with the short rate table and procedure herein. If the company cancels, earned pre-

miums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be sufficient tender of any refund of premium due to the named Insured."

With reference to an insurance contract, this court said in Chard v. New York Life Ins. Co., 145 Neb. 429, 16 N. W. 2d 858: " 'A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured.' Hamblin v. Equitable Life Assurance Society, 124 Neb. 841, 248 N. W. 397. See, also, Oswald v. Equitable Life Assurance Society, 128 Neb. 173, 258 N. W. 41."

In Morton v. Travelers Indemnity Co., 171 Neb. 433, 106 N. W. 2d 710, this court said: "In Lonsdale v. Union Ins. Co., 167 Neb. 56, 91 N. W. 2d 245, we reaffirmed that: 'An insurance policy should be construed in the same manner as any other contract in order to give effect to the intent of the parties at the time it was made.

" 'The language therein used should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean.

" 'If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted.

" 'In the construction of a contract, the instrument must be construed as a whole giving force and effect to all of the provisions of the contract.

" 'The parties to an insurance contract may make the contract in any legal form they desire and, in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to

limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed.' See, also, Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874."

There is no explanatory language limiting the definition of "the named insured" in the cancellation clause of the policy here involved. In the light of the above principles of law, the phrase "the named insured" clearly indicates and includes the names described in the insurance policy. No limitations or exceptions were expressed in the policy of insurance. In the event of any ambiguity in the definition of "the named insured," such would be resolved in favor of the insured. However, we conclude from a reading of the policy that no ambiguity exists. It is clearly indicated that William M. Kent and Stanley Kent are designated as the co-owners of the automobile insured by the defendant.

It is the defendant's contention that under the facts in this case Stanley Kent was the agent of William M. Kent and directed by him to procure the insurance, and that Stanley Kent was vested with full authority to cancel the policy.

In Valentine Oil Co. v. Powers, 157 Neb. 87, 59 N. W. 2d 160, this court said: "As said in Restatement, Agency, § 1, p. 7: '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.' In comment d, p. 10, it is said: ' "Agent" is a word used to describe a person authorized by another to act on his account and under his control.'

"As stated in 2 C. J. S., Agency, § 2, p. 1026: '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 re-

gard to what they call their relationship.' Also, 'It is the duty of an agent, in all transactions concerning or affecting the subject matter of the agency, to act with the utmost good faith and loyalty to further the principal's interests.' 3 C. J. S., Agency, § 138, p. 6."

The defendant refers to 3 Am. Jur. 2d, Agency, § 13, p. 426, which states in part: "As a rule, any person has the capacity to act for another, and even though a person might be under such legal disability that his contracts would not be binding upon himself, he may nevertheless act as the agent of another."

The defendant also refers to 3 Am. Jur. 2d, Agency, § 14, p. 427, which states in part: "Although the contracts of infants are not, in all cases, binding on them, there is no doubt that they may act as agents, and their contracts, made in that character, if otherwise unexceptionable, will be binding on their principals. The privileges which the law allows an infant are given to protect his own interests, not to enable him to disaffirm acts done for others not affecting his own property."

The defendant cites certain language from the case of Farmers Cooperative Shipping Assn. v. Adams Grain Co., 84 Neb. 752, 122 N. W. 55, as follows: "It is well established that the authority of an agent cannot be established by his own acts and declarations. * * * Consequently, when we speak of the apparent authority of an agent as binding his principal, we mean such authority as the acts or declarations of the principal give the agent the appearance of possessing."

The defendant cites Thomson v. Shelton, 49 Neb. 644, 68 N. W. 1055, wherein this court said: "Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency."

The defendant asserts that, applying the above principles or theories, William M. Kent knew, or should have

known, that before Stanley Kent could purchase insurance, as he was directed to do, Stanley Kent would be required to fill out an application form provided by the insurance company; that it is from the representations made on the application by the applicant that an insurance company gathers facts upon which to base its decision as to whether or not to accept the risk and what premium is to be assessed; and that Stanley Kent was the agent of William M. Kent and was authorized to cancel the insurance policy.

Other texts and cases are cited by the defendant announcing the above propositions of law relating to agency.

The plaintiffs' position is that where two names appear on the face of the insurance policy and the automobile is owned by the same two persons named in such policy, the policy must be construed to include both names for the purpose of effecting a binding cancellation of the policy of insurance.

Section 44-374, R. R. S. 1943, provides: "No policy of insurance shall be issued upon any property except in the name of some party having an interest in the property."

Under the above statute it is apparent that William M. Kent was properly made an insured because he had an interest in the automobile in suit and was a coowner thereof.

In 29 Am. Jur., Insurance, § 239, p. 623, it is said: "The definition recognized in the cases is that the insured, under a contract of insurance upon property or of health and accident insurance, is the person in whose favor the contract is operative and who is indemnified against, or is to receive a certain sum upon, the happening of a specified contingency or event."

In Jones v. Dubuque Fire & Marine Ins. Co., 317 Pa. 144, 176 A. 208, the court held: "Where property is owned jointly, and so insured, one owner cannot cancel the policy of insurance and substitute another therefor

without the consent of the coinsured."

In 29 Am. Jur., Insurance, § 404, p. 752, it is said: "Cancellation of an insurance policy under a provision allowing cancellation at the request of the insured may be effected through agents. It is not necessary under a provision of this kind that the request for cancellation be made personally by the insured, but it is sufficient if it is made by a person acting as the agent of the insured. *However, an agent whose authority is limited solely to the procurement of a policy has not per se the right to cancel the policy.*" (Emphasis supplied.)

From the evidence, the transaction delegated by William M. Kent was the purchase of an insurance policy. The cancellation of that policy is not incidental, but contrary, to the express authority granted. The express authority to buy an insurance policy does not carry with it the implied authority to cancel such policy. It is true that William M. Kent specifically authorized Stanley Kent to purchase the insurance policy. From the evidence it is clear that he did not expressly authorize or consent to Stanley's attempted cancellation of the policy, and had no knowledge of this fact until after the accident.

From the evidence and the authorities cited by the plaintiff, we conclude that the express authority to purchase this policy of insurance does not carry with it the implied authority to cancel such insurance so as to bind William M. Kent. William M. Kent has not by his own act and conduct clothed Stanley Kent with the apparent authority to cancel the policy of insurance.

The agent of the defendant was well aware of the situation and knew that Stanley Kent and William M. Kent were the coowners of the automobile insured. The record shows that the defendant had full and complete knowledge that William M. and Stanley Kent were coowners of the automobile which the defendant insured. They were designated as such in the insurance policy. The policy was so issued. A check of William M. Kent

for the premium was received by the defendant as payment of the premium for the policy.

Under the evidence in this case and the authorities cited by the plaintiff, we conclude that the judgment of the trial court should be, and is hereby, affirmed, and that attorneys' fees in the amount of $200 should be taxed as costs for services of counsel for plaintiffs in the Supreme Court.

AFFIRMED.

ROBERT DRAPER, APPELLANT, V. MAURICE H. SIGLER, WARDEN, NEBRASKA STATE PENITENTIARY, APPELLEE.
131 N. W. 2d 131

Filed October 30, 1964. No. 35725.

1. **Robbery.** Robbery is a crime of violence within the meaning of section 29-2620, R. R. S. 1943.
2. **Criminal Law.** An indeterminate sentence given for a crime of violence is erroneous but not void.
3. **Habeas Corpus.** To obtain release by habeas corpus the judgment or sentence must be more than merely erroneous; it must be an absolute nullity.
4. ———. Habeas corpus is regarded as a collateral and not a direct proceeding when used as a means of attack upon a judgment sentencing a defendant.
5. **Criminal Law.** When a court, in pronouncing an indeterminate sentence on a defendant, fixes the minimum at not less than the minimum and the maximum at not more than the maximum provided for the substantive offense of which the defendant stands convicted under such sentence, he is required to serve the maximum unless sooner released by the Board of Pardons under the provisions of the law guiding the actions of that board, or unless such sentence is corrected or changed by proper proceedings.

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

Robert Draper, pro se.

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

Heard before WHITE, C. J., MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and DIERKS, District Judge.

SPENCER, J.

This is an appeal by Robert Draper, hereinafter referred to as appellant, from the dismissal of a petition for a writ of habeas corpus. Petition for the writ was filed in the district court for Lancaster County on October 16, 1963. On November 6, 1963, Maurice H. Sigler, warden of the Nebraska Penal and Correctional Complex, hereinafter referred to as respondent, made a return to an order to show cause why the writ should not be issued. On December 13, 1963, the district court entered an order that appellant's petition did not state facts sufficient to require the issuance of a writ, and that the court did not have jurisdiction to grant the relief requested, and dismissed the petition.

There is no dispute as to the facts herein. The appellant pleaded guilty to a charge of robbery in the district court for Douglas County, and on the 28th day of September 1956, was sentenced to the Nebraska State Reformatory for an indeterminate period of not less than 6 nor more than 9 years. On December 13, 1963, when the petition was dismissed, the appellant had served more than 7 years, and on October 5, 1964, when the case was heard in this court, more than 8 years on the sentence.

It is the appellant's contention: First, that the imposition of an indeterminate sentence was erroneous; second, that the sentence should be considered as a definite sentence for the minimum period or 6 years; and third, that he has served more than the 6 years and is therefore being illegally detained in the Nebraska State Penitentiary.

We agree that the sentence imposed was in this instance erroneous. It was imposed under the provisions of section 29-2620, R. R. S. 1943. So far as material herein, that section provides: "Every person over the

age of eighteen years convicted of a felony or other crime punishable by imprisonment in the penitentiary, *excepting* treason and *crimes of violence* or attempts at crimes of violence against the person of another, shall, if judgment be not suspended or a new trial granted, be sentenced to the penitentiary; but the court imposing such sentence may in its discretion, providing such person has not previously been confined in any penitentiary, impose upon such person an indeterminate sentence." (Emphasis supplied.)

It is to be noted that crimes of violence are specifically excluded from the operation of section 29-2620, R. R. S. 1943. Robbery is a crime of violence within the meaning of the statute. See Stevens v. State, 19 Neb. 647, 28 N. W. 304. The imposition of an indeterminate sentence was therefore erroneous. On the analogy of the reasoning found in In re Application of Rice, 144 Neb. 547, 14 N. W. 2d 850, which involved an indeterminate sentence for a second offense, and McElhaney v. Fenton, 115 Neb. 299, 212 N. W. 612, where the sentence exceeded the maximum authorized, we hold that where an indeterminate sentence is given for a crime of violence, the sentence is erroneous but not void.

Appellant in a proper proceeding could have had the sentence corrected. See Edmonds v. State, 163 Neb. 323, 79 N. W. 2d 453. He chose not to do so, but waited until he had served the required minimum and then sought a writ of habeas corpus, which is regarded as a collateral and not a direct proceeding when used as a means of attack upon a judgment sentencing a defendant. See Hulbert v. Fenton, 115 Neb. 818, 215 N. W. 104.

Habeas corpus is not available to the appellant on the facts herein. As we said in Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007: " 'To obtain release by such a proceeding (habeas corpus), the judgment or sentence must be more than merely erroneous; it must be an absolute nullity.' "

In In re Havlik, 45 Neb. 747, 64 N. W. 234, we said:

" 'Mere errors and irregularities in a judgment or proceeding of a court in a criminal case under and by virtue of which a person is imprisoned, which are not of such a character as render the proceedings void, cannot be reviewed on an application for a writ of habeas corpus. That writ cannot operate as a writ of error.' "

There is a further reason why appellant cannot prevail. Rather than initiating proper proceedings to correct what appears to be an erroneous sentence, he permits himself to be committed and to serve the minimum period without complaint. Appellant then argues that the sentence is one for the minimum period specified in the sentence. Actually, the sentence is one for the maximum period specified in the sentence. This point is no longer open to question in this jurisdiction. In Studley v. Studley, 129 Neb. 784, 263 N. W. 139, we said: "A sentence of 'not less than one year nor more than ten years,' made under the provisions of the indeterminate sentence law of this state, is a definite sentence for the maximum term thereof."

When a court, in pronouncing an indeterminate sentence on a defendant, fixes the minimum at not less than the minimum and the maximum at not more than the maximum provided for the substantive offense of which the defendant stands convicted, and the defendant is committed under such sentence, he is required to serve the maximum unless sooner released from custody by the Board of Pardons under the provisions of law guiding the actions of that board, or unless such sentence is corrected or changed by proper proceedings. See Hulbert v. Fenton, *supra*.

The order of dismissal entered herein by the district court is in all respects correct and is hereby affirmed.

AFFIRMED.

HERBERT DANIEL ARIOSO, APPELLANT, V. MAURICE H. SIGLER, WARDEN, NEBRASKA STATE PENITENTIARY, APPELLEE.
131 N. W. 2d 134

Filed October 30, 1964. No. 35726.

Habeas Corpus: Criminal Law. This case is controlled by the opinion in Draper v. Sigler, *ante* p. 726, 131 N. W. 2d 131.

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

Herbert Daniel Arioso, pro se.

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

Heard before WHITE, C. J., MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and DIERKS, District Judge.

SPENCER, J.

This case, which is an appeal from the dismissal of a petition for a writ of habeas corpus, is a companion case to Draper v. Sigler, *ante* p. 726, 131 N. W. 2d 131. Although the two cases were separately briefed and argued, the issues are in all respects exactly the same in the two cases.

Herbert Daniel Arioso, appellant, was sentenced in the same court and on the same day as Draper, on a plea of guilty to a charge of robbery. He was also sentenced to the Nebraska State Reformatory for an indeterminate period of not less than 6 nor more than 9 years from and after the 28th day of September 1956, and has served more than 8 years of the sentence.

This case is controlled by what we said in Draper v. Sigler, *supra,* and for the reasons set out therein, the order of dismissal entered by the district court is in all respects correct and is affirmed.

AFFIRMED.

DORIS L. WALTERS, APPELLEE, v. WILLIAM K. WALTERS, APPELLANT.

131 N. W. 2d 166

Filed October 30, 1964. No. 35730.

1. **Divorce.** A judgment for child support may be revised or altered at any time as to future payments if the circumstances of the parties change or it shall be to the best interests of the children. § 42-312, R. R. S. 1943.
2. ———. A judgment for child support may be modified only upon a showing of facts or circumstances which have occurred since the judgment was entered. The judgment is res judicata as to all matters existing at the time it was rendered.
3. ———. A proceeding to modify a judgment for child support is not a retrial of the original case or a review of the equities of the original decree.

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

Bertrand V. Tibbels, for appellant.

Wright, Simmons & Hancock, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, BOSLAUGH, and BROWER, JJ., and DIERKS, District Judge.

BOSLAUGH, J.

The plaintiff, Doris L. Walters, and the defendant, William K. Walters, were married on June 13, 1946. On May 29, 1959, the plaintiff was granted a divorce from the defendant. The plaintiff was awarded the custody of their three children together with alimony and child support.

On October 21, 1963, the defendant filed a petition to modify the judgment of May 29, 1959, by canceling all future payments of child support. After a hearing upon the merits of the petition the trial court found generally against the defendant and refused to modify the judgment of May 29, 1959. The defendant has appealed to this court.

The defendant was represented by counsel in the

original divorce proceeding. On May 27, 1959, he entered into a written stipulation with the plaintiff concerning the disposition of their property, the custody of their children, and the child support and alimony to be awarded to the plaintiff in the event a divorce was granted. The judgment entered on May 29, 1959, approved the stipulation of the parties and incorporated its terms and provisions in the judgment. The plaintiff was awarded the custody of William Keith Walters, then 12 years of age; Richard Owen Walters, then 9 years of age; and Greg Nordell Walters, then 8 years of age. The defendant was ordered to pay child support at the rate of $100 per month until each child reached the age of 18 years, married, became self-supporting, or died. As each child reached the age of 18 years, married, died, or became self-supporting, the payments were to be reduced successively from $100 per month to $75 per month and $37.50 per month. The payments were to terminate when all three children had reached the age of 18 years, had married, had died, or had become self-supporting. None of these events have occurred as to any of the children at this time.

The petition to modify the judgment of May 29, 1959, alleged that since the entry of the decree the defendant had become permanently and totally disabled "for all practical purposes," that his personal estate had been wholly exhausted, and that he was unable now and will be unable in the future to comply with the judgment.

The evidence shows that the defendant is afflicted with epilepsy and suffers from both grand mal and petit mal seizures. The defendant's mentality is below average and there has been a gradual decrease in his mental capacity. The defendant is not able to do work that requires mental acuity but is capable of doing work on the ground which is away from dangerous moving machinery, livestock, or similar hazards.

A judgment for child support may be revised or altered at any time as to future payments if the circum-

stances of the parties change or it shall be to the best interests of the children. § 42-312, R. R. S. 1943. A judgment for child support may be modified only upon a showing of facts or circumstances which have occurred since the judgment was entered. Griess v. Griess, 161 Neb. 1, 71 N. W. 2d 513. The judgment is res judicata as to all matters existing at the time it was rendered. Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51.

The defendant in this case has been afflicted with epilepsy since he was 15 years of age. Apparently, his mental condition is a result of his illness and any change in his mental condition that has occurred since May 29, 1959, appears to be the result of the normal course of his illness.

The defendant lives on a farm with his mother. The defendant has helped with the farm work. His mother has given him money to help pay the child support, his other expenses, and have a little spending money. There is some indication in the record that the financial situation of the defendant's mother has changed and that she will not give the defendant the same amount of money in the future that she has given to him in the past.

The record in this case does not show a change of circumstances sufficient to require the modification of the judgment for child support. Although the defendant may not have sufficient income or personal estate at this time to make the payments required under the decree, his situation is not materially different from what it was at the time the judgment was rendered.

The defendant cannot obtain a modification of the judgment at this time upon a showing that the payments required by the judgment were beyond his ability at the time the judgment was entered. A proceeding to modify a judgment for child support is not a retrial of the original case or a review of the equities of the original decree. Morris v. Morris, 137 Neb. 660, 290 N.W. 720; McIlwain v. McIlwain, 135 Neb. 705, 283 N. W. 845.

The defendant relies upon Sullivan v. Sullivan, 141 Neb. 779, 4 N. W. 2d 919, and Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340. These cases involved factual situations where there had been a change in the circumstances of the parties. They do not support the defendant's claim for relief in this case.

The judgment of the district court is affirmed. The plaintiff's attorney is allowed the sum of $200 for his services in this court.

AFFIRMED.

MILDRED M. BEVERIDGE, APPELLANT AND CROSS-APPELLEE, v. MILLER-BINDER, INC., APPELLEE AND CROSS-APPELLANT.
131 N. W. 2d 155

Filed October 30, 1964. No. 35733.

1. **Fraud.** False representations, in order to found an action in the nature of deceit, must not consist merely of promises to be performed in the future, and generally not merely of expressions of opinion by a vendor as to the quality of his goods. Ordinarily they must be representations of existing facts.
2. **Fraud: Damages.** In cases where there has not been a rescission, the remedy is damages for the fraud; the burden in such cases is on the person alleging the fraud or misrepresentation to prove it and the amount of his damages, and the measure thereof is the difference between the article or thing if it had been as represented and its actual value.
3. **Damages: Trial.** When the alleged measure of damages is challenged by objections to the pleading or evidence, by a motion for a directed verdict, or by a tender of an instruction, the correct measure of damages must be given to the jury and there must be evidence in the record to support it.
4. ———: ———. Where there is a material variance in the measure of damages and the evidence, and objection thereto is timely made, a judgment obtained thereon cannot stand.

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

Frost, Meyers & Farnham and Frederick J. Stoker, for appellant.

John W. Delehant, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, and BROWER, JJ., and DIERKS, District Judge.

CARTER, J.

This is an action for fraud, deceit, and misrepresentation. Plaintiff alleged that she purchased a lot from the defendant for the purpose of building a house thereon and that the defendant misrepresented the quality and depth of the filled ground upon it. The jury returned a verdict for the plaintiff. The defendant moved for judgment notwithstanding the verdict and in the alternative for a new trial. The trial court sustained defendant's motion for a new trial, and plaintiff appealed. Defendant cross-appealed, alleging that the trial court erred in not sustaining its motion for judgment notwithstanding the verdict.

The evidence shows that plaintiff purchased two lots from the defendant at different times previous to the purchase of the lot involved in the present litigation. She called Verne W. McKinley, a sales representative of the defendant, about the purchase of the lot here involved. In response to her call, McKinley called at plaintiff's home and sold the lot to her for $3,350, the owner's asking price. About 1 year later plaintiff employed a contractor to dig the basement and construct the footings for the foundation. In proceeding with the work the contractor discovered that certain areas of the lot were filled, uncompacted dirt, of a maximum depth of 12 feet or more. The filled dirt was so loose that the ditches for the foundation footings caved in and increased the anticipated cost to such an extent that plaintiff discontinued work on the project.

The evidence shows that foundation footings require a depth of 8 inches in naturally compacted ground when it is below the frost line. When such footings are open and not below the frost line, a depth of 40 to 48 inches is required. It is necessary in constructing foundation

footings for a residence property that such footings rest on the natural ground unless the compaction of the filled dirt is sufficient to bear the weight of the construction. In the instant case it was necessary to place the foundation on the solid ground below the filled dirt. This necessitated the construction of the footings as much as 12 feet below the surface of the filled area, which condition, when discovered, caused the plaintiff to terminate the work.

It is the contention of the plaintiff that McKinley falsely represented the depth of the filled area on the lot, to her damage, which is the basis of her action for damages. Plaintiff testified as follows: "And it was a year after I bought the lot that this happened and I started digging, so I can't remember the exact words that he used, except that I know he assured me that it wasn't a bad fill-in." On redirect examination she testified that McKinley said: "It was either four or six" feet that she might have to go down. This is all the evidence in the record as to the representations made by the defendant or its agent as to the depth of the filled dirt on the lot. McKinley testified that he did not know about the depth of the fill and that he did not make any statement about the depth of the fill.

We think the jury could find defendant's agent represented that the fill dirt was 4 to 6 feet in depth when in fact it was in excess of 12 feet. Such a representation, if found to have been made, is a representation of a fact within controlling rules on the subject.

In Cook Livestock Co., Inc. v. Reisig, 161 Neb. 640, 74 N. W. 2d 370, this court said: "False representations, in order to found an action in the nature of deceit, must not consist merely of promises to be performed in the future, and generally not merely of expressions of opinion by a vendor as to the quality of his goods. They must be representations of known existing facts." See, also, Esterly Harvesting Machine Co. v. Berg, 52 Neb. 147, 71 N. W. 952; Beltner v. Carlson, 153 Neb. 797, 46 N. W.

2d 153. The evidence that McKinley represented that "it wasn't a bad fill-in" is obviously a mere expression of opinion and not a representation of existing fact. But the representation that the fill was 4 to 6 feet in depth is a representation of an existing fact and, if established, is actionable.

With regard to the measure of damages, the trial court instructed the jury as follows: "In determining the amount of the plaintiff's damages you shall consider the following. 1. The difference between the actual value of the property at the time of purchase and the value the property would have had if it was as represented; and, 2. The cost of excavating and refilling the excavation." This is the correct measure of damages. Welch v. Reeves, 142 Neb. 171, 5 N. W. 2d 275.

It is the contention of defendant that the judgment for $2,800 is not sustained by the evidence. There is evidence in the record that the lot in question had a present value of $1,000. There is no evidence in the record as to the value of the lot if it had been as represented. The contract of sale to the plaintiff was offered in evidence, showing the purchase price of the lot to be $3,350. Such evidence is not material and is not competent evidence of the value of the lot if it had been as represented.

In Rankin v. Bigger, 128 Neb. 800, 260 N. W. 202, this court said: "In cases where there has not been a rescission, the remedy is damages for the fraud; the burden in such cases is on the person alleging fraud to prove both the fraud and the amount of his damages, and the measure thereof is the difference between the article or thing if it had been as represented and its actual value." See, also, Welch v. Reeves, *supra.*

The plaintiff appears to rely on the rule that when a certain theory as to the measure of damages is relied on by the parties in the trial as the proper one, it will be adhered to on appeal whether it is correct or not. But in the instant case the defendant moved for a di-

rected verdict. We have held this to be a proper way to test the correctness of the measure of damages. In its motion for a directed verdict the defendant gave as one of its reasons the following: "* * * and also for the additional reason that the plaintiff failed to introduce any competent evidence of the value of the premises in question, if they had been as allegedly represented by the defendant; and since the plaintiff has failed to introduce any such evidence, there has been a complete lack of competent evidence on the issue of damages."

In Haarberg v. Schneider, 174 Neb. 334, 117 N. W. 2d 796, this court said: "In the instant case, the petition was not attacked by motion or demurrer for failure to allege the proper measure of damages. The defendant asserts, however, that he made a motion for a directed verdict which had the effect of raising the question. The motion was: 'The defendant at this time moves the Court for a directed verdict on the ground that the plaintiff has not shown sufficient evidence to sustain his petition.' It will be observed that the form of the motion for a directed verdict is consistent with the measure of damages alleged in the petition. We think the case was tried on the theory that the measure of damages set out in the petition was the correct one and that the decision of the case is controlled by our holding in Welch v. Reeves, *supra*. The case having been tried by both parties on the measure of damages stated in plaintiff's petition, we shall adhere to that theory on this appeal, although it is not a correct one."

Where the measure of damages has been challenged by objections to the pleading or evidence, or by motion for a directed verdict, or by a tender of an instruction, the rules announced in Welch v. Reeves, *supra,* and Haarberg v. Schneider, *supra,* have no application. Such an objection is timely made and requires the submission of the correct measure of damages to the jury if there is competent evidence to support it.

In the instant case the plaintiff pleaded the following

measure of damages: "That the sale of said lot to the plaintiff by the defendant was procured by fraud and misrepresentation and the plaintiff in the purchase of said lot for the purpose of building a house thereon has been damaged in the amount of $2789.00; the same being for $339.00 for excavations for footings not usable under the prevailing conditions; $100.00 to refill said excavations to maintain a temporary safe condition of the land; and $2,350.00 as the difference between the purchase price of $3,350.00 and the actual value of said lot of $1,000.00." The measure of damages pleaded was incorrect and was properly objected to in the motion for a directed verdict. The only evidence in the record supports the erroneous theory of damages pleaded by the plaintiff. There is no evidence of the value of the lot if it had been as represented. Even though the trial court correctly instructed the jury on the measure of damages, there is no evidence to support the verdict rendered under the instructions of the court, to which objection was made in the motion for a directed verdict and in the motion for a new trial. Under such circumstances the trial court properly granted a new trial.

Defendant contends on cross-appeal that its motion for judgment notwithstanding the verdict was erroneously overruled. In this respect we point out that there was evidence offered on the two items totalling $439. The jury could properly find for the plaintiff for this amount if it found that misrepresentation had been established. A judgment for plaintiff could properly be found, but not in the amount of $2,800. The judgment was excessive as a matter of law. The motion for judgment notwithstanding the verdict was properly overruled.

For the reasons stated, the order of the trial court in granting a new trial is correct and its judgment is affirmed.

AFFIRMED.

LYDIA GROSKOPF SPANGLER, APPELLANT, V. TERRY CARPENTER, INCORPORATED, ET AL., APPELLEES.
131 N. W. 2d 159

Filed October 30, 1964. No. 35835.

1. **Workmen's Compensation.** In a workmen's compensation case disability is determinable by a consideration of employability and earning capacity.
2. ———. The burden is on a plaintiff in a workmen's compensation case to prove a right of recovery.
3. ———. The rule of liberal construction of the Workmen's Compensation Act does not apply to the evidence to support a claim.
4. ———. In a rehearing in the Nebraska Workmen's Compensation Court a de novo consideration is required.
5. **Workmen's Compensation: Appeal and Error.** On appeal to the district court in a workmen's compensation case the hearing is by review of the transcript of the proceedings from the Nebraska Workmen's Compensation Court.
6. ———: ———. On appeal to the Supreme Court in a workmen's compensation case the consideration is de novo on the record from the district court.

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

Holtorf, Hansen, Fitzke & Kortum, for appellant.

Lovell & Raymond, for appellees.

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

YEAGER, J.

This is an action by Lydia Groskopf Spangler, plaintiff and appellant, against Terry Carpenter, Incorporated, and Employers Mutual Liability Insurance Company of Wisconsin, a corporation, defendants and appellees, to recover workmen's compensation on account of alleged injuries sustained by the plaintiff on February 10, 1961, in an accident which she claims occurred while she was engaged in employment by the defendant Terry Carpenter, Incorporated, and on account of which she is entitled to recover from this defendant, and the other

defendant, who is the workmen's compensation insurance carrier.

The action was originally commenced by the filing of a petition in the workmen's compensation court on January 10, 1963. The defendants filed an answer, issue was joined, and trial was had before a single member of the workmen's compensation court, and an award was made and filed on June 6, 1963, in favor of the plaintiff and against the defendants. There is no record of the evidence on which the award depends.

On June 17, 1963, the plaintiff filed a refusal to accept the findings and award, and requested a rehearing, reversal, and modification by the workmen's compensation court sitting en banc. Rehearing was had as requested.

At the rehearing the parties adduced their evidence bearing on the question of the happening of the accident, the plaintiff's injuries, if any, and the character and extent of the liability, if any, of the defendants on account thereof. A record of this evidence was made and preserved. On the basis of this record and the issues as defined by the pleadings an award was made by the workmen's compensation court on rehearing. This was made November 21, 1963. This award contained the findings of the court and its judgment as to the amount, kind, and character of relief to which the plaintiff was entitled. From this judgment the plaintiff appealed to the district court on the ground that the judgment was not, under the facts and the law, sufficient.

A trial was had in the district court and in that court it was submitted, from the standpoint of evidence, on the record which was taken and preserved in the case on rehearing in the workmen's compensation court. No other evidence was received or offered in the district court.

In the district court in response to the petition of plaintiff, the defendants by answer declared their acceptance of the award made by the workmen's compensation court sitting en banc, and requested affirmance

thereof by the district court. On this record the district court affirmed the award of the workmen's compensation court and rendered judgment accordingly. It is this judgment of the district court that the plaintiff seeks to have reversed in the appeal here.

By the appeal the plaintiff does not contend that she is not entitled to receive the benefits in her favor declared in the judgment, but only that on the evidence and under law she is entitled to benefits in excess of those awarded to her.

Except in a single particular there is nothing which may be regarded as a dispute in the evidence. Except as to this one instance the only question is that of whether or not the evidence of plaintiff is sufficient as prima facie proof that she is entitled to an award in excess of the award of the workmen's compensation court which was approved by the judgment of the district court.

Before the workmen's compensation court the plaintiff adduced her evidence much of which was admitted over objections and rulings by that court adverse to the defendants, but no point of this was made in the trial in the district court by the defendants.

The sum total of the defense amounted to an admission by the defendants that the evidence of plaintiff was sufficient to sustain that portion of her claim which was awarded by the workmen's compensation court and thereafter affirmed by the judgment of the district court.

The only evidentiary dispute related to the question of the degree of permanent partial disability of the plaintiff flowing from the accident. Two doctors who testified on behalf of plaintiff as expert witnesses fixed this disability, one at not to exceed 10 percent, and the other at 10 percent to 50 percent. Included in the testimony of neither of these witnesses is there any reference to described and known injury to any physical bodily structure or structures. It is pointed out further that

there is no evidence in the record describing any particular described and known physical injury to the plaintiff.

A third doctor who testified on behalf of the defendants gave it as his opinion that the disability amounted to from 5 percent to 10 percent. In the light of this evidence and testimony of the plaintiff that before the accident she could in her employment handle packages of 50 pounds in weight, but that after returning to work she could not handle such packages, the workmen's compensation court found that her permanent partial disability was 10 percent. No other element of disability was supported by evidence. The award and judgment for temporary total disability was for $37 a week for 53 2/7 weeks and the award and judgment for permanent partial disability was $5.33 a week for 246 5/7 weeks. The plaintiff claims the period for temporary total disability should be increased to 71 4/7 weeks and that the weekly rate for permanent partial disability should be increased to $13.34 or 66⅔ percent of $20, which $20 amount was the amount her rate of pay was reduced in her employment after the accident below the payment received before the injury.

In a workmen's compensation case disability is determinable by a consideration of employability and earning capacity. Pavel v. Hughes Brothers, Inc., 167 Neb. 727, 94 N. W. 2d 492; Miller v. Peterson, 165 Neb. 344, 85 N. W. 2d 700; § 48-121, R. S. Supp., 1963. In this case there is an absence of evidence in the field of employability from April 18, 1961, until plaintiff was employed by Corks and Cans February 18, 1963.

In the light of the absence of evidence covering this period as to employability, it may not well be said that the plaintiff is entitled to recover in the area anything in excess of what was awarded and for which judgment was rendered.

These disputed questions were resolved in favor of the defendants and from examination of the record it may

not well be said that any error unfavorable to the plaintiff was involved.

In addition to these portions of the claim of plaintiff, she claimed the right to recover for numerous other items the details of which are not required herein but they are all referred to in the transcripts and the award of the workmen's compensation court. That court had a hearing thereon and refused allowance of many of them and made its findings and adjudication thereon, all of which appears in the award from which appeal was taken to the district court. It is this group of items, together with the two which have already been considered herein, which were disallowed and this disallowance was affirmed by the district court. As to other allowances which were made in favor of the plaintiff there is no dispute.

At no point in the proceedings, in either the workmen's compensation court or the district court, did the plaintiff offer competent evidence of probative value on the items of costs to her which she testified were obligations of the defendants in these areas. It is true that there was hearsay evidence and conclusions given by witnesses in the bill of exceptions, properly objected to, and the pleadings denied any duty or legal obligation on the part of the defendants to make payment therefor.

The burden of proof was on the plaintiff to prove that these items of claim were compensable under the Workmen's Compensation Act in this action, the consideration of which must be de novo in this court.

On the question of the burden of proof this court has said: "The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation within the rules above set out, nor does it permit a court to award compensation where the requisite proof is lacking." Dietz v. State, 157 Neb. 324, 59 N. W. 2d 587. See, also, Hass-

mann v. City of Bloomfield, 146 Neb. 608, 20 N. W. 2d 592; Beam v. Goodyear Tire & Rubber Co., 152 Neb. 663, 42 N. W. 2d 293.

The procedure which was applicable in this case was that on the rehearing in the compensation court a de novo consideration was required. § 48-179, R. R. S. 1943. On appeal to the district court the filing of a petition and a transcript of the proceedings before the compensation court together with a bill of exceptions was required, after which the district court was required to examine the record coming to it from the compensation court and render its judgment. §§ 48-181, 48-182, and 48-184, R. R. S. 1943. On appeal to this court a consideration de novo was required on the record which came from the district court. § 48-185, R. R. S. 1943.

The effect of the findings and judgment of the workmen's compensation court and of the district court was to say that there was a total lack of competent evidence of probative value to amount to a prima facie showing that these disputed items or any of them were recoverable in this action by the plaintiff from the defendants.

A review of the record de novo by this court leads to the same conclusion in this respect. The judgment of the district court is therefore affirmed.

AFFIRMED.

JOE D. PIERCE ET AL., APPELLEES, V. HERMAN RABE ET AL., APPELLANTS.

131 N. W. 2d 183

Filed November 6, 1964. No. 35711.

1. **Easements: Adverse Possession.** The use and enjoyment which will create title by prescription to an easement are substantially the same in quality and characteristics as the adverse possession which will give title to real estate. The use and enjoyment must be adverse, under claim of right, continuous,

notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, must continue for the full prescriptive period, and must be substantially identical.

2. ———: ———. To establish a prescriptive right to an easement, all of the elements of a prescriptive use and enjoyment must be established by clear, convincing, and satisfactory evidence.

3. **Highways.** If the owner of land encloses it with a fence and installs gates therein at the entrance and exit where the right-of-way is claimed across the tract, it is evidence that he recognizes the right of those who use the road to continue to use it.

4. **Easements: Adverse Possession.** If a claimant has shown notorious, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse use, it will be presumed to have been under a claim of right. The owner of the servient estate, in order to avoid the acquisition of an easement by prescription, has the burden of rebutting the presumption by showing the use to have been permissive.

5. **Highways.** It is not indispensable to the establishment of a highway by prescription that there has been no deviation in the line of travel. If the course of travel has remained substantially unchanged for the full period, it is sufficient even though at times, to avoid encroachments, obstructions, or the like upon the road, there have been slight changes in the line of travel.

6. ———. If the owner of land over which a road extends changes the route for his convenience or advantage, and if the public continues the use of the highway as changed and public authorities expend public funds on the improvement of the highway, the owner of the land cannot question the identity of the line of travel. The public right therein does not become extinguished but exists in the highway as changed and the owner of the land may not question the identity of the course of the highway.

7. ———. Change in the course of a road after the right of the public is established by use for the statutory period does not defeat the public right to the use of the road as previously established.

8. **Appeal and Error.** 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.

Appeal from the district court for Boyd County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Robert V. Hoagland, for appellants.

W. L. Brennan, for appellees.

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

BROWER, J.

Plaintiffs Joe D. Pierce and H. R. Pierce, brothers as coowners of certain land mentioned herein, brought this action in the district court for Boyd County, Nebraska, against the defendants Herman Rabe and Emelia Rabe, husband and wife, to procure an injunction enjoining defendants from erecting and padlocking gates or interfering with the plaintiffs' right to use a road extending east and west over and entirely through the defendants' land which connects the plaintiffs' premises with a road running north and south on the section line three-fourths of a mile east of plaintiffs' land.

The parties will be designated as they were in district court except where one is referred to when their first and last names or initials will be used.

The county judge had issued a temporary order restraining the defendants from padlocking the gates. In district court a similar temporary injunction was entered based on the stipulation of the parties. At the conclusion of a trial to the court the temporary order was made permanent, and the defendants' motion for a new trial having been overruled, they have appealed to this court.

The defendants assign as errors to the trial court that its decision is contrary to the law and the evidence; that the court erred in finding from the evidence that a public road had been established for the requisite period of time by prescription; and that the court erred in failing to quiet title to the real estate as prayed for by defendants as against a purported clause in the deed from the defendants to Boyd County which referred to

an accommodation road and will be hereafter set out.

The defendants own a tract of 160 acres of land in the center of Section 33, Township 35 North, Range 14 West of the 6th P.M., in Boyd County, consisting of the four contiguous regular governmental 40-acre divisions of said section which have a common point at the center thereof.

The plaintiffs own approximately 320 acres to the west thereof in Sections 33, 32, and 29 of the same township and range.

The premises of both parties have a common boundary 80 rods long. This boundary consists of the west line of the southeast quarter of the northwest quarter of said Section 33, owned by the defendants, which is also the east line of the southwest quarter of the northwest quarter of said section belonging to the plaintiffs who own the entire 80 acres contained in the west half of the northwest quarter of said section as a part of their 320 acres.

Ponca Creek traverses the area involved entering the eastern boundary of the defendants' land from whence its course proceeding upstream bends southward and thereafter turns northerly and winds through the defendants' land and crosses the boundary common to both parties about 30 rods south of its northernmost extent.

On the east line of Section 33 is a county road running north and south along the section's entire length. The road in controversy starts just to the north of the half-section line joining the said county road from the west, and proceeds west 80 rods to the east line of the 160-acre farm of the defendants. This portion of the road was deeded to the county by the conveyances hereinafter discussed. It is 40 feet wide. Thereafter the remaining portion of this alleged roadway, which is the real subject of the controversy, proceeds north on the east side of the defendants' premises for about 40 rods where it turns west and extends in a westerly direction, but not

on a completely straight line, near or through but in any event past defendants' homestead and buildings to a point near the north bank of Ponca Creek. There it angles more to the northwest crossing the common boundary line into the plaintiffs' premises about 20 rods south of the northwest corner of the defendants' farm. After that it proceeds in a northwesterly direction to the plaintiffs' home and buildings, and then turning first northerly and then northwesterly, crosses the southwest corner of Section 28 and enters Section 29 to the west. There is a public township road between those sections which apparently the road in question eventually joins. The evidence as to this latter road is somewhat conflicting. Joe Pierce and the plaintiffs' witnesses testify that it is almost impossible to traverse except on horseback or foot on most all occasions and the defendants refute this at least to some extent. The evidence seems to establish that the terrain it traverses after leaving the plaintiffs' building area is quite rough and the road has not been kept in repair. Because of this at least, the road is practically impassable for trucks, implements, or loads of hay. The neighboring towns to the south in which many farmers traded could not be reached over this road going north without a long circuitous journey.

The testimony concerning the use of the road by the public is in great conflict. That favoring the plaintiffs will be first summarized. The plaintiff Joe Pierce is a single man 60 years of age. His brother, H. R. Pierce, lives at Lincoln. Joe Pierce lived with his brother, Albert, now deceased, on the land the plaintiffs now own from 1932 to 1936. His mother formerly owned it. Later he moved away but came back and now occupies it. Prior to 1933 the buildings on plaintiffs' land were on the south side of Ponca Creek but about that year they were moved to their present location on the north side. In addition to the plaintiff Joe Pierce, nine other witnesses testified as to the use of this road by others. They included those whose ages were 66, 67, 59, and

71, respectively. Several of them had lived in the vicinity all their lives and purported to know of the use made of this road over a great many years. Most of them had lived on farms on and near it; others had relatives or friends residing thereon whom they visited. In some instances they relate driving to town on it or taking their children to school. There was testimony as to this road and the travel on it in 1910, and up to the padlocking of the gates by the defendants in 1963. The testimony of several related only to particular periods and a great amount of the evidence concerned the years 1910, 1911, 1923, and other years in the 1920's or 1930's. However, by dovetailing the several periods concerning which there is testimony and relating that to what was said by witnesses whose accounts cover many years, there is substantial evidence that throughout the period it was traveled by the public although recently to a lesser extent. In the earlier years the area had been much more thickly settled and there were homes on every quarter section. Because of recent agricultural developments farms were consolidated, the number of homes reduced, and travel from the west on this road has markedly diminished. In the earlier periods those traveling by horse and buggy cut across the unfenced pastures involved and drove on different trails running across them. However, there is evidence that for more than 10 years at a time the defendants' premises were fenced and two to four gates were maintained on this road as it crossed the defendants' premises.

In the latter years the plaintiffs' land was apparently the only one having a residence on this road to the west of the defendants' premises. Joe Pierce testified he, his friends, and others continued to use it. After the giving of the deeds to the county, the road through Rabes' 160-acre farm had been graded although by whom he does not say, and on several occasions the snow had been removed therefrom by the county. All witnesses agree they had never asked nor were given permission

to travel on it although no one had ever objected to its use. Some said the course of the road had changed over the years to an extent which varied considerably in the testimony. Most of them, however, agreed its course throughout the period was substantially the same. It appears at one time it ran south of the defendants' building spot and now runs through them, a difference of a few rods. The bridge the county later built was in a slightly different position from the original ford or a previous bridge built by the cooperation of the neighborhood.

The résumé of the testimony of the two defendants and their witnesses with respect to the use by the public of the road in question is now set forth. Herman Rabe is 60 years of age. He has lived in Boyd County all his life but became acquainted with the vicinity for the first time in 1932. He leased the land now owned by them either in that year or 1933 from Herb Audiss, one of his predecessors in title, and has lived on the premises ever since. He rented the land but not the buildings now owned by the plaintiffs from March 1, 1952, to March 1, 1958. Defendants bought the 160 acres they had first leased from the Audiss family by deed dated February 26, 1947. When they went into possession of the 160 acres under the lease, Herman Rabe testified there were two different trails across the defendants' land, one to the north from the defendants' buildings and another running east and west, but in 1947 he says the trail to the west was changed by 20 rods. In 1933 the trails through the land were not used by many people. There were then too many gates, at least four, upon it. The defendants and others with whom he traded work, and Emma Zimmerley, a neighbor, traveled on it. While renting the Pierce place, Joe Pierce came out about once a month to look things over. Art Audiss, who had farmed the Pierce place, took his children to school on these trails. According to him most of them did not, however, use this entire road in question but took the

other trail from the north down the hill to the buildings on the defendants' farm and then on west to the land which is now the plaintiffs. He said the road over the hill has not been used for from 12 to 14 years. He further testified to many changes in the road across his place from east to west. These changes he says were made about 1947, about the time the grade was built. What grading was done through his farm was done by him. Snow removal was not mentioned by him. From 1953 to 1960 no one traveled the east-west road entirely through the 160 acres except Joe Pierce and his friends. In 1947 William Gently had used it.

Emelia Rabe gave testimony quite similar to her husband although she gave the names of more people who had used the trail, most but not all of whom she said came down the hill from the north. Some of the witnesses that testified for the plaintiffs might have used the trails whom she had not noticed.

Only two other witnesses testified for the defendants with regard to the use of the roads or trails which went through the defendants' land. They were husband and wife. They lived at Bonesteel, South Dakota. The husband had rented the defendants' 160 acres from their predecessor in title for the 3 years prior to 1933. They had not lived in the locality nor been on the premises before or since. During their occupancy of the land, the husband testified that not many drove across the land at that time. He could not recall many except the tenants who then occupied the plaintiffs' property and two other families whom he named. Some of them went north up the hill from the buildings and some went east across the place. The neighbors never asked permission to use such trails. A few times he used the portion of this road that went further west through the plaintiffs' land to get north to the school house. He said there was a gate on this road but he could not remember where it was and he tells of a bridge but from the record it is difficult to tell where this bridge was located.

The wife's testimony is much the same although she does definitely refer to the road going east out of the plaintiffs' place and as to its being used only by a few.

A witness for the plaintiffs testified on rebuttal that he had lived on an adjoining farm north of the defendants' farm for 13 years and had owned it for the last 10. He said there really was no road going north up the hill from defendants' land. He described it as just where "they" went up the hill to other land formerly belonging to "Audiss" which "Rabe" farmed. No machinery could be taken up the hill as it was too sandy unless the ground was frozen, or strawed in summer. One would have to travel by saddle horse or horse and buggy. He had lived in the community 64 years. He had gone into the defendants' premises with a horse and buggy both from the north and east. The road north up the hill from defendants' place had never gone out to the road as there were too many creeks to cross.

Another aspect of this case concerns the deed given by the defendants to Boyd County. When defendants bought their farm in 1947, the conveyance to them included in addition to the 160 acres what may be described as the south rod of the southeast quarter of the northeast quarter of said Section 33. By deed dated and acknowledged May 22, 1947, this was conveyed by the defendants to Boyd County. Enough additional land adjoining this on the north to make a 40-foot roadway was procured by conveyance from others to the county. The deed from defendants to the county is in evidence. It was not recorded until April 4, 1950, and it appears to have been lost for a time. The printed portion of the deed has the blanks filled in by typewriter including the description of the strip conveyed. Immediately thereafter there appears printed by hand in pen and ink, the following: "It being the intention that the present travelled road across the balance of the Herman Rabe land be considered to be an accomodation (sic)

road." Its execution by both defendants was acknowledged by C. J. Tomek, county clerk of Boyd County, and the signatures witnessed by the clerk and Bert Kenaston, at that time county supervisor. The testimony concerning the execution of the deed by the defendants to Boyd County as well as the insertion of the hand printed portion thereof is in great conflict.

The witness thereon, A. L. Kenaston, testified that the land of the plaintiffs and defendants at the time of the giving of the deed was in his supervisor district. Herman Rabe had talked to him concerning the county constructing a bridge on the strip of road leading to defendants' land. He had told Rabe the county could not place a bridge on a private road and that enough land had to be secured to make it a 40-foot road. If Rabe would give Pierce an accommodation road and the 40-foot strip was acquired, the county would build the bridge. He testified the deed was drawn up at the courthouse and the witness came in when it was being prepared. Herman Rabe sat at the end of the counter but he does not remember where Emelia Rabe sat, in fact, he does not recall whether or not she was there. Tomek, the county clerk, asked him to sign as a witness and he did so. The phrase in question was in the deed when it was signed. It would not have been accepted nor the bridge built if it had not been in it. He said the county wanted "Pierce" to be given a road out and the question was whether there was an open road down there and they called it "an accommodation road, an open road." The county board had gone down before and looked it over. He said that he had never gone to defendants' house with Tomek and the deed was not executed there but at the courthouse.

The defendants both testified that the deed was not signed at the courthouse; that Kenaston and Tomek came out to the defendants' house about this bridge and told them they would have to deed the county the strip for a road; and that they were in the kitchen there on

May 22, 1947. On direct examination Herman Rabe first said: "Q. Now, at that time, did Mr. Tomek have a deed for you to sign prepared? A. He didn't have no deed, no; he just had a piece of paper, and he says we will fix it up when we get to town. We signed it, but I never got to see it. Q. Did you sign a deed to it, at that time? A. If I signed a deed, at that time, the only thing I signed was what we signed at our house. Q. Showing you, Mr. Rabe, the plaintiffs' Exhibit number six, which purports to be a deed from you and your wife to Boyd County, dated May 22, 1947, was that the paper that was signed at your house? A. If this paper was there at the house; I can't remember. Q. You did sign some paper? A. Yes, I signed some paper there, and so did my wife, but I don't believe this here was on that paper, if it was. Q. You say 'This here,' to what are you referring? A. This part in here (pointing to exhibit). Q. When you point out to 'This here,' you are referring to that part of the instrument that is written in pen and ink; or printed in ink? A. Yes. Q. Was that on there at the time you and Mrs. Rabe signed it in your home? A. I don't think it was, because I sure would not have signed it if it was. Q. Did you have any discussion, at that time, with Mr. Tomek, as you remember now, relative to an accommodation road? A. Well, that was never mentioned to me, so if it was in there it was put in there afterwards." Thereafter he testified that nothing had ever been said to him about an accommodation road. Kenaston and Tomek assured him defendants would not be "tied down" in any manner. The subsequent testimony of both defendants is quite positive that the writing was not in the deed when signed. It was signed at their home in the kitchen, Herman Rabe read it over, and the writing was not there. It had to have been inserted later and the first time either of them knew about it was at a meeting of the county board on January 8, 1963, concerning the

road in question, at which they appeared with their attorney.

This is the substance of the evidence necessary for our decision in this case. The substantive law necessary for its determination is contained in the opinion of this court in State ex rel. Game, Forestation & Parks Commission v. Hull, 168 Neb. 805, 97 N. W. 2d 535, where the pertinent rules are set out as follows: "The use and enjoyment which will create title by prescription to an easement are substantially the same in quality and characteristics as the adverse possession which will give title to real estate. The use and enjoyment must be adverse, under claim of right, continuous, notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, must continue for the full prescriptive period, and must be substantially identical.

"To establish a prescriptive right to an easement, all of the elements of a prescriptive use and enjoyment must be established by clear, convincing, and satisfactory evidence. * * *

"If the owner of land encloses it with a fence and installs gates therein at the entrance and exit where the right-of-way is claimed across the tract, it is evidence that he recognizes the right of those who use the road to continue to use it.

"If a claimant has shown notorious, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse use, it will be presumed to have been under a claim of right. The owner of the servient estate, in order to avoid the acquisition of an easement by prescription, has the burden of rebutting the presumption by showing the use to have been permissive. * * *

"It is not indispensable to the establishment of a highway by prescription that there has been no deviation in the line of travel. If the course of travel has remained substantially unchanged for the full period, it

is sufficient even though at times, to avoid encroachments, obstructions, or the like upon the road, there have been slight changes in the line of travel.

"If the owner of land over which a road extends changes the route for his convenience or advantage, and if the public continues the use of the highway as changed and public authorities expend public funds on the improvement of the highway, the owner of the land cannot question the identity of the line of travel. The public right therein does not become extinguished but exists in the highway as changed and the owner of the land may not question the identity of the course of the highway.

"Change in the course of a road after the right of the public is established by use for the statutory period does not defeat the public right to the use of the road as previously established.

"A public highway may be established by implied dedication in this state for use as a public highway if there is present an intent to appropriate an easement for such public use. The intent may be expressed in the visible conduct and acts of the owner if they are such as would cause ordinarily prudent men to infer an intent to dedicate a right-of-way for a public highway; and if they are so received and acted upon by the public, the owner cannot after the acceptance recall his appropriation."

Applying the law in the cited case set out, it appears that the weight of evidence preponderates in favor of the plaintiffs showing an established right of user by the public to the road by prescription continued for the statutory period of 10 years. In our opinion the use for the required period antedated the time when the defendants came upon their lands as tenants and continued thereafter. That the roadway was not used to the same extent in later years would not terminate the right of user. It appears to be still traveled by some. The lesser use at present is accounted for by the change in

the number of inhabitants in the vicinity.

The clause in the deed to the county if placed therein before its execution lends support to plaintiffs' theory that the defendants knew and were conceding the plaintiffs had previously a right to travel thereon. It would appear the trial court did not base its decision on dedication and this court having agreed with its decision it is not necessary to determine whether it could be sustained on other grounds. However, evidence tending to show dedication may also bear on the question of prescription, and vice versa. Burke v. Diers, 102 Neb. 721, 169 N. W. 263. This of course depends on whose testimony is to be accepted in respect to its execution. It is to be noted that the first portion of the direct evidence of Herman Rabe quoted herein suggests he remembered little of what he signed. The latter portion thereof seems to be prompted by the question put to him. The subsequent positive testimony of both defendants stressing their theory of the deed's execution is weakened to a considerable extent by that which preceded it.

"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." Walkenhorst v. Apolius, 175 Neb. 583, 122 N. W. 2d 875.

The trial court evidently gave credence to the version of the evidence given by the plaintiffs' witnesses. Our examination of the record indicates its decision on the disputed evidence was correct. We are therefore constrained to accept the evidence offered by the plaintiffs as to the execution of the deed and the presence of the clause in the deed with respect to the accommodation road. The county was willing to build the bridge

if the road in question could be used by the plaintiffs. The defendants gave the deed. The road was opened and the bridge was built, and apparently the road was cleared of snow at times. Under the circumstances the defendants are in a poor position to urge no right of the public to now use it. Further, the provisions placed in the deed to a certain extent indicates the defendants knew of the rights of the public in the road when the deed was prepared and the clause inserted or they would not have made the concession.

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

AFFIRMED.

IN RE ADOPTION OF BARRY GENE MCCAULEY, A MINOR CHILD.

ROBERT MCCAULEY ET AL., APPELLEES, V. EUGENE E. STEWART ET AL., APPELLANTS.

131 N. W. 2d 174

Filed November 6, 1964. No. 35717.

1. **Adoption of Children.** Section 43-104, R. R. S. 1943, provides in part: "No adoption shall be decreed unless the petition therefor is accompanied by written consents thereto executed by * * * (3) both parents, if living; * * * except that consent shall not be required of any parent who shall: (a) have relinquished the child for adoption by a written instrument; (b) have abandoned the child for at least six months next preceding the filing of the adoption petition; * * *."
2. ———. Section 43-106, R. R. S. 1943, provides in part: "Consents required to be given under sections 43-104 and 43-105, except under subsection (2) of section 43-104, must be signed in the presence of at least one witness and acknowledged before an officer authorized to acknowledge deeds in this state."
3. **Acknowledgments.** An acknowledgment is the act by which a party who has executed an instrument goes before a competent officer and declares or acknowledges the same as his genuine and voluntary act and deed.
4. **Adoption of Children.** The matter of adoption is statutory, and

the manner of procedure and terms are all specifically prescribed and must be followed.

5. **Equity.** A court of equity, in dealing with legal rights, adopts and follows the rules of law, in all cases to which those rules are applicable, and whenever there is an explicit statute or a direct rule of law governing the case in all its circumstances, a court of equity is as much bound by it as would be a court of law.
6. **Adoption of Children.** Adoption proceedings do not depend upon equitable principles. Where the essential statutory requirements have not been met, equity cannot decree an adoption.
7. ———. To warrant an adoption under section 43-104, R. R. S. 1943, it must clearly appear that the natural parents, if living, had abandoned the child for a period of at least 6 months.
8. ———. In adoption proceedings the welfare of the child is not material until either relinquishments, signed, witnessed, and acknowledged as provided for by statute, or abandonment as prescribed by statute, have been established.

Appeal from the district court for Dawes County: ALBERT W. CRITES, Judge. Affirmed as modified.

Merril R. Reller and John McArthur, for appellants.

Bump & Bump, Charles A. Fisher, and John B. Henley, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, BOSLAUGH, and BROWER, JJ., and DIERKS, District Judge.

MESSMORE, J.

This is an adoption proceeding brought in the county court of Dawes County. The petition for adoption was filed on September 28, 1962. The petitioners, Eugene E. Stewart and Carolyn A. Stewart, were husband and wife and residents of Dawes County. The petition alleged that the petitioners desired to adopt Barry Gene McCauley, a minor child born in Sheridan County; that the care and custody of the minor child was given to the petitioners on April 28, 1962; and that the minor child was born of the marriage between Robert McCauley and Bonnie McCauley, both of whom executed a relinquishment of the child for adoption. The county court entered a decree of adoption finding that all per-

sons interested in the adoption of the minor child had been notified of the time and place of hearing. Robert McCauley and Bonnie McCauley, husband and wife and the natural parents of Barry Gene McCauley, appealed to the district court for Dawes County.

Petition for adoption was filed in the district court for Dawes County by Eugene E. Stewart and Carolyn A. Stewart, alleging that Barry Gene McCauley had been in the exclusive care of Eugene E. Stewart and Carolyn A. Stewart since the date of his birth; that the said minor child had been abandoned by its natural parents, the McCauleys; that on the date of birth of said minor child, the McCauleys had delivered to Dr. Bernard A. Owens an authorization to place the child in a foster home for the purpose of future adoption; that to serve the best interests of Barry Gene McCauley, the custody of said child should be retained by the petitioners; and that the natural parents of the minor child, the McCauleys, were not fit or proper persons to have the care and custody of the minor child. The prayer was for an affirmance of the adoption decree entered by the county court.

The McCauleys moved to strike from the petition all reference to the abandonment of the minor child, Barry Gene McCauley. This motion was sustained.

The McCauleys filed an answer wherein they denied that a consent and relinquishment for adoption as claimed by the petitioners had ever been acknowledged by the natural parents before a notary public; and that the decree of adoption entered by the county court was a nullity and void.

The petitioners, the Stewarts, filed a reply to the answer alleging that they were unaware of any irregularities in the consent and relinquishment given by the McCauleys.

There was a motion to strike certain allegations of the reply relating to the abandonment of the minor child by the McCauleys. This motion was sustained.

A pretrial conference was held. The parties agreed that the issues would be: (a) Have the requirements of the statutes been sufficiently satisfied to constitute a valid adoption of Barry Gene McCauley, and if so, are the McCauleys fit, suitable, and proper persons to have the care and control of this minor child? (b) If the adoption proceedings have not satisfied the requirements of the statutes on adoption, has there been an abandonment of the minor child by the natural parents thereof? And (c) if there has been no valid adoption, and if there has been no abandonment by the natural parents of the said minor child, may the court consider the question of the fitness and suitability of the natural parents to have the care, custody, and control of the child, and if so, are the natural parents fit and suitable persons to have the custody of the child?

The trial court ruled that if there was no valid adoption, and if there was no abandonment, the suitability of the natural parents to have the custody of the minor child would not be an issue in this case. The trial court further ruled that all evidence relating to the fitness and suitability of the natural parents to have the custody of the minor child be excluded, and all evidence relating to that issue be stricken from the record.

The trial court further ruled that the motion to strike all evidence dealing with the issue of abandonment be sustained; that all evidence theretofore taken relative to the issue of abandonment be stricken; and that further evidence offered on such issue of abandonment be excluded. These rulings also applied to the offer to prove certain facts regarding the issue of abandonment, the suitability or unsuitability of the natural parents, and the suitability of the adoptive parents.

The one issue then remaining before the trial court was whether or not the adoption proceedings sufficiently and substantially complied with the statutes to make the decree of adoption entered by the county court valid.

The trial court ordered that the decree of adoption

entered by the county court of Dawes County be vacated and set aside; and that Barry Gene McCauley be awarded to the natural parents of such child, Robert McCauley and Bonnie McCauley.

The petitioners, the Stewarts, filed a motion for a new trial which was overruled. The petitioners appealed.

For convenience Eugene E. Stewart and Carolyn A. Stewart will be referred to as appellants and Robert McCauley and Bonnie McCauley will be referred to as appellees. On occasion, when required, we will refer to the parties by their names, or first names, and to other witnesses by their names.

The appellants assign a number of errors, the most pertinent of which the appellants claim necessary to be determined are as follows: The trial court erred in not finding and determining that Barry Gene McCauley was abandoned and neglected by his natural parents and failing to receive evidence on this issue; the trial court erred in not receiving evidence of the unlawful and improper conduct of the McCauleys and each of them before and after the birth of Barry Gene McCauley; the trial court erred in limiting its decision on the evidence pertaining only to the question of whether or not there had been proper relinquishments executed by the McCauleys; the trial court erred in not hearing testimony of appellants as to their suitability, character, and financial circumstances as adopting parents of Barry Gene McCauley; and the trial court erred in not considering that the best interests of Barry Gene McCauley require that he not be placed in the custody and control of his natural parents.

The record discloses that Barry Gene McCauley was born on April 28, 1962.

Dr. Bernard A. Owens, physician and surgeon, testified that he practiced his profession in Hay Springs; that he owned a clinic located in a building of brick construction; that he had two aids and everything needed

for private practice; that he had known the McCauleys since April 1960; that as their doctor he attended to their needs and delivered two children born to Bonnie, one of which was Barry Gene; and that he attended Bonnie during her pregnancy with Barry Gene. The doctor further testified that when he first saw Barry Gene he was on the back seat of the McCauley car; that he took the baby into the clinic and attended to him; that the child was born in the car in front of the clinic; that he carried the child into the clinic and wrapped him in a towel; and that the clinic had towels and blankets, but no clothing for the baby. He further testified that prior to the birth of Barry Gene he had several conversations with Bonnie relative to adopting the baby out, and told her to talk over with her husband whether or not they wanted to put the baby out for adoption; that he asked Bonnie if she had talked the matter over with her husband and she said that she had and they thought it was the thing to do; that on April 7, 1962, Bonnie stated that she still planned to adopt the baby out and requested the doctor to keep this matter a secret; that Bonnie also requested that he find a home for the baby; and that he told her he could find a nice home for the baby. The doctor further testified that later he asked Bonnie if it was still their will to put the baby out for adoption and she said it was. The doctor further testified that the first time he talked to anyone other than the McCauleys concerning the placement of the child for adoption was 2 weeks before Barry Gene's birth when he talked to Eugene and Carolyn Stewart. The doctor informed the McCauleys that there would be papers to sign later relating to the adoption and they agreed to sign such papers. He received two telephone calls from Bonnie wanting to know if the papers were ready to sign, and he said he would get them ready. On May 12, 1962, Bonnie came to the doctor's office and wanted to know if the papers were ready. The doctor further testified that he told the

McCauleys the night Barry Gene was born that a lawyer would have to draw up relinquishments; that there was no lawyer in Hay Springs so he mentioned attorney Mitchell of Rushville, and that the McCauleys said that was all right; that Robert and Bonnie McCauley asked the doctor to get the release papers ready for the adoption of Barry Gene; and that this direction was made the Saturday night of the baby's birth. The doctor further testified that attorney Mitchell prepared the papers; that the doctor brought the two relinquishment papers, designated exhibits Nos. 5 and 6, back to his office; that the doctor called McCauleys on the telephone; that they came to the office on either May 14 or May 15, 1962; that the doctor placed half-inch tape over the names of the Stewarts and told the McCauleys that was because he wanted to keep secret the names of the adoptive parents; and that Robert McCauley's signature was placed on one of the relinquishments, exhibit No. 5, after he had read the instrument. Bonnie McCauley was present and signed exhibit No. 6 at the same time. The doctor mentioned that the signatures would have to be notarized. He suggested that attorney Mitchell notarize the relinquishment papers because he knew about the adoption, and stated that the McCauleys would have to go to him to have the papers notarized. The doctor further testified that the relinquishment papers contained no signatures when they were received by him through the mail; that exhibits Nos. 5 and 6 were executed at approximately the same time; and that Bonnie was present when the conversation was had with reference to securing attorney Mitchell as notary. The doctor took the relinquishment papers to attorney Mitchell, and received them back through the mail on approximately May 25, 1962, after they had been notarized. The doctor further testified that LaRea Koller was in and out of his office at the time the relinquishments were signed; and that he saw Bonnie on May 19, June 2, and August 4, 1962, and no demand was ever made for Barry

Gene nor anything said about the relinquishments.

Bonnie McCauley testified that she was the natural mother of Barry Gene McCauley; that she signed the relinquishment on May 26, 1962; that she did not at any time or place ever acknowledge exhibit No. 6, the relinquishment of Barry Gene, to be her voluntary act and deed in the presence of attorney Mitchell or any other notary public; that her husband, Robert McCauley, signed exhibit No. 5 on May 26, 1962, in the presence of Bonnie and Dr. Owens only; and that her husband could not have acknowledged exhibit No. 5 on May 19, 1962, the date that the relinquishments were alleged to have been notarized by attorney Mitchell, because he was with her all that day, and for the further reason that the signing of such relinquishments was on May 26, 1962.

There is evidence in the record to the effect that the McCauleys wanted the baby returned to them.

The undisputed evidence in this case discloses that no acknowledgement was made before a notary public at the time the relinquishments were signed by Bonnie and Robert McCauley, either by attorney Mitchell of Rushville, or by any other notary public.

As before stated, the trial court refused to allow any evidence bearing upon the issue of whether or not the natural parents or the adopting parents were suitable or unsuitable to have custody of the child, on the ground that there was no valid adoption and no abandonment and therefore such an issue was immaterial in this case, and rejected offers of proof relating to such issues.

The trial court further ruled that all evidence bearing upon the issue of abandonment was inadmissible because the petition for adoption was filed before the statutory 6-months period had elapsed.

The following statutes relating to adoption of children are pertinent to this case.

Section 43-104, R. R. S. 1943, provides in part: "No adoption shall be decreed unless the petition therefor is accompanied by written consents thereto executed

by * * * (3) both parents, if living; * * * except that consent shall not be required of any parent who shall: (a) have relinquished the child for adoption by a written instrument; (b) have abandoned the child for at least six months next preceding the filing of the adoption petition; * * *."

Section 43-106, R. R. S. 1943, provides in part: "Consents required to be given under sections 43-104 and 43-105, except under subsection (2) of section 43-104, must be signed in the presence of at least one witness and acknowledged before an officer authorized to acknowledge deeds in this state." Subsection (2) of section 43-104, R. R. S. 1943, refers to any district court in the State of Nebraska having jurisdiction of the custody of a minor child by virtue of divorce proceedings had in any district court in the State of Nebraska, a matter which is not involved in this case.

In Trowbridge v. Bisson, 153 Neb. 389, 44 N. W. 2d 810, this court said: "An acknowledgment has been defined as: 'The act by which a party who has executed an instrument * * * goes before a competent officer * * * and declares or acknowledges the same as his genuine and voluntary act and deed.' Black's Law Dictionary, (3d ed.), p. 31. See, also, Aultman & Taylor Co. v. Jenkins, 19 Neb. 209, 27 N. W. 117; * * *.

"As stated in 1 Am. Jur., Acknowledgements, § 142, p. 376: 'A grantor in an instrument of conveyance who never at any time appeared for the purpose of acknowledging the instrument is not bound in any wise by the recitals in the certificate of acknowledgment attached by a notary public. The notary is without authority or jurisdiction to attach any certificate whatever. In such a case, the jurisdiction of the officer not having been invoked, his utterance is a nullity and his certificate has no evidentiary force whatever in favor or against anyone.' See, also, Annotation, 72 A. L. R. 1302; Pereau v. Frederick, 17 Neb. 117, 22 N. W. 235."

The foregoing language would apply in the instant

case relating to the alleged relinquishment of the minor child by its natural parents.

In 2 Am. Jur. 2d, Adoption, § 43, p. 894, it is said: "A consent which fails to meet the statutory requirements cannot be given legal effect. If, for example, the consent though written and signed is not subscribed and sworn to before one authorized by law to administer an oath as required by the statute, it will be considered insufficient, * * *."

In Foley v. Carnesi, 123 Colo. 533, 232 P. 2d 186, 24 A. L. R. 2d 1123, it is said: "It is argued that in this case the evidence shows that there was no duress or fraud at the time respondent signed the consent, and that the purpose of having such a consent subscribed and sworn to is to lessen the possibility of duress or fraud. Admitting that this could be one purpose of that procedure, we still cannot say that the legislature did not intend that every consent by the natural parent to an adoption of a child should not be subscribed and sworn to for the purpose of emphasizing the seriousness and solemnity of the step being taken. It also should be emphasized that the person authorized by law to administer oaths or affirmations is a public officer, which of itself gives the transaction a more impressive setting and an atmosphere of finality."

It is quite apparent that the Legislature of this state, as did the Legislature of Colorado, made the acknowledgment of a consent or relinquishment of a minor child by the natural parent or parents a prerequisite to a valid consent for adoption.

In the case of In re Petition of Ritchie, 155 Neb. 824, 53 N. W. 2d 753, this court said: "The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed. Kofka v. Rosicky, 41 Neb. 328, 59 N. W. 788, 25 L. R. A. 207, 43 Am. S. R. 685. * * *

"The applicable rules are:

" 'A court of equity, in dealing with legal rights, adopts

and follows the rules of law, in all cases to which those rules are applicable, and whenever there is an explicit statute or a direct rule of law governing the case in all its circumstances, a court of equity is as much bound by it as would be a court of law.' State ex rel. Sorensen v. State Bank of Omaha, 128 Neb. 148, 258 N. W. 260. * * *

"Adoption proceedings do not depend upon equitable principles. Where the essential statutory requirements have not been met, equity cannot decree an adoption. 2 C. J. S., Adoption of Children, § 1, p. 368. See, also, St. Vincent's Infant Asylum v. Central Wisconsin Trust Co., 189 Wis. 483, 206 N. W. 921; Borner v. Larson, 70 N. D. 313, 293 N. W. 836; In re Francis, 82 Ohio App. 193, 77 N. E. 2d 289; Rivers v. Rivers, 240 Ala. 648, 200 So. 764."

In 2 Am. Jur. 2d, Adoption, § 24, p. 879, it is said: "Consent of the natural parents who have not forfeited their parental rights and duties to the adoption of their child by another lies at the foundation of most statutes of adoption, and under most statutes the consent of such parents to the adoption of their child is regarded as an essential requisite to jurisdiction on the part of the court to make an order of adoption, and the absence of consent is fatal to validity of the decree * * *."

In 2 Am. Jur. 2d, Adoption, § 9, p. 867, it is said: "The requirements of a statute which authorizes adoption by contract or deed must be substantially complied with. If the statute required that the written instrument of adoption be acknowledged and recorded, a failure to conform to this requirement invalidates the proceeding."

In 2 Am. Jur. 2d, Adoption, § 7, p. 866, it is said: "Generally speaking, adoption statutes will be strictly construed in favor of the rights of the natural parents in controversies involving termination of the relation of the parent and child, especially in those cases where it is claimed that owing to misconduct his consent to the adoption is not required. Every intendment should be

made in such case in favor of the parent's claim, and where the statute is open to construction and interpretation, it should be construed in support of the parent's natural rights."

In Dorshorst v. Dorshorst, 174 Neb. 886, 120 N. W. 2d 32, this court said: "The right to make an antenuptial contract being statutory and in derogation of the common law, the manner prescribed by statute for exercising the right is a condition upon which the right exists. * * * When an antenuptial contract is not acknowledged as required by section 30-106, R. R. S. 1943, it is void for failure to comply with a statutory condition that is essential to the existence of the right to make such a contract."

While the foregoing case deals with an antenuptial contract, the rule relating to compliance with the statutes is the same as in a case for adoption of minor children.

Under the evidence and the authorities heretofore cited, no proper acknowledgment was taken of the natural parents of the minor child, Barry Gene, as required by statute. Consequently, there were no proper relinquishments by the natural parents of such minor child to effect an adoption of their child Barry Gene. The judgment of the trial court in this respect was correct.

The appellants contend that in any event, there is an abandonment of Barry Gene McCauley by his natural parents.

The record shows that the alleged time of abandonment was not at least 6 months next preceding the filing of the petition for adoption of Barry Gene McCauley in the county court. It was stipulated by the parties that Barry Gene McCauley was born on April 28, 1962. The petition for adoption was filed in the county court of Dawes County on September 28, 1962, or exactly 5 months after the birth of Barry Gene McCauley. The petition for adoption filed in the county court alleged

nothing with reference to abandonment of this minor child, nor did the decree of adoption from the county court say anything about abandonment of this minor child. This was not an issue in the county court.

Referring to section 43-104, R. R. S. 1943, heretofore set forth in part, it provides that the abandonment must be "at least six months next preceding the filing of the adoption petition." It is apparent that this section of the statute was not complied with.

In Tiffany v. Wright, 79 Neb. 10, 112 N. W. 311, this court said: "For the beneficent purpose of providing homes for homeless infants, all of the states of this Union have enacted statutes of adoption, which are of civil and not of common law origin. These statutes are all primarily based upon the consent of the child's parent, or parents, if living and accessible, and the exceptions, which permit adoption without such consent, must clearly come within the provisions of the statutes."

In Fouts v. Carlson, 137 Neb. 402, 289 N. W. 764, this court referred to section 43-102, Comp. St. 1929, which was reenacted substantially as section 43-104, R. R. S. 1943. The court said: "The effect of the foregoing provision is to provide that complete abandonment of a child for a period of six months by the parents will warrant the adoption of such child by a person who has had the lawful custody or control of it for a like period of time without procuring a relinquishment and consent to adoption from the parents. Whether or not there has been an abandonment is a question of fact which must be determined by the evidence. It cannot be questioned that our adoption statute is primarily based on the consent of parents, if living and accessible, and an adoption without such consent must come clearly within the exception contained in the statute."

In the above-cited cases, the fact issue of abandonment was reached because the statutory period of 6 months had expired. It is clearly indicated by the above-cited language appearing in both cases that if the

statutory 6-months period had not elapsed, the abandonment exception to the requirement of consents is not available. On the issue of abandonment, the appellants must fail. The trial court did not commit prejudicial error in excluding the testimony relating to abandonment of the minor child in this case.

The appellants contend that the welfare of Barry Gene McCauley is the paramount consideration in all proceedings involving the adoption of children.

In this connection, the case of Ferguson v. Herr, 64 Neb. 649, 90 N. W. 625, is cited by the appellants. In this case Benjamin F. Ferguson and his wife Hannah, by proceedings before the county court of Richardson County, adopted Willie Duff Martin, a minor child. When he was 21 years of age, he claimed to have inherited the real estate of which his adopted mother died seized, as the sole and only heir-at-law, subject to the right of the surviving husband. On rehearing, 64 Neb. 659, 94 N. W. 542, the sole question presented for determination was whether or not, by virtue of certain adoption proceedings, Willie Duff Martin Ferguson, who had been adopted by the Fergusons, became possessed of the right of inheritance from his adoptive parents, the same as a child born in wedlock. The court said: "As we view them, the stipulations and conditions in the statement of the Fergusons are broad enough to include the right of inheritance, * * *." The welfare of the child was not involved and played no part in the determination of this case.

The appellants cite Milligan v. McLaughlin, 94 Neb. 171, 142 N. W. 675, 46 L. R. A. N. S. 1134. This was a partition action. A question of title arose in the case, the solution of which depended upon whether or not certain proceedings seeking to adopt Clarence Brother McLaughlin in the county court of Custer County were valid and effectual, or, if ineffectual, whether there was a contract of adoption which would be specifically enforced. Martin McLaughlin and his wife, the parents of

the child, filed their signed relinquishment and consent to the adoption. This court said that there was a completed contract for adoption and heirship. There was no mention of the welfare of the child in this case.

The appellants cite Jones v. State, 175 Neb. 711, 123 N. W. 2d 633. This was an action initiated by petitioners in the separate juvenile court of Douglas County, 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. It is true that the welfare of the child is an issue in such a proceeding, but the same rules are not involved in the instant case and are not applicable to an adoption case where the statutory grounds for adoption are lacking. The above-cited cases are not applicable under the circumstances of the instant case.

In the instant case the alleged relinquishments of Barry Gene McCauley by his natural parents were invalid because of their failure to comply with the statutes as heretofore set forth. In addition, according to the statutes there was no abandonment of the minor child, Barry Gene McCauley. Consequently, the evidence relating to the suitability of the natural parents of the minor child, or the suitability of the adoptive parents was not an issue.

In Susko Adoption Case, 363 Pa. 78, 69 A. 2d 132, the court said: "Unlike custody cases, in adoption proceedings the welfare of the child is not material until either consent or abandonment as prescribed by the Adoption Act has been established. 'Under the Adoption Act the welfare of the child is weighed only after the necessary consents have already been given or forfeited. The welfare of the child, as an element in adoption proceedings, has no relation to the question of the parent's abandonment': Schwab Adoption Case, 355 Pa. 534, 50 A. 2d 504."

As stated in Oeth v. Erwin, 6 Ill. App. 2d 18, 126 N. E. 2d 526: "In adoption it is not the duty of the court

to determine if petitioners could best provide for the child. The court must first determine if statutory grounds for adoption exist * * *. Since adoption and custody are two different things, a clear and convincing case must be made to warrant adoption."

In the light of the foregoing cases, the trial court did not err in refusing to receive evidence relating to the welfare of the minor child.

Where there is no designated juvenile court as such, the district courts and county courts have concurrent jurisdiction and may act accordingly upon the evidence which affects the welfare and custody of any minor child under the age of 18 years that comes within the provisions of the statute relating to neglected and dependent children. See § 43-202, R. R. S. 1943.

A further remedy that relates to the custody of infants is by habeas corpus. See, Lung v. Frandsen, 155 Neb. 255, 51 N. W. 2d 623; Barnes v. Morash, 156 Neb. 721, 57 N. W. 2d 783; Osterholt v. Osterholt, 173 Neb. 683, 114 N. W. 2d 734. There are other cases too numerous to cite relating to the custody and welfare of a child wherein such issue was tried in habeas corpus proceedings.

In considering the record, the statutes here involved, and the authorities heretofore cited, we conclude that the judgment of the trial court should be affirmed, except that portion of the decree awarding the custody of the minor child to the natural parents.

AFFIRMED AS MODIFIED.

PAUL V. CASE, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

131 N. W. 2d 191

Filed November 6, 1964. No. 35728.

1. **Burglary.** Section 28-532, R. R. S. 1943, defines one separate and distinct offense of burglary and the gist of the crime so

defined is the willful, malicious, and forcible breaking and entering of any of the structures there named with the intent to commit any of the offenses specified therein.

2. **Criminal Law.** When an offense is not designated by the statute creating it as either a felony or a misdemeanor, the grade of the offense is determined by the maximum punishment authorized by the statute.

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

Paul V. Case, pro se.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, and BROWER, JJ., and DIERKS, District Judge.

BROWER, J.

This is a habeas corpus proceeding commenced by the petitioner Paul V. Case who will be referred to herein as plaintiff, in the district court for Lancaster County, Nebraska, after filing an affidavit to proceed in forma pauperis. The petition alleges the plaintiff is deprived of his liberty and confined in the Nebraska Penal and Correctional Complex at Lincoln, Nebraska.

The trial court held the petition did not state facts sufficient to require the issuance of the writ and dismissed the petition. The plaintiff has appealed from the judgment of dismissal by the trial court.

That which was designated as a petition and is separately signed continues with a statement of facts and an argument which are apparently covered by one verification and intended to be construed together. Inasmuch as the plaintiff appeared without counsel in the trial court and this court and seems totally unfamiliar with legal procedure, they will be so treated here.

It may be stated that the petition and the argument of the plaintiff is itself vague and difficult to follow, probably because he is not a lawyer. We have en-

deavored, however, to ascertain his contentions. The petition first alleges plaintiff is confined by reason of a commitment obtained by fraud by the authorities of Lancaster County, Nebraska. It fails, however, to set out any facts showing such fraud but confines itself to allegations that the statute under which he was convicted and sentenced was ambiguous in its nature and content and therefore unconstitutional.

From the certified copy of the information and commitment attached to the petition, it appears that the petitioner was heretofore charged with the commission of the offense of burglary of a dwelling house under section 28-532, R. R. S. 1943, on April 14, 1963. The information sets forth that plaintiff being the accused therein willfully, maliciously, feloniously, and forcibly broke and entered the dwelling house described with the intent then and there to steal property of value. He was thereafter arraigned, pleaded guilty on April 18, 1963, and was sentenced on May 2, 1963, to imprisonment for a term of 5 years in said penal complex.

Section 28-532, R. R. S. 1943, which the plaintiff contends is unconstitutional, so far as is pertinent here, reads as follows: "Whoever willfully, maliciously and forcibly breaks and enters into any dwelling house, * * * with intent to kill, rob, commit a rape, or commit any felony, or with intent to steal property of any value, shall be punished by imprisonment in the penitentiary not more than ten years nor less than one year, or by a fine not exceeding five hundred dollars, or imprisonment in the jail of the county not exceeding six months."

The plaintiff urges that he is entitled to obtain a discharge from his imprisonment because the sentence was beyond the power of the trial court and because of the statute being unconstitutional for the reasons herein stated.

The assignment of error and argument first asserts section 28-532, R. R. S. 1943, is vague, ambiguous, and

duplicitous in that it sets forth imperfectly and vaguely two crimes and is moveover unconstitutional. The contention seems to be that there are really two offenses stated in this section. The first he states is a felony which includes breaking and entering, "with intent to kill, rob, commit a rape, or commit any felony"; the second, "with intent to steal property of any value," he asserts is a burglary of a misdemeanor grade. Plaintiff argues that the words, "kill, rob, commit a rape, or commit any felony," must of necessity include every felony, and that the remaining portion, "steal property of any value," must refer to stealing property of a small value as it would otherwise be a felony and previously covered by the statute. Therefore this latter portion of the section describes only a misdemeanor. He calls attention also to the great difference in the penalties made applicable by the section, some of which would be generally applied in case of a felony and others for a misdemeanor. From these arguments he contends the statute describes two crimes, one a felony and one a misdemeanor. He contends that being accused in the information of entering the premises "with intent to steal," therefore has relation only to the misdemeanor described and the penalty in such a case is the fine or a sentence in the county jail and not the greater penalty mentioned in the statute under which he was sentenced. Consequently the sentence imposed was excessive, illegal, and void.

It is obvious, however, that section 28-532, R. R. S. 1943, defines one separate and distinct offense of burglary and the gist of the crime so defined is the willful, malicious, and forcible breaking and entering of any of the structures there named with the intent to commit any of the offenses specified therein. There is no merit to the contention that more than one crime is defined.

From the careful study of the remainder of the plaintiff's argument, it appears that he further contends that

if the offense of burglary set out in the section is one offense the statute is still vague, ambiguous, duplicitous, and unconstitutional because the penalty set forth ranges from imprisonment for from 10 to 1 year in the penitentiary to a fine not exceeding $500 or imprisonment in the county jail not exceeding 6 months. Plaintiff argues that the greater penalties set out in the statute are only inflicted for the commission of a felony and that the lesser penalties are applied only for misdemeanors. Therefore if one crime is defined, it is impossible to tell whether that crime is a felony or a misdemeanor. Hence again he insists the statute is vague, ambiguous, illegal, and unconstitutional.

In Carr v. State, 152 Neb. 248, 40 N. W. 2d 677, this court in discussing and disposing of a similar contention said: "The defendant claims invalidity of the statute he was originally charged with violating. § 39-762, R. S. Supp., 1949, § 39-763, R. S. 1943. He says it is 'vague, duplicitous and illegal' for the reason that it defines the offense of leaving the scene of an accident as a felony and a misdemeanor. The objection is untenable. When an offense is not designated by the statute creating it as either a felony or a misdemeanor, the grade of the offense is determined by the maximum punishment authorized by the statute. Rains v. State, 142 Neb. 284, 5 N. W. 2d 887."

We conclude that section 28-532, R. R. S. 1943, in defining burglary sets forth one separate and distinct crime and that the offense defined therein is a felony. That the crime stated is neither vague, duplicitous, or unconstitutional, and that the various contentions of the plaintiff are without merit.

It follows that the petition of the plaintiff failed to state a cause of action authorizing a writ of habeas corpus to issue. The judgment of the trial court in dismissing the plaintiff's petition was proper and should be and is affirmed.

AFFIRMED.

DONALD UZENDOSKI, APPELLANT AND CROSS-APPELLEE, V. CITY OF FULLERTON, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

131 N. W. 2d 193

Filed November 6, 1964. No. 35873.

1. **Workmen's Compensation.** In order to recover under the Workmen's Compensation Act the plaintiff must prove that the death or disability of the workman was the result of an accident arising out of and in the course of the employment.
2. ———. The term "arising out of" the employment in the Workmen's Compensation Act covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including matters of personal convenience and comfort, not in conflict with rules and specific instructions, in which an employee may normally be expected to indulge under the conditions of his work, are regarded as being within the scope or sphere of the employment.
3. ———. Temporary disability within the meaning of section 48-121, R. R. S. 1943, is the period the injured employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident.
4. ———. The extent of the permanent disability is not finally determinable within the meaning of section 48-121, R. R. S. 1943, until the employee is restored insofar as the nature of his injuries will permit. An injured employee is entitled to temporary disability compensation until this determination can be made.
5. ———. Where the evidence shows that an employee is under medical treatment, is convalescing, is suffering from the injury, and is unable to work, with a reasonable expectation of substantial improvement, the extent of permanent disability is not finally determinable, and an award of benefits for permanent disability is not sustained by the evidence.

Appeal from the district court for Nance County: ROBERT D. FLORY, Judge. Reversed and remanded with directions.

Philip T. Morgan, for appellant.

Walter P. Lauritsen, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ., and DIERKS, District Judge.

CARTER, J.

The plaintiff, Donald Uzendoski, brought this action against the city of Fullerton to recover benefits alleged to be due under the Nebraska Workmen's Compensation Act. The district court for Nance County affirmed an award of the compensation court granting the plaintiff the sum of $30.77 per week from July 9, 1962, for 32-4/7 weeks as temporary total disability, and thereafter $30.77 per week for 21½ weeks for 10 percent permanent partial disability to plaintiff's left leg. Certain enumerated medical and hospital expenses were ordered paid about which there is no dispute if liability exists. The plaintiff has appealed. The defendant has cross-appealed, asserting that the injury to the plaintiff did not arise out of and in the course of his employment and that the trial court was in error in not so holding.

The evidence shows that on July 7, 1962, the date of the accident, plaintiff was employed by the city as a lifeguard at the city's municipal swimming pool. Plaintiff was compensated at the rate of $200 per month. The duties of the position were to protect swimmers against injury, to keep the pool clean, and to perform such other minor duties as were incidental to the operation of the swimming pool. Plaintiff's assigned hours were from 1 p.m. to 5 p.m. and 6:30 p.m. to 9 p.m., 7 days a week. The record shows that two lifeguards were employed and that each was permitted to be absent from work on alternate nights. There is evidence in the record that the lifeguards were permitted to swim in the pool when the occupancy of the pool was light, usually after 4 o'clock in the afternoon. The manager of the pool testified that this was the usual practice permitted and followed. There is also evidence that plaintiff was expected to give swimming, diving, and lifesaving lessons to swimmers in the forenoon without additional pay and without charge to the pupil.

On July 7, 1962, plaintiff came to work about 1 o'clock and, there being only a few persons in the pool, he

engaged in practicing diving from the high springboard which was 10 feet above the water. Twenty or thirty minutes later, in making a Gainer dive, he went into the water feet first and struck the bottom of the pool with the bottoms of his feet. The sensation was as if he had sprained his ankles. He continued work that day and the next, and on the day following was advised by the manager to see a doctor, which he did.

It is the contention of defendant, raised on cross-appeal, that the accident did not arise out of and in the course of the employment. The terms "arising out of" and "in the course of the employment" are used conjunctively and both conditions must be established. In the instant case the plaintiff was on the premises within his assigned hours of work when the accident occurred. He was in the course of his employment. The issue is whether or not the accident arose out of the employment. The words "arising out of" the employment refer to the origin or cause of the accident and are descriptive of its character. Appleby v. Great Western Sugar Co., Inc., 176 Neb. 102, 125 N. W. 2d 103.

It is argued by the defendant that plaintiff's assigned duties did not require him to be on the springboard and that he was not at the station where he was assigned, and was therefore outside the employment. On the other hand he was on the premises where he was required to be. He was permitted to use the pool while on duty and was not violating any rule or instruction of the employer. He was not, however, performing the precise work of his employment at the time of the accident. The act of diving into the pool was reasonably incident to the employment in that it was a matter of personal convenience immedately connected with his work. The case is similar in principle to Appleby v. Great Western Sugar Co., Inc., *supra,* and is controlled by that case wherein it is said: "The term arising out of the employment in the Workmen's Compensation Act covers all risks of accident from causative acts done or

occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment." We think, under all the circumstances shown, that plaintiff was on the springboard for a purpose that was reasonably incidental to his work, and that the accident arose out of his employment.

Plaintiff went to Dr. James C. Maly, a local physician. Dr. Maly testified that he was the family doctor for the Uzendoski family. He testified that this 18-year-old boy had suffered some minor injuries, including ankle sprains, while playing football in high school, from which he had fully recovered. Dr. Maly obtained a history of the case from the plaintiff, which was the same as testified to by the plaintiff on the trial. Dr. Maly X-rayed plaintiff's ankles and found no evidence of bone fracture. He made a physical examination, bandaged plaintiff's ankles, and placed him on crutches. After 2 weeks plaintiff had made no improvement and he was referred to Dr. House, an orthopedist at Grand Island. He was informed by Dr. House that the latter felt plaintiff had a cartilaginous fracture and recommended that casts be put on the ankles to limit mobility. This was done by placing a walking-cast on the left leg for 4 weeks and an ordinary cast on the right leg for 5 weeks. When the casts were removed plaintiff's legs were still painful and swollen. Dr. Maly checked for evidence of rheumatic fever and rheumatoid arthritis and gout, and other diseases. He at first diagnosed the condition as arthritic gout, but, after nonresponsive treatment, withdrew this diagnosis. He finally diagnosed the condition as Sudek's atrophy, which is a reflex atrophy, highly sympathetic, and sympathetic dys-

trophy, which affect the nerves, muscles, arteries, bones, and the circulatory system.

Plaintiff desired to attend Creighton University in Omaha and, as a matter of convenience, plaintiff was referred to Dr. Richard J. Fangman of Omaha. Dr. Maly testified that Dr. Fangman recommended a lumbar sympathectomy, which was performed by Dr. Jerome Murphy of Omaha, the surgery being a nerve-clipping operation to alleviate the distrophy and produce better circulation in the leg. The left leg improved substantially after the operation. A similar operation was not performed to benefit the right leg because of resulting general health considerations. Circulation improved in the left leg, but the right leg remained cold, moist, and sweaty, all constituting evidence of dystrophy. Dr. Maly adhered to his diagnosis of Sudek's atrophy and gave it as his opinion that the permanent disability to the right leg is 40 percent and to the left leg, 30 percent.

Dr. Fangman testified that he first saw plaintiff on October 12, 1962, and had seen him 26 times thereafter, the last time, 2 days before the hearing. He also diagnosed plaintiff's condition as sympathetic dystrophy. He testified that there was substantial improvement in the left leg after the sympathectomy was performed. He stated that there was a substantial atrophy of the muscles and the bone structures of the feet; and that there was a decalcification of the bones observable by X-ray. He testified that a secondary diagnosis was hyperuricemia without clinical gouty arthritis and that the possibility exists that a clinical gouty arthritis may develop in the future which would be the result of the trauma. He called attention to the physical condition of the plaintiff who weighed a healthy 175 pounds before the accident and on October 12th, following, weighed but 135 pounds. He gave it as his opinion that plaintiff had suffered a permanent partial disability which he estimated at 50 percent to the right leg and 40 percent to the left leg.

The defendant offered the evidence of two physicians, Dr. Frank J. Iwersen and Dr. Harold A. Ladwig, both of Omaha. Dr. Iwersen is an orthopedic surgeon. He examined the plaintiff on March 29, 1963. He obtained substantially the same history as Drs. Maly and Fangman. He described the plaintiff as 19 years of age, 5 feet 10½ inches in height, and weighing 150 pounds at that time. He observed a marked atrophy of the left quadriceps, it being ¾ inch smaller in circumference than the right. There was weakness in the left knee, the plaintiff being unable to squat and rise without assistance because of such weakness. He observed the scars of the sympathectomy and found no evidence of circulatory disturbance at that time. He found a 25 degree plantar flexion of the left foot and 10 degrees of dorsiflexion of the left foot. The muscles of the right foot were normal, but the right foot was moist and clammy, while the left foot and leg were dry. There was a 25 degree plantar flexion of the right foot and 8 degrees of dorsiflexion. The calves of the legs showed no atrophy. He found no evidence of bone atrophy. He diagnosed the condition as post-traumatic reflex dystrophy of the lower extremities. It is his opinion that the atrophy could be eliminated by special physical exercise and therapy. He testified that when the recalcification of the bones once commenced, it was progressive and would not recede. The plaintiff informed him that he had a gouty arthritis, but he did not look for, or find, any evidence of it. He gave no evidence as to permanent disability, or percentage thereof, for the reason that much improvement was possible and maximum rehabilitation had not been reached.

Dr. Ladwig specialized in neurology. He examined the plaintiff on September 23, 1963, without the aid of X-rays. He found plaintiff's hands and right foot cold and moist. The left foot was warm and dry. He found the circulation in the feet to be good, the feet being pink in color with no abnormal skin effects. He diagnosed the

condition as a reflex type of dystrophy involving the lower extremities. It is the opinion of Dr. Ladwig that the only permanent partial disability is the residual result of the sympathectomy which is less than 10 percent. It is the evidence of Dr. Ladwig that the muscular atrophy can be corrected by proper physical exercises and other forms of therapy. It is his opinion also that the atrophy of the bones will be corrected by natural regeneration, progress in this direction having once commenced. It is his conclusion therefore that the only partial permanent disability in this case is the residual effect of the sympathectomy.

We have reviewed the evidence of the medical experts with some care because of the differences in professional opinions expressed by them. The case is tried in this court de novo, which requires this court to determine the weight of the evidence. We are fully aware that the number of witnesses does not necessarily determine where the weight of the proof lies. The compensation court accepted the evidence of Dr. Ladwig in preference to that of Dr. Maly and Dr. Fangman. It appears necessary to examine into the foundations supporting their expert opinions.

A review of the medical testimony reveals certain points of divergence and agreement which should be pointed out. There is some evidence in this record that plaintiff was afflicted with gout or a gouty arthritis. All the doctors testify that this disease is not caused by trauma; that it is a metabolic disorder not produced by physical injury. Dr. Maly first was of the opinion that plaintiff suffered from gout or a gouty arthritis but abandoned that diagnosis when plaintiff failed to respond to medication. No other doctor found any evidence of this disease. They all agree that reflex dystrophy, often referred to as Sudek's atrophy, is caused by trauma.

Dr. Ladwig and Dr. Iwersen were of the opinion that special physical exercise was necessary to proper treat-

ment. Dr. Maly and Dr. Fangman were of the opposite opinion. The plaintiff being in the care of the latter doctors followed their advice and abstained from all forms of exercise that he could avoid. It is quite evident that if Dr. Ladwig's conclusion is correct the sympathectomy, the nerve-clipping operation on the left side of the back, was a useless operation. When asked about that, his reply was: "As is true in the field of law, there is always room for difference among physicians." Incidental to this point, all of the medical experts are recognized by each other as competent, experienced physicians. All of the physicians appear to agree that the condition was a reflex dystrophy, although Dr. Ladwig found no evidence of it when he examined the plaintiff on September 23, 1963. They are in disagreement as to the use of physical exercise as a part of the treatment. All concede that there was a muscular atrophy of the left quadriceps. All agree that the plaintiff was disabled at the date of trial on January 23, 1964.

After a consideration of all the evidence, we come to the following conclusions: The plaintiff was a young man of 18 years at the time of his injury. He weighed approximately 175 pounds at that time and his weight was reduced to 135 pounds during treatment. He has suffered pain and swelling of the ankles almost constantly from the date of the accident to the time of trial. He has constantly been under the care of competent doctors. He has been hospitalized, he has had his lower extremities in casts, he has used crutches, and he has been subjected to a sympathectomy. As a result of the latter his left leg has shown substantial improvement. He has been unable to work physically for more than 3 or 4 hours at a time. He has pursued a course of instruction at Creighton University to fit himself for the medical profession. He has required long periods of rest and was required to reduce the number of hours of college work. He has complied with the directions of his

doctors and at the time of trial, more than 17 months later, he was still disabled.

Drs. Ladwig and Iwersen testified that physical exercise would alleviate the muscular atrophy, but it has not been done and remains a matter of opinion. Dr. Ladwig also stated that the bone atrophy could have been caused by casts placed on plaintiff's lower limbs or by mere disuse. Plaintiff's doctors state that the recovery of the muscular and bone atrophy is conjectural; and that in some persons natural regeneration will occur, and in others it will not. The improvement in the left leg after the sympathectomy is indicative to us of the seriousness of plaintiff's condition. The testimony of Drs. Maly and Fangman, in whose care the plaintiff has been for more than 17 months, showing continued weakness in the left knee and the continued muscular, bone, and circulatory weaknesses, leads us to the conclusion that plaintiff was partially disabled at the time of trial. That there is a probability of further substantial recovery is testified to by Drs. Ladwig, Iwersen, and Maly.

We think the evidence warrants a finding that the rehabilitation of this plaintiff is so incomplete that a determination of the partial permanent disability could not properly be made at the time of the trial. We find that the award for partial permanent disability is not supported by the evidence and such award is reversed.

It is provided by subsection (3) of section 48-121, R. R. S. 1943, that compensation for temporary disability shall cease as soon as the extent of the permanent disability is ascertained. This means that temporary disability should be paid to the time when it becomes apparent that the employee will get no better or no worse because of the injury. Under the evidence in this record the extent of the permanent injury is not ascertainable. Consequently, an award for such is not sustained by the evidence.

The plaintiff was still under treatment at the time of

the trial, he is still convalescing, he is still suffering from the injury, and he is still unable to work because of the accident. The situation is controlled by Allen v. Department of Roads & Irrigation, 149 Neb. 837, 32 N. W. 2d 740, wherein we said: "We are of the opinion that the phrase 'compensation for temporary disability shall cease as soon as the extent of the permanent disability is ascertained' means that temporary disability shall end when the condition becomes fixed. This simply means that in the present case temporary disability should be paid to the time when it becomes apparent that the arm will get no better or no worse because of the injury. Temporary disability contemplates the period the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident. Temporary disability ordinarily continues until the employee is restored so far as the permanent character of his injuries will permit."

We reverse the judgment of the district court and remand the cause with directions to reverse the award of the compensation court with instructions to that court to vacate its award and enter a further award for temporary disability and, when temporary disability ceases, to hold a further hearing to determine the permanent disability, if any, due the plaintiff under the Nebraska Workmen's Compensation Act.

REVERSED AND REMANDED WITH DIRECTIONS.

FREDERIC BECK, APPELLEE, V. HARRY TRUSTIN, APPELLANT.

131 N. W. 2d 425

Filed November 20, 1964. No. 35704.

1. **Trial.** In every case, before the evidence is submitted to the jury there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence but whether there is any upon which a jury could prop-

erly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

2. ———. A motion for a directed verdict, or for judgment notwithstanding the verdict, admits, for the purpose of decision on the motion, the truth of the material and relevant evidence of the party against whom the motion is directed, and he is entitled to have every uncontroverted fact found in his favor, and to have the benefit of every inference deducible from the evidence.
3. **Negligence: Trial.** When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury.
4. **Negligence.** Negligence, to be actionable, must be the proximate cause of the injury.
5. **Automobiles: Negligence.** The failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger or to misjudge its speed does not ordinarily constitute contributory negligence as a matter of law.
6. ———: ———. Whether a party failed to look or looked and failed to see a motor vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching motor vehicle was within the limit of danger that reasonable minds could not differ thereon.
7. **Trial.** It is the duty of the trial court to fully instruct the jury upon the theory of a party to an action if that theory finds support in the evidence.
8. **Automobiles.** The headlights of motor vehicles shall be so constructed, arranged, and adjusted that they will, under normal atmospheric conditions and on a level road, produce a driving light sufficient to render clearly discernible a person 200 feet ahead, but shall not project a glaring or dazzling light to persons in front of such headlights.

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

Herbert E. Story and Robert C. Oberbillig, for appellant.

Schrempp, Lathrop & Rosenthal, for appellee.

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

SPENCER, J.

This is an action for damages brought in the district court for Douglas County, Nebraska, by Frederic Beck, plaintiff and appellee, hereinafter referred to as plaintiff, against Harry Trustin, defendant and appellant, hereinafter referred to as defendant, for injuries sustained because of the negligence of the defendant when his automobile collided with the plaintiff, a pedestrian.

The cause was tried to a jury and a verdict was returned for the plaintiff. Defendant filed a motion for judgment notwithstanding the verdict, and for a new trial. This motion was overruled and the defendant perfected his appeal to this court.

We detail only sufficient of the facts necessary to an understanding of the questions involved. At approximately 5:45 p.m. on November 22, 1961, plaintiff, who had alighted from a city bus at the corner of Nicholas Street and Happy Hollow Boulevard, was walking in an easterly direction on the south side of Nicholas Street toward his home, which is located east of the intersection of Fifty-second and Nicholas Streets. Plaintiff at that time was wearing a blue and white checked overcoat and no hat. The defendant at the time of the collision was driving his automobile south on Fifty-second Street on his way to his home, which is located south of Dodge Street. He had come off the boulevard and turned south of Fifty-second Street at Western Avenue, which he estimates to be 220 or 230 feet north of Nicholas Street.

Plaintiff testified that when he reached the southwest corner of Fifty-second and Nicholas Streets, he looked to the north to see if there were any cars coming. He saw the lights at the Fifty-second Street and Western Avenue intersection, but saw no cars in the block which were coming his way. He did not hesitate or break his pace but kept right on walking. He stepped off the curb and then looked to the south and saw a car coming but judged it to be far enough away to permit him to cross safely. He then testified: "Q. Then just

tell the ladies and gentlemen of the jury what happened from that point on, sir. A. Well, I kept walking across the street at a normal pace; and as I neared the center of 52nd Street, I started turning to look to the north. I saw out of the corner of my eye some lights of a car; and then before I could do anything, I was struck. The car came so fast that there wasn't anything I could do to get away from it." At that time he testified he was about 1½ feet from the center of the intersection in what would be the crosswalk through the intersection connecting the east and west sidewalk on the south side of Nicholas Street. The sidewalk area was 10 feet south of the street.

The defendant testified that it was a "murky dark" evening and he had his lights on as he approached the Fifty-second and Nicholas Streets intersection. There were some lights shining and he realized it was a car approaching but paid no attention to it. His testimony is as follows: "Q. And tell us now just what happened as you came up to that intersection. A. Well, as I say, it was murky and I was—as I say, I was traveling 20 to 25 miles per hour. When I got to the intersection, right into the intersection, I saw a figure. Well, to me it looked like he leaped, and I immediately slammed my brakes on and pushed my horn at the same time—both feet because I wanted to stop that car—and I struck this man just about at the sidewalk that crosses to the east and west on the south side of Nicholas. Q. And what happened to your car then? A. Well, I must have slid 10 or 15 feet, but my car was absolutely dead when I hit him. Just as I hit him it stopped right there. I jumped out around, and I—naturally I gathered the fellow up in my arms, and I realized I didn't dare to move him because I didn't know what had happened. * * * Q. Well, did you see him when he was on the curb? A. No. You see, he seemed to have leaped. I don't know whether he was running, I didn't see him come there; but as he came off that curb, he seemed to have

leaped across that—off that curb; so I didn't see him at all until he was right in the middle of those lights. And he seemed to be not on the ground, you see. What I mean, in other words, his feet were off the ground."

An investigating officer who was called to the scene testified there were 32 feet of skid marks behind the car, which had passed through the intersection so that the rear end covered the south crosswalk. He testified the car was 20 feet in length and that he found the plaintiff in the street 30 feet south of the crosswalk. An eyewitness testified that after being struck, the plaintiff came to rest approximately 10 feet in front of the car. The officer, who testified that he recognized the defendant, who was the president of the Omaha city council, took no pictures although he had a camera with him, and made no drawing to scale at the scene of the accident. He also testified that he examined the headlights of the defendant's car and they were clear.

The driver of a car approaching from the south proceeding north observed the plaintiff when he was leaving the curb in the crosswalk and at that time this witness was at least 100 feet south of the crosswalk. He testified the plaintiff was walking at a normal pace across the intersection. When the plaintiff stepped into the street, he could not see exactly where the defendant's car was, but then placed it north of Nicholas Street and not quite to the intersection. He saw the defendant's car strike the plaintiff. The left front headlight of the car struck the plaintiff, who was almost to the center of the street. He looked at the headlights of the car after the impact, and in his estimation they were foggy, and he could have called the police officer's attention to them but didn't remember. He did not hear any horn sounded before the impact. This witness testified that after the impact he heard the plaintiff tell the defendant that he did not look where he was going.

Defendant alleges nine assignments of error. Assignments Nos. 1 and 2 involve the overruling of motions for

directed verdict made during the course of the trial; No. 3 involves the overruling of the motion for new trial; and No. 4 involves the overruling of defendant's motion for judgment notwithstanding the verdict. These are all related and will be covered by the general discussion. Assignments Nos 5, 6, 7, and 8 complain of the giving of instructions Nos. 2, 5, 10, and 11 respectively. Assignment No. 9 involves instructing on charges of negligence, which were stricken from the plaintiff's petition upon the motion of the defendant, and is included in the objection to the trial court's instruction No. 5.

In every case, before the evidence is submitted to the jury there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. See Hickman v. Parks Construction Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040.

A motion for a directed verdict, or for judgment notwithstanding the verdict, admits, for the purpose of decision on the motion, the truth of the material and relevant evidence of the party against whom the motion is directed, and he is entitled to have every uncontroverted fact found in his favor, and to have the benefit of every inference deducible from the evidence. See Palmer v. McDonald, 171 Neb. 727, 107 N. W. 2d 655.

When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury. Buie v. Beamsley, 171 Neb. 181, 105 N. W. 2d 738.

The defendant seriously contends that he was not guilty of any act of negligence which was the proximate cause of the injury. We said in Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531, 82 A. L. R. 2d 714, negligence, to be actionable, must be the proximate cause of the injury. We do not agree with defendant's conclu-

sion. As will be pointed out hereinafter, there was ample evidence from which the jury could find that the negligence of the defendant was the proximate cause of the injury to the plaintiff.

Defendant further argues that the plaintiff was guilty of contributory negligence more than slight as compared with any negligence proved against the defendant, and specifically contends that plaintiff's negligence was in failing to see the automobile of the defendant; in leaving a place of safety and placing himself in the path of the approaching automobile; and in exposing himself to an obvious danger which would have been apparent to him if he had looked.

We consider first whether the plaintiff was guilty of negligence more than slight in comparison with the negligence of the defendant. It is defendant's contention that plaintiff did not look to the north before entering the street. The plaintiff's testimony is unequivocal that he did. It is true he made statements on the day of the accident which tend to question his testimony, but this merely made it a jury question, and the jury must have accepted the plaintiff's version. The defendant further contends that the evidence is undisputed that the plaintiff did not look to the north after he had entered the intersection until he had proceeded almost to the center of the intersection where he was struck by the defendant's car. Is this negligence more than slight as a matter of law when compared with the negligence of the defendant? We determine under the facts in this case that it is not.

Section 35.16.010, city traffic code of the Omaha city ordinances, provides in part: " 'a) The driver of any vehicle shall yield the right of way to a pedestrian crossing the street within any marked crosswalk or within any unmarked crosswalk at the end of a block, * * *.' * * * 'h) Notwithstanding the provisions of this section every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon a roadway,

and shall give warning by sounding the horn when necessary.' "

The provisions of "a" above are substantially the same as those of section 39-751, R. S. Supp., 1963, covering the rights of pedestrians at intersection crossings. The evidence of the only disinterested witness places the defendant's automobile north of the intersection when the plaintiff stepped off the curb. Certainly the jury, under the evidence, could find that plaintiff was in the crosswalk and had the right-of-way when the defendant entered the intersection.

Defendant argues that the factual situation in Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144, is similar to the case at bar, and the rules therein enunciated are controlling. We do not accept the defendant's premise that the facts are similar. That case involved a streetcar and a pedestrian. The streetcar, which was going 7 to 10 miles an hour, stopped 46 feet from the east crosswalk which plaintiff was supposed to be crossing. Disinterested witnesses testified that the plaintiff was walking in a diagonal direction from northeast to southwest.

Defendant also calls our attention to Nichols v. McArdle, 170 Neb. 382, 102 N. W. 2d 848, and Wolstenholm v. Kaliff, 176 Neb. 358, 126 N. W. 2d 178, both of which involved the collision of vehicles in intersections. They are not applicable herein because in the instant case the plaintiff, a pedestrian, under the facts as we are required to view them, clearly had the right-of-way. The question here is whether plaintiff can be charged with negligence as a matter of law because he did not waive his right-of-way. This is inherent in the defendant's contention that the plaintiff had a duty to look and to see the defendant's car, which defendant contends had to be in plain sight.

Defendant relies on Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531, 82 A. L. R. 2d 714, and Palmer v. McDonald, 171 Neb. 727, 107 N. W. 2d 655, which were

pedestrian cases. In both of those cases, we held that the plaintiff, in stepping in front of an oncoming car, was contributorially negligent as a matter of law. In both of those cases, however, an attempt was made to cross a street at an area between intersections and not in a crosswalk provided for the purpose of crossing. Those cases are controlled by Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436, which has no application herein.

The facts in the instant case bear more resemblance to those in Buie v. Beamsley, 171 Neb. 181, 105 N. W. 2d 738, than to those in the cases cited by the defendant. Both the Buie case and the instant one involve a pedestrian in a crosswalk. Plaintiff in that case turned when she heard the brakes of the truck applied. She testified she could have stopped at any time before she reached the north driving lane. The trial court on that testimony directed a verdict against the plaintiff. We reversed the judgment and remanded the cause because the question of contributory negligence was one for the jury where the plaintiff had the right-of-way but may not have acted as the ordinarily prudent person.

As pointed out in Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 125 N. W. 2d 556, before a verdict can be directed against a motorist for failing to see an approaching vehicle at a nonprotected intersection, the position of the approaching vehicle must be undisputedly located in a favored position. Certainly, a pedestrian with a right-of-way is in a much stronger position, and if his right-of-way is to be protected, we cannot permit the failure to see an approaching car or a misjudgment as to its speed to be the sole criteria. The failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger or to misjudge its speed does not ordinarily constitute contributory negligence as a matter of law. It is no more than evidence from which a jury may find contributory negligence.

In Cawthra v. Shackelford, 176 Neb. 147, 125 N. W. 2d 186, a case involving a collision between an automo-

bile and a tractor, we held: "Whether a party failed to look or looked and failed to see a motor vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching motor vehicle was within the limit of danger that reasonable minds could not differ thereon." As we view the evidence, the exception has no application herein.

In the light in which we are required to view the evidence herein, it is apparent that the plaintiff had entered the intersection at a time when the defendant's car was still north of the intersection and at a time when the defendant should have seen the approach of the plaintiff. The plaintiff had proceeded at least 10 feet into the intersection before he was struck by the left front of the defendant's car, and the only disinterested witness said plaintiff was walking normally. There was a skid mark behind the car 32 feet in length. The car was 20 feet in length, and it did not stop until after it had completely crossed the crosswalk plaintiff was using, so that the rear end of the car was approximately even with the north side of the crosswalk. The plaintiff was propelled 10 feet in front of the car and was found in the street. There was no estimate of speed other than that of the defendant that he was driving 20 or 25 miles an hour. The plaintiff's testimony that defendant's car came so fast that plaintiff "could not do anything," and the physical facts, could readily indicate a speed in excess of that figure. Assuming, however, defendant was traveling 20 miles an hour, he would be traveling approximately 30 feet a second. In the time it took plaintiff to reach the center of the intersection, the jury could find the car would travel a minimum of 100 feet. This would place the car well out of the intersection and out of the limit of danger when plaintiff left the curb.

If the plaintiff had looked to the north after he left the curb, he undoubtedly would have seen the defendant's car approaching. This, however, would not have

changed the situation because even if he had seen the defendant's car, he could have assumed that defendant would respect his right-of-way until there was something to indicate otherwise. The trial court concluded that any negligence on the part of the plaintiff was not of that comparative degree which, as a matter of law, would defeat his recovery, and submitted the issue of contributory negligence to the jury under proper instructions. Defendant could expect no more. As we view the evidence, at most it could only raise a question as to the degree of plaintiff's contributory negligence, if any.

Defendant argues that there was no evidence that he could have stopped before the collision or have turned out to avoid it. As we view the record, plaintiff had the right-of-way. It was the defendant's duty to respect that right-of-way. Defendant suggests in his brief that the reason he did not see the plaintiff was that the plaintiff came up from the side and was not directly in front of the defendant's automobile. We fail to see how this can possibly excuse him. Any pedestrian using a crosswalk will come from the side unless he stands in the path of the approaching car. Defendant contends that his headlights were clear and cast a beam for several hundred feet, although there is evidence from which the jury might have believed otherwise. In any event, the headlights on defendant's automobile should have lighted the entire intersection as he approached, and should have included the sidewalk and the curb. The driver of a car approaching from the direction toward which the defendant was driving observed the plaintiff step off the curb when his own car was at least 100 feet away from the crosswalk.

It is the defendant's contention that the plaintiff was hurrying through the intersection and leaped into the path of his car. Defendant also argues that plaintiff did not leave the curb until defendant reached the intersection and at a time when the defendant's car was not more than 35 feet away from the crosswalk. The

jury did not see fit to accept the defendant's evidence. If, as the evidence of plaintiff and the disinterested witness would indicate, the plaintiff was walking normally through the intersection, it would have been impossible under the physical facts for the accident to have happened if the defendant was 35 feet from the crosswalk when the plaintiff stepped off the curb.

The defendant is a man 70 years of age. The record indicates that he had some eye difficulty involving the removal of cataracts, and that he was required to wear contact lenses. While there was no satisfactory evidence adduced which would indicate that the defendant could not see peripheral objects, that inference might be drawn from the fact that the defendant should have seen the approach of the plaintiff if he had been properly observing the intersection.

Instruction No. 2 was the trial court's résumé of the allegations of plaintiff's petition. Defendant takes particular exception to the following specifications of negligence: "2. In failing to have his automobile under reasonable control. 3. In failing to keep a proper lookout. 4. In failing to observe the plaintiff in time to stop or turn aside in order to avoid colliding with him. 5. In failing to operate his vehicle in such a manner as to be able to stop to avoid a collision with an object within the area lighted by his headlights."

The discussion heretofore clearly demonstrates that reasonable control and proper lookout were clearly within the issues to be submitted to the jury, and no further discussion is necessary.

The third specification objected to, being "4" above, had been stricken from the plaintiff's petition on motion. However, under the evidence adduced without objection, it was not an improper specification of negligence. It is the duty of the trial court to fully instruct the jury upon the theory of a party to an action if that theory finds support in the evidence. Gain v. Drennen, 160 Neb. 263, 69 N. W. 2d 916.

The fourth specification, being "5" above, commonly referred to as the assured clear distance rule, which also had been stricken from the plaintiff's petition on motion, is also contested by the defendant on the theory that the plaintiff moved into the lighted area from the side and the defendant was not required to stop. Where this argument has not been answered by the observations on right-of-way, it will be covered in the discussion on instructions Nos. 10 and 11.

Instruction No. 5 was the burden of proof instruction. Defendant's objection goes to the fact that two specifications of negligence given in instruction No. 2, and referred to above, had previously been stricken from the petition on motion. There was evidence adduced to support the specifications given. Their inclusion in the instructions could not constitute prejudicial error. We find no merit in the defendant's contention.

Instruction No. 10 covered reasonable control and proper lookout, and included the following: "The driver of a motor vehicle must keep such a lookout in the direction of travel that he can see a person or vehicle as soon as it is illuminated by his headlights and it is his duty to have his automobile under such control, under the driving conditions existing, that he can stop it in time to avoid a collision with any object in the area lighted by his headlights."

Under the provisions of section 39-780, R. R. S. 1943, the defendant's headlights should have lighted the area of the intersection when he was 200 feet north of it. This would be immediately after he turned into Fifty-second Street. Under the physical facts herein, the point where the impact occurred in the intersection, and the fact that the defendant was traveling a minimum of 20 to 25 miles an hour, the plaintiff could have been in the intersection when the defendant was at least 100 feet north of the crosswalk, unless the defendant's version that the plaintiff was leaping or hurrying through the intersection is accepted as true. Instruction No. 10

was a proper instruction under the evidence adduced in this case.

Defendant objects to the following portion of instruction No. 11: " 'The headlamps of motor vehicles shall be so constructed, arranged and adjusted that * * * they will under normal atmospheric conditions and on a level road, produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but shall not project a glaring or dazzling light to persons in front of such headlamp.' " This is the applicable portion of section 39-780, R. R. S. 1943.

Defendant argues that there was no evidence that his headlights were in any way defective or contributed in any way to the occurrence of the accident. There was testimony his lights were foggy, whatever that implies. The law requires a driving light sufficient to render a pedestrian 200 feet away clearly discernible. It was the defendant's testimony that his lights were clear and cast a beam for several hundred feet. That being the situation, we must assume that he could see a person in or near the crosswalk when he was 200 feet back. Under the evidence adduced, a question was clearly presented whether defendant should have seen the plaintiff before he entered the intersection.

The defendant argues the plaintiff approached at a right angle to the path of travel of his automobile. This does not change the situation. The jury could properly find that the defendant's failure to make proper observation was the proximate cause of the accident.

It is apparent that the jury did not accept defendant's version that the plaintiff was hurrying or leaping through the intersection. Consequently, this is not a case where a plaintiff suddenly moves into the path of a vehicle followed by almost instantaneous collision. It is equally evident that the jury could reasonably have determined that the plaintiff was at the curb or entering the intersection at the time defendant was at least 100 feet north, depending on the speed of his car. Instruction No. 11

was proper under the facts in this case. We do not agree that this instruction placed an unfair burden on the defendant.

We find no errors in any of the instructions complained of, and, viewing the instructions as a whole, conclude they properly covered the issues and the evidence adduced herein.

For the reasons given, we find no error prejudicial to the defendant in the manner in which the issues were submitted to the jury, and find that the motion for a new trial or for a judgment notwithstanding the verdict was properly overruled. The judgment herein should be and hereby is affirmed.

AFFIRMED.

IN RE APPLICATION OF UNITED MINERAL PRODUCTS COMPANY.

UNITED MINERAL PRODUCTS COMPANY, APPELLANT, V. NEBRASKA RAILROADS OF WESTERN TRUNK LINES COMMITTEE, APPELLEE.

131 N. W. 2d 388

Filed November 20, 1964. No. 35727.

1. **Statutes.** The repeal of a statute affects in no manner a pending action founded thereon nor a cause of action that accrued prior to any such repeal, except as may be provided for in the repealing statute.
2. **Public Service Commissions: Carriers.** By statute the Nebraska State Railway Commission, except as to joint rates, is required to fix classifications of rates and charges for the transportation of freight, passengers, and cars over any railway or by any common carrier in this state, and shall give to the railroad or common carriers to be affected thereby 10 days' notice of the time and place when and where the rates will be fixed, at which time the railway company or common carriers shall be entitled to be heard.
3. ———: ———. An attack upon any such rate is required to come after its establishment and notice, and not prior thereto.
4. ———: ———. As to joint rates it is the duty of railway

companies and common carriers doing business in this state to establish reasonable joint line rates.

5. ———: ———. If common carriers fail to establish reasonable joint line rates it becomes the duty of the Nebraska State Railway Commission, on its own motion or on the application of some one interested, to establish reasonable joint line rates by original fixation or by change and revision.

6. ———: ———. This establishment or fixation on motion of the commission or on behalf of interested parties requires 10 days' notice to the carriers involved and a hearing, and notice and a grant of hearing to interested parties making complaint.

7. ———: ———. The validity of rates which common carriers may exact depends upon whether or not there has been a compliance with the statutory procedures.

8. ———: ———. A rate once established continues to be the legal rate until legally canceled, and subsequent tariffs naming new rates cannot carry the new rate into lawful effect.

9. ———: ———. Joint rates may not be canceled or modified except upon hearing and with notice to all parties affected thereby.

10. ———: ———. In an instance where there is a failure of the Nebraska State Railway Commission to comply with the statutory procedures in the establishment of a joint line rate, its findings are void and of no effect.

Appeal from the Nebraska State Railway Commission. Reversed.

Nelson, Harding & Acklie and Richard A. Peterson, for appellant.

Mason, Knudsen, Berkheimer & Endacott, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, BOSLAUGH, and BROWER, JJ., and DIERKS, District Judge.

YEAGER, J.

This action, as originally instituted, is one in which United Mineral Products Company, a corporation of Weeping Water, Nebraska, designated in this court as appellant, filed an application with the Nebraska State Railway Commission petitioning it to establish single car, joint line commodity rates on limestone, crushed or ground, from Weeping Water, Nebraska, to all points in

the State of Nebraska, which are 54 cents a ton higher than the single line rates from Ashland, Nebraska, to the same points.

By this application the request is that a new rate shall be fixed from Weeping Water, Nebraska, to all points in the State of Nebraska, except as to three points named later herein, at 54 cents a ton above the single line rate from Ashland, Nebraska, to such points.

In the application it is pointed out that in a previous instance the commission established, and this court approved, a joint line rate for shipments from Weeping Water, Nebraska, which exceeded the single line rate from Ashland, Nebraska, by 54 cents a ton in the case of shipments to three points, namely, Ord, Allen, and Hastings, Nebraska.

The rates to points other than the three named are not declared in the application, but it is inferable that the existing joint line rate to at least some of the points other than the three would exceed the rate established for the three which as has been stated was only 54 cents a ton above the single line rate on single car shipments.

This, the appellant declares, amounts to unjust discrimination and it is on this account it seeks the establishment of rates based on the 54 cent differential over single line rates on shipments of the named products in the state.

In response to the application the Nebraska Railroads of Western Trunk Lines Committee, composed of five railroads named in the protest, designated herein as appellee, filed a protest. By the protest the appellee asked for no relief or for any affirmative action by the commission.

A hearing was had before the commission on the application of the appellant and the protest of the appellee. At this hearing two witnesses testified on behalf of the appellant and two on behalf of the appellee. After the hearing was concluded the commission made findings and

rendered an order in apparent disposition of the controversy.

By finding it is declared that the witnesses for the appellee presented a proposal counter to that of the appellant from the presently existing joint rate which was a reduction from the presently established and existing joint line rate. This proposal was contained in column 19 of exhibit 9, an exhibit offered and received in evidence on behalf of the appellee.

It is stated here that this represented what the witnesses regarded as a fair rate and did not indicate either any rate charges requested by the appellee, or which were being currently charged for this character of service, and neither did it represent a rate charge imposed in anywise by the commission.

In disposition of the case in neither findings nor order was a ruling made on the application of the appellant. The findings and final order granted to the appellee that which was proposed by the witnesses for appellee in column 19 of exhibit 9. The findings and order refer to this as an application made by the appellee. The order declared that the named railroads were "authorized to place in effect on Nebraska intrastate traffic, effective September 4, 1963, subject to an expiration date of December 31, 1963, or until further order of the Commission, rates to apply on highway construction material, filler, consisting of limestone, ground or limestone dust, in closed cars, minimum weight 100,000 pounds, the rates as shown in Column 19 of Exhibit 9 in the subject application which by reference hereto, are made a part hereof."

From this disposition of the action by the Nebraska State Railway Commission the appellant has taken its appeal. As grounds for reversal the brief of appellant contains a number of assignments of error, but before consideration of them, if they require consideration herein, it appears there is a matter of procedure affecting the power of the commission to render valid findings and a

valid order disposing of the case. Although not adverted to by the parties in their presentations it appears to have such controlling significance in determining the validity of the action of the commission that it may not be ignored.

Before proceeding to an examination of this subject it appears well to call attention to section 49-301, R. R. S. 1943, which is as follows: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

The reason for calling attention to this is that the powers of and functions of the Nebraska State Railway Commission and the rights, powers, and duties of parties subject to control of the commission were defined by laws enacted prior to 1963. The proceeding here was commenced on June 5, 1963, and although many changes were made by the Legislature in 1963, by amendment, repeal, and the enactment of new and additional provisions, the laws in effect at that time are controlling in the action here. The findings and order involved were rendered September 3, 1963. Whatever was done at the 1963 session of the Legislature or later is not of consequence in the determination of the case here.

In this light this opinion proceeds on the assumption that the determination shall respond to the statutes in 1963, rather than to the statutes as changed in 1963. In any event the statutory features in the area of concern prior to and after the actions of the 1963 session of the Legislature insofar as involved here are not materially different.

Section 75-302, R. R. S. 1943, contained the following: "The State Railway Commission shall fix a schedule and classification of rates and charges except joint rates hereinafter provided for, for the transportation of freight, passengers, and cars over any railway or by any common carrier in this state. To that end the commission shall

give the railroad company or common carriers to be affected thereby ten days' notice of the time and place when and where the rates will be fixed. Any such railway company or common carriers shall be entitled to be heard at such time and place to the end that justice may be done, and the commission shall have process to enforce the attendance of witnesses, to be served as in civil cases."

Section 75-306, R. R. S. 1943, contained the following: "It is hereby made the duty of all railway companies doing business in this state to establish reasonable joint through rates for the transportation of freight between points upon their respective lines within this state, and shall receive and transport freight and cars over such route or routes as the shipper shall direct."

By section 75-307, R. R. S. 1943, it was provided that where freight is to be transported between different points within the state to be carried by two or more railway companies operating connecting lines such railway companies shall transport it at reasonable through rates.

Section 75-308, R. R. S. 1943, contained the following: "In the event that railway companies or common carriers, as defined in section 75-301, fail to establish through joint rates, or fail to establish and charge reasonable rates for such shipments, it shall be the duty of the State Railway Commission, either upon their own motion, or upon the application of some person interested, to establish such rates for the shipment of freight and cars over two or more connecting lines of railroad in this state. In the making thereof, and in changing or revising the same, they shall be governed, as nearly as may be, by the provisions of sections 75-302 to 75-307 * * *."

The effect of these provisions in the case here is to say that as to joint line rates, it is the duty of the railway companies to establish on their lines within the state reasonable joint through rates.

If the railway companies fail in their duty to establish

joint rates then it shall be the duty of the commission, on its own motion or on the application of some person interested, to establish such rates for shipment over joint line connecting railroads. This establishment may come about by original fixation or by change and revision.

This right however depends upon compliance with the exactions of section 75-302, R. R. S. 1943, the one which exacts 10 days' notice to railroad companies or common carriers involved.

Section 75-401, R. R. S. 1943, provided that any person in his own behalf or in behalf of a class similarly situated, or any firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or body politic or municipal organization, or railway company or common carrier, may complain of rates and in such an instance the commission shall give notice and grant a hearing on the complaint and fix a date for hearing. It was also provided that action may be taken on the motion of the commission after giving notice of hearing.

The power to consider a subject matter such as is involved here is statutory and the statutes prescribe the manner in which it shall be exercised. In Platte Sand & Gravel Co. v. Chicago, B. & Q. R. R. Co., 121 Neb. 855, 238 N. W. 766, a case involving the required manner of exercise of the power and the force and effect of a failure so to do, particular consideration was given to sections 75-408 and 75-501, Comp. St. 1929, which are respectively like sections 75-308 and 75-401, R. R. S. 1943.

As already pointed out, section 75-308, R. R. S. 1943, provided for the establishment of joint rates by the commission. This section coupled with section 75-302, R. R. S. 1943, furnished the procedures for the establishment of such rates. Platte Sand & Gravel Co. v. Chicago, B. & Q. R. R. Co., *supra,* declares that the validity of such rates depends upon whether or not there

has been a compliance with the statutory procedures.

In that case it was declared that in case of change the commission was required to give notice and grant a hearing. In the opinion by quotation from McCaffrey Bros. Co. v. Chicago, B. & Q. R. R. Co., 114 Neb. 382, 207 N. W. 503, it was said: " 'A freight rate once lawfully established continues to be the legal rate until legally canceled. Subsequent tariffs naming new rates, without canceling previous rates, cannot carry the new rate into lawful effect.' "

Further in the opinion it is stated: "But such joint rates may not be canceled or modified except upon a hearing, with notice to all carriers affected thereby." See, also, Southern Roads Co. v. Galveston, H. & S. A. Ry. Co., 140 I. C. C. 413; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 10 S. Ct. 462, 33 L. Ed. 970; Central of Georgia Ry. v. Georgia R.R. Commission, 215 F. 421.

It is true that in this case, as in the cited case, the power and effect of fixing and changing joint line rates is involved, but the provisions of section 75-308, R. R. S. 1943, insofar as notice and hearing are concerned places burden equally in all instances where such a burden is imposed. If therefore there was a failure of the Nebraska State Railway Commission to comply with the statutory exactions to which attention has been called in the establishment of the joint line rate under consideration and on the record here this failure is apparent, then it follows that its findings and order were and are void and of no effect.

It is observable that the appellant did not by its application seek a rate generally to be applied to joint line shipments, but for the establishment of a special quantity rate. The significance of this here is that it aids in an understanding of the character of appellant's application.

The application was for a change in rates for joint line shipments over the State of Nebraska except shipments

to the three named points. That application was in order and there was compliance by the commission with regard to notice and hearing, and there was a hearing. After the hearing the commission made findings and rendered its order, but not with reference to anything contained in that application.

The transcript contains no indication that the commission made any determination upon the application of the appellant. This is true notwithstanding the fact that on the basis of the transcript there was nothing else properly before the commission on which to base a decision. The appellee filed no application of any kind or character whereby it sought establishment, change, or modification of any kind of rates. The same is true of the carriers represented by it.

It is true that the findings indicate that there was an application on the part of appellee, and that the order rendered was based thereon. This however is not true. What the commission actually did was to treat the testimony of a witness for the appellee as an application, and render its order accordingly.

Even if this were to be treated as an application it would not constitute a basis for a change in existing joint line rates or the establishment of new rates. There was no compliance with the statutory requirements for notice and hearing.

The protest to the application of the appellant could not be regarded as an application for establishment or change of rates. It amounted to nothing more than a negative response to the application of the appellant.

There is nothing in the record to indicate that any action was taken in furtherance of action of the commission in the matter of fixing of rates by it on its own motion, and even if this did appear, it does not appear that notice was given and hearing granted as required by statute.

The action of the commission in the establishment of the new joint line rates was not only irregular and

without authority but it was void. In the opinion in Platte Sand & Gravel Co. v. Chicago, B. & Q. R. R. Co., *supra,* it was said: "Section 75-712, Comp. St. 1929, makes it unlawful for any railway company or common carrier to change any rate, schedule, or classification until application has been made to the railway commission and permission had for that purpose. * * * Section 75-501 provides for a revision or modification of the rates charged, but only upon a hearing before the commission, with due notice to the common carriers affected." The substance of the prohibitions contained in this quotation is carried into the statutory provisions referred to herein defining the functions of the commission as related to the action here.

The commission on the record and under the facts and circumstances disclosed was called upon only to make a determination upon the application of the appellant for the establishment or modification of a joint line rate requested. This application was never passed upon. Instead, without application or notice, but solely on the testimony of two witnesses for the appellee, the commission proceeded to establish joint line rates to all points in the State of Nebraska. This establishment of rates was, under the terms of statute and the decisions of this court, clearly void.

This is not to say that the required consideration of the application of the appellant and a determination thereon would have been without legal force and effect, or that the matter is not now subject to consideration in a proper proceeding but only that in this proceeding the appellant is entitled to no substantive relief. Neither party is entitled to substantive relief at the hands of this court.

The order of the Nebraska State Railway Commission is reversed, with each party to pay its own costs. In this light a consideration of the assignments of error in the briefs is not required.

REVERSED.

F. B. BAYLOR, APPELLEE, V. CLEMENT L. TYRRELL, APPELLANT.

131 N. W. 2d 393

Filed November 20, 1964. No. 35737.

1. **Damages.** The amount of damages for pain and suffering has no legal rule for its measure and rests largely in the sound discretion of the jury.
2. **Trial: Damages.** It is not error for counsel in final argument to the jury to suggest flat amounts of recovery for different periods of pain, suffering, and disability, if such different periods of pain and suffering bear some real relation to differences demonstrated in the evidence.
3. ———: ———. The verdict of a jury in a personal injury case will not be set aside unless it is so clearly exorbitant as to indicate passion and prejudice or disregard of the evidence or controlling rules of law by the jury.
4. **Pleading.** A material allegation in a pleading is one essential to the claim or defense which could not be stricken from the pleading without leaving it insufficient.
5. **Trial: Appeal and Error.** If an instruction is not sufficiently specific in some respect, it is the duty of the party to offer requests to supply an omission, and unless this is done, the judgment will not be reversed for such defects.
6. **Trial.** The instructions must be construed together as a whole.
7. **Damages.** Loss of earning capacity, as distinct from loss of wages, salary, or earnings, is a separate element of damage.
8. **Damages: Pleading.** Loss of earnings is an item of special damage and must be specifically pleaded and proved.
9. ———: ———. Proof of impairment of earning capacity may be had under general allegations of injury and damage.
10. **Trial: Damages.** Proof of an actual loss of wages or earnings is not essential to recovery for loss of earning capacity.
11. **Damages.** Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry.
12. ———. Recovery for mental suffering or anxiety may be had provided the mental suffering or anxiety is a reasonably certain result or is reasonably apprehended as a result of the injuries sustained.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

Healey, Healey & Goth, for appellant.

Baylor, Evnen, Baylor & Urbom, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, and BROWER, JJ., and DIERKS, District Judge.

WHITE, C. J.

This is a personal injury suit growing out of a car-pedestrian accident on May 2, 1962, at the intersection of Twenty-seventh and Van Dorn Streets in Lincoln, Nebraska. From a jury verdict and judgment in the sum of $14,200, the defendant appeals.

The plaintiff, 77 years of age, was struck on his left side, knocked off his feet, turned over twice, came to rest about 7 or 8 feet in front of defendant's car, complained of pain in his left hip, was given a sedative at the scene, and was taken to the hospital by ambulance.

Hospitalization disclosed painful injuries to the knees, shoulder, and jaw, and a more severe serious injury in the fracture of the neck of the femur in the left hip. An operation was necessary the afternoon of the accident by which the head of the ball of the hip joint was manipulated into place and fastened by the use of screws. His pain was eased at times by opiates, but was quite general in nature and was aggravated by the necessary movements and therapy required to regain his ability to walk. After 19 days in the hospital, he was able to walk with two crutches.

In the 17-month period between hospitalization and the time of trial, the plaintiff suffered pain, used forearm and shoulder crutches, and a cane. His left leg became weak, gets tired, and causes a general fatigue. The use of a crutch or cane will be required permanently.

The mortality tables give plaintiff a life expectancy of 5 years. He has a permanent and increasing future disability. This consists of a shortened left leg, a limp, a restriction of leg and hip motion, and a progressive degenerative condition of the bone because at his age the

bone lacks good circulation and powers of repair. The permanent disability was 20 to 25 percent at the time of trial, and will increase in the future. There is a general weakness and fatigue resulting from these conditions. The restriction of motion as to internal rotation of the hip is a condition that developed and then increased after about April 1963 and is indicative of progressive degenerative changes. Pain, in varying degrees, accompanies these conditions.

Plaintiff, at the time of the accident, was active in all phases of the practice of law. He lost 9 weeks from work while in the hospital and at home, and now can only work part of the time he devoted to the practice previously. The breadth of his activities in the practice has been narrowed.

The evidence shows that the plaintiff suffered considerable anxiety and anguish from the knowledge of the probabilities of degeneration of the hip bone, based on information given him by his doctor from time to time, including the advice that it could not be known for a year and a half after September 1963 whether an artificial hip bone might be necessary. Disregarding the detailed and voluminous testimony as to discomfort, pain, and subjective discomfort, the above résumé outlines the plaintiff's injuries in the different categories referred to. They are largely undisputed and are all supported by the evidence.

The first and major contention the defendant makes is that prejudicial error arose from improper final argument to the jury as to damages. Plaintiff's counsel, in final argument, broke the evidence down into about six different areas. These were pain and suffering at the time of the accident, the 19-day period of hospitalization, the 17 months after hospitalization until the time of trial, the future disability and pain, mental suffering and anxiety, and loss of earning capacity. As in most cases of this type, the evidence logically broke down into these different items or areas and no question appears or could

appear as to counsel's right to present and identify the damages separately in this fashion. The evidence clearly supports such an analysis. As to these different items or categories, plaintiff, in argument, suggested a flat amount for the jury to allow as to some of the above items. Brevity forbids quotation of the total argument. After summing up the plaintiff's experience and pain at the scene of the accident, counsel stated: "You will have to use your judgment as I have had to use mine, and I will suppose that if you ascribe, for instance, oh, $2500 for that simple experience alone you wouldn't be out-of-bounds. Try to relive it. It seems grossly low, but that is a suggestion."

After summing up the 19-day experience in the hospital, counsel stated: "For 19 days he goes through this before he is discharged from the hospital. What of that experience? The reasonable measure of value for those 19 days of lying there and going through this recuperative process, seems to me, that if I suggested $1900 that would be very low. $3800 might be more realistic for 19 days, for this hospitalization for 19 days."

Either orally, or by placing a figure on a blackboard, plaintiff's counsel ascribed a flat suggested amount for the other items. Counsel also told the jury: "Your job is to try to compensate Mr. Baylor and make him whole. The words of the instructions will be, 'To make him whole.' Then figure out what the value of the money would be in placing Mr. Baylor back in the same condition as he was before. I understand it is impossible to do that, *but you can use your own best judgment;* and whatever *I say in this respect you are to understand, please, my inferences will be my thinking and not be yours.* They are values which I ascribe to things and will give to you as guides. I think I can't desert you on this and say, 'Here, it is your problem, it is too hard for me, take it away.' I think I would not be doing my job *if I did not try to make some analysis,*

at least, of the *individual items* of damages that have occurred." (Emphasis supplied.)

Defendant, citing and relying mainly on Boop v. Baltimore & Ohio R.R. Co., 118 Ohio App. 171, 193 N. E. 2d 714, an intermediate Ohio appellate court decision, asserts that it is prejudicial error for counsel to break the damage picture into fragments and then apply to each fragment a mathematical formula by multiplying fixed amounts for small periods of time in order to arrive at an amount for the entire period of expectancy. This is generally characterized in the cases as a "mathematical formula" argument. There is a diversity of opinion in the cases as to the right of counsel to use such an argument. It appears that the weight of authority supports the propriety of such an argument. Bowers v. Pennsylvania R.R. Co. (1960), 182 F. Supp. 756, affirmed, 281 F. 2d 953; Haycock v. Christie (1957), 249 F. 2d 501; Imperial Oil, Limited v. Drlik (1956), 234 F. 2d 4, certiorari denied 352 U. S. 941, 77 S. Ct. 261, 1 L. Ed. 2d 236; Clark v. Hudson (1957), 265 Ala. 630, 93 So. 2d 138; McLaney v. Turner (1958), 267 Ala. 588, 104 So. 2d 315; Vanlandingham v. Gartman (1963), 236 Ark. 504, 367 S. W. 2d 111; Newbury v. Vogel (1963) (Colo.), 379 P. 2d 811; Evening Star Newspaper Co. v. Gray (1962), 179 A. 2d 377; Ratner v. Arrington (1959) (Fla.), 111 So. 2d 82; Corkery v. Greenberg (1962), 253 Iowa 846, 114 N. W. 2d 327; Aetna Oil Co. v. Metcalf (1944), 298 Ky. 706, 183 S. W. 2d 637; Louisville & Nashville Ry. Co. v. Mattingly (1960) (Ky.), 339 S. W. 2d 155; Little v. Hughes (1961) (La.), 136 So. 2d 448; Eastern Shore Public Service Co. v. Corbett (1962), 227 Md. 411, 177 A. 2d 701; Yates v. Wenk (1961), 363 Mich. 311, 109 N. W. 2d 828; Flaherty v. Minneapolis & St. Louis Ry. Co. (1958), 251 Minn. 345, 87 N. W. 2d 633; Boutang v. Twin City Motor Bus Co. (1956), 248 Minn. 240, 80 N. W. 2d 30; Arnold v. Ellis (1957), 231 Miss. 757, 97 So. 2d 744; Four-County Elec. P. Assn. v. Clardy (1954), 221 Miss. 403, 73 So. 2d 144, 44 A. L. R. 2d 1191; Wyant

v. Dunn (1962), 140 Mont. 181, 368 P. 2d 917; Johnson v. Brown (1959), 75 Nev. 437, 345 P. 2d 754; Haley v. Hockey (1950), 199 Misc. 512, 103 N. Y. S. 2d 717; King v. Railway Express Agency, Inc. (1961) (N. D.), 107 N. W. 2d 509; Johnson v. Charleston & Western Carolina Ry. Co. (1959), 234 S. C. 448, 108 S. E. 2d 777; J. D. Wright & Son Truck Line v. Chandler (1950) (Tex. Civ. App.), 231 S. W. 2d 786; A.B.C. Stor. & Mov. Co. v. Herron (1940) (Tex. Civ. App.), 138 S. W. 2d 211; Continental Bus System, Inc. v. Toombs (1959) (Tex. Civ. App.), 325 S. W. 2d 153; Olsen v. Preferred Risk Mutual Ins. Co. (1960), 11 Utah 2d 23, 354 P. 2d 575; Jones v. Hogan (1960), 56 Wash. 2d 23, 351 P. 2d 153. *Contra*: Henne v. Balick (1958), 51 Del. 369, 146 A. 2d 394; Caley v. Manicke (1962), 24 Ill. 2d 390, 182 N. E. 2d 206; Caylor v. Atchison, Topeka & Santa Fe Ry. Co. (1962), 190 Kan. 261, 374 P. 2d 53 (4-3 decision); Botta v. Brunner (1958), 26 N. J. 82, 138 A. 2d 713, 60 A. L. R. 2d 1331; Boop v. Baltimore & Ohio R.R. Co., *supra;* Stassun v. Chapin (1936), 324 Pa. 125, 188 A. 111; Certified TV & Appliance Co. v. Harrington (1959), 201 Va. 109, 109 S. E. 2d 126; Crum v. Ward (1961), 146 W. Va. 421, 121 S. E. 2d 18; Affett v. Milwaukee & Suburban Transp. Corp. (1960), 11 Wis. 2d 604, 106 N. W. 2d 274.

Heretofore, there has been no rule in Nebraska forbidding counsel, in final argument, from equating pain and suffering to time segments within life expectancy, suggesting monetary values for them, multiplying them to reach a final amount, and illustrating such an argument on a blackboard or chart. However, we refrain from passing on this question as it is not presented in this case.

It is apparent from the summarization of the argument given hereinbefore, that counsel suggested flat amounts of recovery for the different areas or categories of pain, suffering, or disability, which different categories or areas bore some real relation to the differences demonstrated in the evidence. Surely, the same pain over a

longer period of time would suggest a larger amount. And, real differing periods of disability, as to quality and time of duration, would warrant an inference of different amounts for each. It is difficult to see how a jury could perform its function as trier of the ultimate facts, unless it gave relative weight to the real differences in pain and disability during different periods, as reasonably reflected by the evidence. This being true, there could be no vice in the simple addition of the amounts allowed for the different periods.

Assuming, but not deciding, that the use of a mathematical formula is error, the gist of the condemned vice is in placing an arbitrary figure on a small time segment period and then multiplying it to reach a final figure. The criticism, if it be valid, is not directed at placing a lump sum dollar amount on any actual different period of pain and suffering which the evidence reasonably supports, but rather at the use of an arbitrary money figure for a time segment and then mathematically multiplying it over the expectancy period, irrespective of what the evidence supports as to any real differences. The plaintiff's counsel in this case did not mention or make use of any money figure arbitrarily selected as representing the value of any minute, day, or week, and then multiply it by formula. As we see it, he argued: (1) The different periods of time the plaintiff had been and would be affected, and (2) the lump sum dollar amount suggested for the loss. It is not the declaration of or the use of a lump sum figure for the different injuries or the periods they are endured that is condemned, but the use of a misleading and nonevidence supported mathematical formula method to reach the lump sum that has been condemned. This distinction is recognized in the authorities, including those cited by defendant. In Affett v. Milwaukee & Suburban Transport Corp., *supra,* quoted at length in the portion of the Boop case, *supra,* relied upon by defendant, it is stated: "Counsel for both the plaintiff and the defend-

ant may make an argumentative suggestion in summation *from the evidence of a lump sum dollar amount for pain and suffering which they believe the evidence will fairly and reasonably support. Counsel may not argue such amount was arrived at or explained by a mathematical formula or on a per day, per month, or on any other time-segment basis.*" (Emphasis supplied.)

The cases denying the use of a mathematical formula have been careful to limit its application, and to specifically point out the propriety of suggesting a lump sum dollar amount. See, Halsted v. Kosnar (1962), 18 Wis. 2d 348, 118 N. W. 2d 864; Caylor v. Atchison, Topeka & Santa Fe Ry. Co., *supra;* Goldstein v. Fendelman (1960) (Mo.), 336 S. W. 2d 661 (argument as to total worth of particular injuries); Caley v. Manicke, *supra* (accepted practice to suggest a total monetary award); Four-County Elec. P. Assn. v. Clardy, *supra.* See, also, 53 Am. Jur., Trial, § 485, p. 392.

Defendant, apparently aware of the fatal missing link in his argument, contends that the division of the suggested lump sums by time units present in the evidence, results in the use of a "mathematical formula." This is an attempt to condemn the lump sum method as a "reverse" mathematical formula. We fail to follow this argument. No authority is cited which condemns a lump sum argument on this basis. It is the arbitrary multiplication forward to reach a false lump sum that has been criticized, not the division back of a lump sum properly suggested. It is clear that counsel for plaintiff studiously avoided suggesting the supposedly fatal original small time segment value for multiplication arbitrarily into the life expectancy period.

Where the evidence discloses real differences in time periods as to quality and intensity of pain and suffering, we fail to see any vice in plaintiff's counsel suggesting lump sums for such periods. If he may suggest a lump amount for the whole case it follows that he should be able to suggest flat amounts for any differ-

ence in time periods that the evidence reasonably reflects. Such differences are before the jury in evidence and to forbid counsel the right to relate such differences in amount would effectively bar him from the right to argue the core issue in any damage case, the amount of money to be awarded.

Defendant contends the verdict of $14,200 is excessive. The amount of damages in cases of this type is not based on any legal rule for measuring them and rests largely in the sound discretion of the jury. It will not be set aside unless so clearly exorbitant as to indicate passion and prejudice or disregard of the evidence or controlling rules of law by the jury. Fridley v. Brush, 161 Neb. 318, 73 N. W. 2d 376. We have already briefly reviewed the evidence as to injuries. The special expenses were $1,779.89. The plaintiff suffered a severe and progressively degenerative injury to his hip. His left leg is weakened and shortened, which will increase as degeneration develops. A crutch or a cane is needed and the motion of the left hip is restricted. He has a general fatigue and system weakness which will not get better. Pain, suffering, and discomfort, in varying degrees, have been the companion of the limited recovery he has achieved. Other injuries to the left knee and collarbone, bruises, and abrasions were present. The plaintiff was active and in good health prior to the accident. His capacity to work has been diminished. The evidence shows these conditions were the result of the accident and not caused by any general debility arising from the defendant's age. A substantially comparable case where this court affirmed a verdict of $16,500 is Fridley v. Brush, *supra*. We think the evidence amply sustains the verdict. There is no merit in this contention.

Defendant contends that instruction No. 3 was in error in stating: "You are further instructed that the burden is upon the defendant in this case to prove by a preponderance of the evidence every material affirmative

allegation in his answer to the plaintiff's petition, * * *."

In his answer, as submitted by the court in instruction No. 1, defendant alleged negligence on the part of the plaintiff and denominated three categories of conduct on the plaintiff's part that he claimed constituted contributory negligence. He now claims that instruction No. 3 required him to prove all three of these alleged acts of contributory negligence, whereas all he needed to prove was one or more. The above instruction clearly referred to the general burden of proof that was to be placed on the defendant in this respect. The "material affirmative allegation in his answer," alluded to here, is the allegation of the defendant as to the ultimate fact of contributory negligence. This is the only "material affirmative" allegation within the meaning of section 25-843, R. R. S. 1943, which states: "A material allegation in a pleading is one essential to the claim or defense which could not be stricken from the pleading without leaving it insufficient."

At most, the three subdivisional allegations modifying the general charge of contributory negligence were specifications of categories of facts by which the defendant hoped to establish the ultimate material allegation of contributory negligence. The pleading of the three subdivisional fact situations would not be sufficient to raise the issue of contributory negligence, and hence could not be a "material affirmative allegation." The court did not require proof of all affirmative allegations, but only proof (in this respect), of the "*material* affirmative allegation" which was the allegation of plaintiff's contributory negligence.

The court's instruction in this respect was in strict conformity with the legal definition of "material allegation" as defined by the statute. The argument is ingenious that it could have misled the jury. But, if the defendant desired clarification, he should have called the court's attention to it by requesting a detailed instruction. Assuming, arguendo, that the instruction was

not sufficiently specific in this respect, it is the duty of counsel to offer requests to supply an omission, and unless this is done, the judgment will not be reversed for such defects. Graves v. Bednar, 171 Neb. 499, 107 N. W. 2d 12; Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751 (citing cases). In this case, the counsel for the defendant not only did not offer an instruction to supply the alleged "omission" but when the court asked him if the instruction No. 3 was "all right the way it is," defendant's counsel responded, "Yes."

The defendant contends that his defense of contributory negligence was not properly submitted because the court in instruction No. 3 told the jury, "Defendant alleges in his answer that the accident and injuries sustained by plaintiff were proximately caused by the careless and negligent acts of the plaintiff * * *." He says that this placed too great a burden of proof on him and did not submit the issue of contributory negligence. There are three answers to this contention. First, the instruction repeated, in almost identical language, defendant's pleading. If the court did not submit the issue of contributory negligence by the use of defendant's own language, then the defendant did not plead it and cannot be heard to complain. Second, instruction No. 10 on comparative negligence fully submitted the issue of contributory negligence and instructed the jury on the exact method of comparison. Third, the court defined contributory negligence as any negligence on the part of the plaintiff *proximately causing or contributing to the accident.* Instructions must be construed together as a whole. This contention is without merit.

Defendant complains of error in submitting "loss of earning capacity," as one of the elements of damage in instruction No. 11. He says that no loss of past earnings was proved, and none was pleaded. He further states that the proof was insufficient to warrant submission of this element.

Loss of earning capacity, as distinct from loss of wages,

salary, or earnings, is a separate element of damage. Loss of earnings is an item of special damage, and must be specifically pleaded and proved.

On the other hand, impairment of earning capacity is an item of general damage and proof may be had under general allegations of injury and damage. Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891; Carlile v. Bentley, 81 Neb. 715, 116 N. W. 772; Wilson v. Sorge, 256 Minn. 125, 97 N. W. 2d 477; Klingbeil v. Truesdell, 256 Minn. 360, 98 N. W. 2d 134. Proof of an actual loss of wages or earnings is not essential to a recovery for loss of earning capacity. Hrabak v. Hummel, 55 F. Supp. 775, affirmed 143 F. 2d 594, certiorari denied, 323 U. S. 724, 65 S. Ct. 57, 89 L. Ed. 582; Riddel v. Lyon, 124 Wash. 146, 213 P. 487, 37 A. L. R. 486.

The proper distinction between the two elements of damage and the factors involved in the proof of loss of earning capacity is well stated in a case cited by the defendant, Klingbeil v. Truesdell, *supra,* wherein it is said: "The apparent difficulties encountered in proving diminution of earning capacity have now been largely solved by our decision in Wilson v. Sorge, 256 Minn. 125, 132, 97 N. W. 2d 477, 483, where we noted that impairment of earning capacity is an item of general damages. 'It permits recovery for a loss or diminution of the power to earn in the future and is *based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry.* It is within the province of the jury to weigh all these elements and, guided by experience and common sense, to arrive at the proper monetary *value of plaintiff's loss without recourse to his past earnings.*'" (Emphasis supplied.) See, also, Riddel v. Lyon, *supra;* Hrabak v. Hummel, *supra;* Zaikaner v. Small, 256 Minn. 275, 98 N. W. 2d 247; Lieberman v. Korsh, 264 Minn. 234, 119 N. W. 2d 180.

It being unnecessary to plead or establish an actual loss of earnings to recover for loss of earning capacity,

we briefly allude to the evidence as to its sufficiency. Besides the general weakness, fatigue, discomfort, and pain the plaintiff has suffered, there is ample evidence in the record as to plaintiff's age, life expectancy, health, habits of work that have been interfered with, his talents, skill, training, experience, and industry. Most of these factors have been affected by the injury, including additional evidence that he can work and concentrate only a little more than half the time he did before, and that his ability to perform certain specialized work has been impaired. These factors of loss of earning capacity are incapable of exact measurement and the fact that they are difficult to ascertain should not be a bar to recovery. Jacobsen v. Poland, *supra.*

We therefore hold that loss of earning capacity was properly submitted, that loss of earnings was not necessary to be pleaded or proved, and that the proof was sufficient as to the required factors establishing loss of earning capacity.

We note also that proof was offered as to plaintiff's prior earnings, and on objection of the defendant, the court excluded this testimony. Defendant cannot now complain of a claimed defect in proof which was produced at his request. 3 Am. Jur., Appeal and Error, § 879, p. 432; Huddleson v. Polk, on rehearing, 70 Neb. 489, 100 N. W. 802.

Lastly, defendant contends error in instruction No. 12 relating to the damage element of anxiety or "mental suffering." By instruction No. 11, the court submitted this issue and cautioned the jury that: "Damages for future pain and suffering, *mental or physical,* * * * must be based upon competent evidence that *such damages are clearly shown and reasonably certain as a* proximate result of the injuries; * * *." (Emphasis supplied.)

The evidence shows that the plaintiff was informed by his surgeon that his operation might not be successful and was thereafter advised and informed that deterioration of his hip might come any time within 5 years. And

the evidence showed at the time of the trial that the hip was in a progressive state of deterioration. The court, in an explanatory instruction No. 12, stated: "You are instructed that certain evidence has been received in this case to the effect that plaintiff was advised by his physician as to the possibility that the condition of his hip might deteriorate or become worse following his operation and as to the possibility of another operation becoming necessary. This evidence was received by the court and should be considered by you, not for the purpose of establishing the truth of the statements recited in such evidence but merely for the limited purpose of forming a basis for mental suffering, if any such you find, and for no other purpose."

Defendant's main contention is that recovery for anxiety can only be had when it reasonably results or is reasonably apprehended as a result of his injuries, and that the language used submits the issue in terms of conjecture and possibilities. We do not agree. Construing the two instructions together, it is clear that instruction No. 11 submitted the issue of anxiety to the jury, and required that it be shown with reasonable certainty to have resulted from the injuries. Instruction No. 12 was a cautionary instruction, which, in effect, carefully limited the scope of the medical testimony in this respect. The jury could find that it was entirely reasonable, in the light of the doctor's advice, that the plaintiff would undergo anxiety and mental suffering. Further progressive deterioration of the hip actually developed. These instructions, when construed together, told the jury: (1) That his anxiety or mental suffering must have a reasonable basis, and (2) that the evidence with relation to the doctor's advice as to "possibilities" could only be considered with relation to the determination of a reasonable basis for the anxiety and mental suffering, and for no other purpose. Medical science cannot in all cases predict the prognosis of an injury or disease. Advice by a physician of *this fact*

may reasonably lead to anxiety. Disclosure by a physician that a wound "might" develop into cancer is a reasonable basis for a patient to have anxiety about the possibility of developing cancer, and is recoverable in damages. Ferrara v. Galluchio, 5 N. Y. 2d 16, 152 N. E. 2d 249, 71 A. L. R. 2d 331.

We have examined other contentions as to instruction No. 12 and they are without merit. We have examined the whole record in this case and it reveals that the defendant was accorded a full and fair trial. The record is without prejudicial error and the judgment is affirmed.

AFFIRMED.

JOSEPH BALOG ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.

131 N. W. 2d 402

Filed November 20, 1964. No. 35738.

1. **New Trial.** Where the trial court gives no reason for an order granting a new trial, and the appellant contends that there is no prejudicial error in the record which justifies the granting of a new trial, it is the duty of the appellee to point out the prejudicial error which the appellee contends justifies the granting of the new trial.
2. **Landlord and Tenant: Eminent Domain.** The value of a leasehold is the difference between the rental value of the remainder of the term and the rent reserved in the lease. If the rent reserved equals or exceeds the rental value, the lessee suffers no loss and cannot recover.
3. **Eminent Domain: Damages.** Where the entire leasehold is taken, the measure of damages is the value of the leasehold.
4. ———: ———. Where a part of a leasehold is taken or a leasehold is damaged, the measure of damages is the difference between the value of the leasehold immediately before and immediately after the taking.
5. **Trial.** Conflicting instructions are erroneous and prejudicial unless it is apparent from the record that the jury was not misled thereby.
6. **Trial: Damages.** It is the duty of the trial court to instruct

the jury as to the proper basis upon which damages are to be assessed.

7. **Evidence.** The reception of evidence collateral to the main issue is within the sound legal discretion of the trial court.
8. **Eminent Domain.** Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals, or the public safety any more than under a police regulation having no relation to such matters but only to the general welfare.
9. **Constitutional Law: Eminent Domain.** The exercise of police power may or may not involve the taking of private property and it may or may not involve mere noncompensable inconvenience to the owner thereof. The distinction is not whether it is a valid exercise of police power but whether or not the property itself is taken or damaged.
10. **Constitutional Law: Highways.** The right of an owner of property abutting on a street or highway to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without due process of law and compensation for his loss.
11. **Streets.** The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances.
12. **Constitutional Law: Eminent Domain.** The right of a landowner or lessee to just compensation for property taken or damaged for public use is guaranteed by the Constitution. Art. I, § 21, Constitution of Nebraska.
13. **Eminent Domain: Highways.** An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway.
14. ———: ———. Whether the right of access to an existing highway has been destroyed or materially impaired is a question of fact which must be determined upon the particular facts in each case.

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

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., James J. Duggan, and James M. Winter, for appellant.

Davis, Thone, Bailey & Polsky, for appellees.

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

BOSLAUGH, J.

This is a proceeding in eminent domain. The plaintiffs, Joseph Balog and Josephine Balog, are lessees of a tract of land which is located adjacent to and north of the Cornhusker Highway north of Lincoln, Nebraska. In March and April of 1962, the plaintiffs constructed a building upon the leased land in which they operate a restaurant and tavern business.

On July 31, 1962, the State of Nebraska, the defendant in this proceeding, condemned a strip of land 12 feet in width across the south end of the leased property, together with the right of access to the Cornhusker Highway except by means of a one-way service road or frontage road which has been constructed between the south line of the leased property and the north line of the Cornhusker Highway.

The plaintiffs refused to accept the award of the appraisers appointed by the county court and appealed to the district court. The jury returned a verdict which in form found for the plaintiffs but assessed the amount of their recovery at "$ None." The plaintiffs filed a motion for new trial which was sustained. The defendant has appealed from the order which set aside the verdict and granted the plaintiffs a new trial. The assignments of error all relate to the order sustaining the motion for new trial.

The trial court gave no reason for its order granting the plaintiffs a new trial. The defendant contends that there is no prejudicial error shown in the record which would justify the granting of a new trial. It then becomes the duty of the plaintiffs to point out the prejudical error which they contend justifies the granting of the new trial. Connor v. State, 175 Neb. 140, 120 N. W. 2d 916.

The plaintiffs contend that the trial court erred in instructing the jury in reference to the measure of damages and in excluding the testimony of other lessees as to the effect of the improvement upon their property.

By instruction No. 6 the trial court instructed the jury that where a leasehold is taken or injured, the lessee is entitled to recover the value of the leasehold or the difference between the rental value of the remainder of the term and the rent reserved in the lease; that where a leasehold is taken or damaged, the lessee is entitled to recover the difference in the value of the leasehold immediately before and immediately after the taking; and that where the rent reserved equals or exceeds the rental value of the premises, the lessee suffers no loss and cannot recover.

In instruction No. 7 the jury was instructed that the measure of the damages sustained by the plaintiffs was the difference between the market value of their leasehold interest immediately before and immediately after the taking from which the injury resulted.

Instruction No. 8 was as follows:

"The measure of damages where a portion of a leasehold interest is taken, is the difference between the 'bonus' in the lease before and after the taking.

"This means that you will have to first (1) determine what is the fair rental value of the lease as of July 31, 1962, as enhanced by the improvement made by the lessee, for the remaining term of the lease as shown by the evidence. (2) You will then deduct from such amount the rent required to be paid by the lessee. (3) The difference, if any you find, constitutes what is referred to as the 'bonus' in the lease. If you find no difference between the fair rental value of the lease and the rent required to be paid by the lessee, there is no 'bonus' and therefore you cannot find any damages. On the other hand, if you find a 'bonus' in the lease as explained above you must then determine whether such 'bonus' has been depreciated in value by reason of the taking

herein for highway purposes. The amount of this depreciation in value, if any you so find from the evidence, shall constitute the damages sustained by the lessee. The measure of such depreciation, if any, is the difference between the bonus, if any, before and after the taking of the tract of land as of July 31, 1962."

The value of a leasehold is the difference between the rental value of the remainder of the term and the rent reserved in the lease. Ballantyne Co. v. City of Omaha, 173 Neb. 229, 113 N. W. 2d 486. If the rent reserved equals or exceeds the rental value, the lessee suffers no loss and cannot recover. Where the entire leasehold is taken, the measure of damages is the value of the leasehold. Where a part of a leasehold is taken or a leasehold is damaged, as in this case, the measure of damages is the difference between the value of the leasehold immediately before and immediately after the taking.

The instructions which were given in this case were confusing and misleading. One part of instruction No. 6 advised the jury that the plaintiffs were entitled to recover the value of the leasehold. Another part of instruction No. 6 advised the jury that the plaintiffs were entitled to recover the difference in the value of the leasehold immediately before and immediately after the taking. Instruction No. 8 defined value of the leasehold as a "bonus" and advised the jury that the plaintiffs could not recovery unless there was a "bonus" in the lease. The word "bonus" was an unfortunate choice of terms since it sometimes carries the connotation of being something in addition to what is ordinarily received by or strictly due to the recipient. See 5 Words and Phrases, Bonus (Perm. Ed.), p. 671.

The instructions which were given were misleading and conflicting. Conflicting instructions are erroneous and prejudicial unless it is apparent from the record that the jury was not misled thereby. Darnell v. Panhandle Coop. Assn., 175 Neb. 40, 120 N. W. 2d 278.

The damages in this case, if any, are to be determined by finding the value of the leasehold before the taking, the value of the leasehold after the taking, and the difference in the value of the leasehold before and after the taking. The instructions to the jury should state this method of ascertaining the damages in clear and concise language.

It is the duty of the trial court to instruct the jury as to the proper basis upon which damages are to be assessed. Enterprise Co., Inc. v. Sanitary Dist. No. One, 176 Neb. 271, 125 N. W. 2d 712. The failure of the trial court to instruct the jury properly as to the applicable measure of damages was prejudicial error and justified the granting of a new trial.

The plaintiffs offered the testimony of a garage operator and a service station operator to show that the construction of the improvement in question has had an adverse effect upon their businesses. The trial court refused to permit either witness to testify concerning his dollar volume of business before and after the construction of the improvement. The testimony offered was properly excluded.

The reception of evidence collateral to the main issue is within the sound legal discretion of the trial court. Peterson v. Andrews, 88 Neb. 136, 129 N. W. 191. Although the volume of the businesses operated by these witnesses may have declined, the decline in volume may have been due to causes other than the construction of the improvement. This type of evidence tends to be remote and ordinarily should not be received.

The defendant contends that the plaintiffs are not entitled to a new trial because they have no right to recover any damages resulting from their loss of direct access to the Cornhusker Highway. The witnesses for the plaintiffs testified that the damages to the plaintiffs' leasehold resulted from the change in the means of access. However, the defendant produced evidence that plaintiffs were damaged by the taking of the 12-

foot strip of land across the south end of the leased property. There was evidence that the plaintiffs had been damaged in the amount of between $300 and $400 because of restoration costs which included the cost of moving a sign and some gas lamps and spreading crushed rock upon the surface of the ground. The plaintiffs were entitled to the benefit of this evidence and to recover these damages without regard to whether they could recover damages because of the loss of direct access to Cornhusker Highway. Since the case must be retried, the issue raised by the defendant should be determined.

The patronage of the plaintiffs' restaurant and tavern business consists entirely of drive-in business. Before the improvement of Cornhusker Highway the plaintiffs had two driveways which provided direct access to their property from Cornhusker Highway. Since the construction of the improvement, the access to the plaintiffs' property is from a service road or frontage road that is parallel to and north of the Cornhusker Highway. A curb and guard rail separate the frontage road from the Cornhusker Highway. Traffic upon the frontage road is one-way moving from east to west. The entrance to the frontage road from Cornhusker Highway is located approximately 310 feet east of the plaintiffs' property. The entrance to Cornhusker Highway from the frontage road is approximately 358 feet west of the plaintiffs' property. The evidence in this case would sustain an award of damages for the depreciation in the value of their leasehold if the plaintiffs have a right to recover for the loss of direct access to the Cornhusker Highway.

The defendant argues that the plaintiffs cannot recover damages because their right of access to Cornhusker Highway was taken by an exercise of the police power. The fact that the improvement of a highway is an exercise of the police power does not determine whether the landowner or lessee is entitled to recover damages. This

distinction was recognized in Phillips Petroleum Co. v. City of Omaha, 171 Neb. 457, 106 N. W. 2d 727, 85 A. L. R. 2d 570, where this court said: "Appellant substantially argues that the court in giving instructions Nos. 4, 5, and 7 failed to recognize the right of a municipality to exercise the police power delegated to it in reference to its streets. § 14-301, R. R. S. 1943. The essence of the contention in this respect is that damages resulting from the exercise of the police power by appellant are not compensable. The fact that appellant had under the police power the right to improve its streets and thereby control the traffic thereon does not mean that it had immunity from liability to respond in damages which resulted to private property abutting the improvement where a part of the property of appellee was taken by condemnation. The exercise of police power may or may not involve the taking of private property and it may or may not involve mere noncompensable inconvenience to the owner thereof. The distinction is not whether it is a valid exercise of police power but whether or not the property itself is taken or damaged. In 18 Am. Jur., Eminent Domain, § 11, p. 639, the author says: 'The real distinction, however (between eminent domain and the police power), lies in the fact that in eminent domain property or a right in property is taken from the owner and transferred to a public agency to be enjoyed by it as its own, whereas under the police power, although it may, and often does, take property in the constitutional sense so that it must be paid for, this is not accomplished by a transfer of ownership, but by destroying the property or impairing its value.'

"This is a condemnation proceeding originated by a petition of appellant which characterizes it as such. The petition asked the appointment of appraisers to determine the compensation appellant was required to pay in the manner and to the extent required by law, and of course there was not and could not have properly

been any claim in the petition that the appellant was exempt from obligation to pay damages by reason that the municipality was exercising the police power. *Thereby appellant subjected itself to liability for all damages sustained by the taking which this court has repeatedly held includes all elements and inconveniences which affect the market value such as ' "The creation of noise and dust, the invasion of privacy, the deprivation of light and means of* access, * * * and like matters * * *." ' Crawford v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 832, 49 N. W. 2d 682.

"In State ex rel. Westminster Presbyterian Church v. Edgecomb, 108 Neb. 859, 189 N. W. 617, 27 A. L. R. 437, this court quoted with approval from Chicago, B. & Q. Ry. Co. v. State of Illinois ex rel. Drainage Commissioners, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596, the following: ' "Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare. The foundations upon which the power rests are in every case the same." ' " (Emphasis supplied.)

The right of an owner of property abutting on a street or highway to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without due process of law and compensation for his loss. Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N. W. 2d 76. The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances.

The following statement from Genazzi v. County of Marin, 88 Cal. App. 545, 263 P. 825, was quoted with approval in the Hillerege case: "Generally speaking, an abutting land owner on a public highway has a special

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

The defendant further argues that an abutting landowner or lessee is not entitled to damages for loss of direct access to a highway if access is provided to a frontage road. The defendant relies upon section 39-1328, R. R. S. 1943, which authorizes the construction of frontage roads and further provides: "Upon the construction of any frontage road, any right of access between the controlled access facility and property abutting or adjacent to such frontage road shall terminate and ingress and egress shall be provided to the frontage road at such places as will afford reasonable and safe connections."

The statute cited, section 39-1328, R. R. S. 1943, is silent as to right of a landowner or lessee to recover damages for loss of direct access and is not determinative of the question presented. The right of a landowner or lessee to just compensation for property taken or damaged for public use is guaranteed by the Constitution. Art. I, § 21, Constitution of Nebraska. The right of access is a property right and the Legislature could not provide for its taking or damage without the payment of just compensation.

We believe that the correct rule, and the rule which prevails in this jurisdiction, was stated in State ex rel. Morrison v. Thelberg, 87 Ariz. 318, 350 P. 2d 988, where the court said: "An examination of many authorities from various jurisdictions convinces us that the weight of authority in the United States is to the effect that

either the destruction or the material impairment of the access easement of an abutting property owner to such highway is compensable. We therefore overrule the principle laid down in In re Forsstrom and Grande v. Casson, supra, which declared the non-compensability of an abutting property owner for the destruction or substantial impairment of his right of access to such highway. We also reject the reasoning upon which the rule rests i.e., that there is a presumption of payment. The rule to the contrary, supported by the weight of authority, is based upon the fact that an abutting property owner to a highway has an easement of ingress and egress to and from his property which constitutes a property right. Our State Constitution, Art. 2 § 17, A. R. S., prohibits the taking or damaging of private property for public use without just compensation. It follows that the State can neither take nor damage said easement of ingress or egress of an abutting property owner without just compensation.

"The case of State ex rel. Merritt v. Linzell, 163 Ohio St. 97, 126 N. E. 2d 53, states that an owner of property abutting on a public highway possesses, as a matter of law, not only the right to the use of the highway in common with other members of the public, but also a private right or easement for the purpose of ingress and egress to and from his property which latter right may not be taken away or destroyed or substantially impaired without compensation therefor. This rule was reaffirmed in Starr v. Linzell, Ohio Com. Pl., 129 N. E. 2d 659, and has been enunciated in at least the following cases: Coyne v. City of Memphis, 118 Tenn. 651, 102 S. W. 355; Knox County v. Lemarr, 20 Tenn. App. 258, 97 S. W. 2d 659; Sharber v. City of Nashville, 27 Tenn. App. 625, 183 S. W. 2d 777; Blount County v. McPherson, 268 Ala. 133, 105 So. 2d 117; Siemers v. St. Louis Electric Terminal R. Co., 348 Mo. 682, 155 S. W. 2d 130; City of Cannelton v. Lewis, 123 Ind. App. 473, 105 N. E. 2d 911, 111 N. E. 2d 899; Lane v. San Diego Electric R. Co.,

208 Cal. 29, 280 P. 109; Strehlow v. Mothorn, 100 Cal. App. 692, 280 P. 1021; Department of Public Works and Buildings v. Wolf, 414 Ill. 386, 111 N. E. 2d 322; State v. Calkins, 50 Wash. 2d 716, 314 P. 2d 449; State, By and Through State Highway Commission v. Burk, 200 Or. 211, 265 P. 2d 783; 43 A. L. R. 2d Annotation 1072; McMoran v. State, Wash., 345 P. 2d 598. * * * When the controlled-access highway is constructed upon the right of way of the conventional highway and the owner's ingress and egress to abutting property has been destroyed or substantially impaired, he may recover damages therefor. The damages may be merely nominal or they may be severe. Other means of access such as frontage roads as in the instant case may be taken into consideration in determining the amount which would be just under the circumstances. Knox County v. Lemarr, 20 Tenn. App. 258, 97 S. W. 2d 659. Other means of access may mitigate damages, State v. Ward, 41 Wash. 2d 794, 252 P. 2d 279, but does not constitute a defense to the action however. Golden v. Louisville & N. R. Co., 228 Ky. 134, 14 S. W. 2d 379." See, also, People v. Ricciardi, 23 Cal. 2d 390, 144 P. 2d 799; Blount County v. McPherson, 268 Ala. 133, 105 So. 2d 117; Clayton County v. Billups Eastern Petroleum Co., 104 Ga. App. 778, 123 S. E. 2d 187; Hamilton v. Mississippi State Highway Commission. 240 Miss. 895, 128 So. 2d 742; McMoran v. State, 55 Wash. 2d 37, 345 P. 2d 598; Hendrickson v. State (Minn.), 127 N. W. 2d 165.

The plaintiffs may recover damages for loss of direct access to Cornhusker Highway if their right of access has been destroyed or substantially impaired. Whether the right of access has been destroyed or substantially impaired is a question of fact which must be determined upon the particular facts in each case. Hendrickson v. State, *supra.*

The evidence in this case would support a finding of substantial impairment of the right of access. The construction of the frontage road is a circumstance which

tends to mitigate the damages and must be considered but it does not, as a matter of law, deprive the plaintiffs of their right to damages, if any.

The order of the district court sustaining the plaintiffs' motion for a new trial is affirmed.

AFFIRMED.

HENRY LINENBRINK, APPELLEE, V. CHICAGO AND NORTH WESTERN RAILWAY COMPANY, APPELLANT.

131 N. W. 2d 417

Filed November 20, 1964. No. 35745.

1. **Constitutional Law: Railroads.** The development of transportation by motor carriers and airlines, since this court held the fencing laws to be constitutional, has not rendered fencing statutes unconstitutional by depriving railroads of equal protection of law or due process of law because of discrimination between railroads and other carriers upon which no such liability is imposed.
2. **Statutes.** A statute valid when enacted may become invalid by a change in conditions to which it is applied.
3. ———. The determination of questions of classification is primarily for the Legislature, and courts will not interfere unless classification is clearly arbitrary and unreasonable.
4. **Railroads: Motor Carriers.** Reasonable differences exist for making distinctions between railroads, motor carriers, and airlines in dealing with the general fencing statutes and the liabilities imposed therein because of their different methods of operation which authorizes the Legislature to treat railroads as a class with reference to such police power regulations.
5. **Fences: Statutes.** The purpose of fencing statutes is to protect lives and property. The changes in condition which require a statute once held valid to be declared invalid ordinarily apply to conditions which remove or reduce the need for and the purposes of the act.
6. **Constitutional Law: Statutes.** Where the Legislature determines a public policy of the state by a proper exercise of the police power, changing conditions which tend to make the result inequitable and unjust are ordinarily for the Legislature and not the courts.

Appeal from the district court for Cherry County: ALBERT W. CRITES, Judge. Affirmed.

Gaines, Spittler, Neely, Otis & Moore and Richard L. Spittler, for appellant.

Quigley & Quigley, William S. Dill, and Healey, Healey & Goth, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. FLORY and ROBERT L. SMITH, District Judges.

CARTER, J.

This is an action to recover the value of two bulls which were killed by defendant's train on or about September 16, 1961. The trial court sustained plaintiff's motion for a summary judgment and entered judgment for plaintiff in the amount of $1,190 with interest and costs. The defendant has appealed.

The essential facts are stipulated as follows: The two bulls were of the value of $1,190 on the day they were killed. The defendant did not have its railroad right-of-way fenced and in a proper state of repair as a result of which the bulls came on the railroad right-of-way and were struck and killed by defendant's train.

The only question raised by the appeal is the constitutionality of sections 74-601 to 74-604, R. R. S. 1943, imposing duties and obligations upon railroad companies for failure to construct and maintain fences on railroad right-of-ways as provided by such statutes. The defendant contends that such statutes are violative of the Fourteenth Amendment to the Constitution of the United States and of Article I, sections 1, 3, and 25, Constitution of Nebraska. These provisions provide for equal rights to all persons, due process of law, and the forbidding of discrimination between citizens in respect to the ownership and enjoyment of property.

Sections 74-601 to 74-604, R. R. S. 1943, were first enacted in 1867 and no amendments of controlling im-

port have been enacted up to the present time. These statutes provide in substance that every railroad corporation shall erect and maintain fences on the sides of its railroad suitable and sufficient to prevent cattle from getting on such railroad, except at crossings of public roads and within the limits of towns, cities, and villages. For failure to so fence its railroad against livestock running at large, the railroad company shall be absolutely liable to the owner of any livestock injured, killed, or destroyed by its agents, employees, or engines.

In the case of Middaugh v. Chicago & N. W. Ry. Co., 114 Neb. 438, 208 N. W. 139, this court in 1926 passed upon this precise question, stating: "A statute which requires a railroad company to erect and maintain fences along the sides of its right of way, and fixes a liability upon it for damages occasioned by its failure to comply with the statute, does not deprive such company of its property without due process of law, or deny it the equal protection of the law, so as to violate the Constitution of Nebraska (Art. I, sections 1, 3), or the Fourteenth Amendment to the Constitution of the United States, (citing cases)."

It is the contention of the defendant that, although the statutes in question were constitutional in 1926, they have become unconstitutional because of changed conditions. We do not question the validity of the assertion that a law once held to be constitutional may subsequently become unconstitutional because of changed conditions; and that it may become unconstitutional because of additions to a class once held to be a class sufficient to support legislation as to it when such classification might be discriminatory as to others who subsequently enter the class, or where the reason for the classification no longer exists because of subsequent changed conditions, or where the statute becomes confiscatory because of changed conditions. Hubbell Bank v. Bryan, 124 Neb. 51, 245 N. W. 20; Nashville, Chattanooga & St. Louis Ry. Co. v. Walters, 294 U. S. 405,

55 S. Ct. 486, 79 L. Ed. 949. The question here presented is whether the conditions have so changed as to require a present holding of unconstitutionality.

The defendant relies in substance on the following changed conditions: Freight and passenger traffic in a very substantial amount has been lost by the railroads in recent years to new forms of transportation such as passenger buses, trucks, and airlines. The miles of railroads maintained and the number of trains operating have been materially reduced. Truck and bus lines use the public highways and are not burdened with the construction and maintenance of fences or an absolute liability such as that imposed on railroads for noncompliance with the fencing laws.

The plaintiff points up the following distinguishing factors in his brief: The railroads were the beneficiaries of grants of public lands. They were granted the right of eminent domain which enabled them to cross public roads at random and to cross pasture lands where they chose. They own the right-of-way over which their trains operate. They pass through range lands where they choose to go without consideration of the convenience of the landowner. There is no showing that Nebraska is any less a cattle state now than it was in 1926, or that the purposes of the legislation are any less important now than then.

It is the contention of the defendant that passenger buses, trucks, and airlines are new forms of transportation of the same class as railroads and that no reasonable basis now exists for legislation applicable to railroads and not to passenger buses, trucks, and airlines. It is true that all are common carriers subject to regulation in the public interest.

There are distinguishing factors that warrant differences in legislation between railroads and passenger buses and truck lines. Fort Worth & D. C. Ry. Co. v. Welch (Tex. Civ. App.), 183 S. W. 2d 730. Trains travel at high speeds on a fixed route; they cannot be stopped

in short distances or turned aside to avoid collisions. They travel through large areas of the state where the raising of livestock is the prevailing industry. On the other hand, passenger buses and truck lines are licensed businesses travelling the public highways. Their speed, size, and weight are limited. They are required to carry insurance for the protection of passengers and shippers. They are subject to traffic control and other safety measures. Airlines are so different in their methods of operation that there is no resemblance between them and the railroads as to regulation in their methods of operation. We think there are distinguishing differences in methods of operation between railroads and passenger buses, trucks, and airlines that render railroads a proper class for purposes of regulation under the rules announced by this court. The general rule is: "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." Creigh v. Larsen, 171 Neb. 317, 106 N. W. 2d 187. See, also, State v. Chicago & N. W. Ry. Co., 147 Neb. 970, 25 N. W. 2d 824. We find that there is no discrimination as to class in the instant case.

The purpose of sections 74-601 to 74-604, R. R. S. 1943, was the protection of lives and property. The changed circumstances shown by the defendant do not relate to this problem. They relate to the loss of business to other forms of transportation, the reduction of track mileage and train miles, the loss of gross income, and the lowered assessments for tax purposes. These have no direct relation to the protection of passengers and train crews from injury, or livestock from damage. The

changed conditions asserted, admittedly true, are not such that eliminate or reduce the dangers the statutes were enacted to protect.

The contention is advanced that the absolute liability imposed on railroads for a violation of the fencing laws is a harsh one which is not imposed on other forms of transportation for their violation of regulatory statutes and that this in itself is so discriminatory as to require a holding of unconstitutionality. Our holding herein, that the purposes of the legislation have not been impaired by the changed conditions asserted, leaves the issue subject to the holding of this court in Middaugh v. Chicago & N. W. Ry. Co., *supra*. Admittedly sections 74-601 to 74-604, R. R. S. 1943, constitute an exercise of the police power which this court sustained as proper in the Middaugh case. The conditions which induced the passage of the fencing laws still exist and, consequently, we can find no basis for departing from the holdings of that case. That case reflects the legislative policy of the state and if incidental changes in conditions are to be given consideration, it is a change in legislative policy that must be sought and not a change by judicial holding.

The controlling rules in this case are supported by the following authorities: Berens v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co. (S. D.), 120 N. W. 2d 565; Louisville & Nashville R.R. Co. v. Stuart, 270 Ala. 285, 117 So. 2d 399; Fort Worth & D. C. Ry. Co. v. Welch, *supra*.

The defendant cites Atlantic Coast Line R. Co. v. Ivey, 148 Fla. 680, 5 So. 2d 244, 139 A. L. R. 973, and Louisville & Nashville R.R. Co. v. Faulkner (Ky.), 307 S. W. 2d 196, as supporting its position. The inapplicability of these cases is pointed up in the cases cited in support of this holding, particularly in Berens v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co., *supra*. We hold the two cases cited by the defendant to be nondecisive of

the present case for the reasons stated in the cases cited in support of this opinion.

We are in agreement with the conclusions reached in Berens v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co., *supra,* which states: "We have carefully considered each of the cases mentioned. South Dakota is still geared to a farm and ranch economy. Concentrations of live stock are heavier than they were several decades past. There is much open range country in many sparsely populated areas crossed by transcontinental railroads on which trains move at great speeds. Reason and safety still require and necessitate classification under legislative police powers between railroads and motor carriers conducting their business on public highways.

"We agree with what was said by the Texas and Alabama courts in the cases cited that the classification is reasonable and not arbitrary; that it rests upon real and substantial differences between railroads and motor carriers; that the classification reasonably promotes the public interest and welfare. Two of these statutes were enacted before statehood and the general fencing statute shortly after statehood. The legislature through the years has seen fit to retain these statutes. If changed conditions warrant their repeal, this should be by legislative action and not by judicial decision."

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN M. SCHWADE, APPELLANT.

131 N. W. 2d 421

Filed November 20, 1964. No. 35765.

1. **Intoxicating Liquors.** Generally, providing the statutory requirements as to foundation are met, evidence as to the obtaining of a specimen of body fluid, including urine, at or near

the time in question, is admissible as relevant and competent evidence on the issue of intoxication.

2. **Constitutional Law.** For a question of constitutionality to be considered in this court, it must be properly raised in the trial court. If it is not raised in the trial court, it may not be considered by this court.
3. **Courts: Appeal and Error.** An essential factual determination may not be made by the district court or this court unless based upon competent evidence in the record.

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

Mark A. Buchholz, for appellant.

Ralph D. Nelson, Henry L. Holst, and Fred J. Swihart, for appellee.

Heard before WHITE, C. J., MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. SMITH, District Judge.

WHITE, C. J.

Defendant appeals from a conviction and sentence under a city ordinance for driving a motor vehicle while under the influence of alcoholic liquor. At 1:30 a.m. on June 4, 1963, two Lincoln police officers, after observing defendant's erratic driving, took him to the police station, administered tests, and collected a voluntarily furnished specimen of urine, which tested 0.21 percentage alcohol (by weight).

The district court received in evidence the urine specimen and the testimony of the state licensed expert chemist that the specimen tested 0.21 percentage of alcohol by weight. The court instructed the jury on the rebuttable presumption of intoxication thus arising under section 39-727.01, R. S. Supp., 1961.

We summarize the contentions of the defendant as presented by those of his assignments of error and propositions of law that are discussed in his brief on appeal. His first and main contention is that the presumption statute, section 39-727.01, R. S. Supp., 1961, is uncon-

stitutional. Generally, he bases this contention upon the claim that, as a matter of recognized scientific fact, there is no rational connection between the percentage of alcohol in the urine and the state of intoxication of a defendant at the time the urine specimen was taken. Second, he contends that the presumption provisions of section 39-727.01, R. S. Supp., 1963, are ex post facto, as far as their application to this case is concerned, and a violation of the constitutional provision prohibiting the enactment of ex post facto legislation. Section 39-727.01, R. S. Supp., 1961, was amended by Laws 1963, c. 228, § 1, p. 714, to make its provisions applicable to trials and prosecutions under city ordinances (section 39-727.01, R. S. Supp., 1963). Since the effective date of the new act was June 10, 1963, and the offense occurred on June 4, 1963, he says that the application of the new statute to this trial is ex post facto because the difficulty of conviction is lessened as to the measure or character of the evidence required. His third contention is that the evidence is insufficient to support a conviction.

As to the first contention, in Vore v. State, 158 Neb. 222, 63 N. W. 2d 141, this court has held that there is a rational connection between urine specimen alcohol concentration and intoxication at the time the specimen was taken. The purport of our holding with reference to the defendant's contention is apparent from the following quotation: "The historical background of section 39-727.01, R. R. S. 1943, which has been adopted in substance by many states, is set forth in Toms v. State (Okl. Cr.), 239 P. 2d 812. It is therein pointed out that much alarm has been expressed by the legal profession in regard to statutes fixing a formula for determining intoxication by testing *body fluids* when there is such a *degree of variability in humans.* It is there stated, *accompanied by the citation of ample medical and legal authority,* that impairment sufficient to adversely influence driving ability is demonstrated quite clearly in the average individual *at alcoholic concentrations of*

0.09 percent to 0.11 percent in the blood. The court then states that the establishment of 0.15 percent as the presumption limit allows sufficient tolerance for individual variation. Consequently the fixing of 0.05 percent and below as creating a presumption of nonintoxication, and the fixing of 0.15 percent and above as creating a presumption of intoxication, afford full protection against individual variation to those submitting to the test." (Emphasis supplied.) The Toms case, 95 Okl. Cr. 60, 239 P. 2d 812, contains an exhaustive analysis of the relevancy of urine alcohol concentration to blood alcohol concentration and establishes that where there is 0.15 percent or more alcohol in the blood, or *equivalent amounts in other body fluids,* that it was sufficient as presumptive evidence of intoxication. It is said therein: " 'So by obtaining and analyzing samples of the urine or breath and measuring the amount of alcohol therein, an accurate and reliable estimate of the concentration of alcohol in the circulating blood can be obtained by chemical and mathematical calculation.' "

Defendant does not question that the foundational statutory requirements for the admission of this testimony have been met. In effect, we are asked to reexamine this determination of the competency and relevancy of this type of testimony in the light of the several medical and scientific authorities supplied us in the brief of the defendant. Defendant called no expert witness. None of the medical or scientific authorities supplied us in the brief were offered or received in evidence at the trial. On this basis, we are asked to determine, as a matter of law, that the scientific fact is that there is insufficient correlation between urine alcohol secured under the statutory test conditions and the degrees of intoxication of a defendant. We are asked to hold that the presumption statute is unconstitutional, therefore, because it is not based upon any rational connection that would justify its imposition.

There are two reasons why the defendant's conten-

tions as to constitutionality must fail. First, the record does not reveal that he raised the question of constitutionality in either aspect now presented to this court at any time in the trial court. As early as Pill v. State, 43 Neb. 23, 61 N. W. 96, a criminal case, this court said: "We must decline to consider the constitutionality of these sections at this time, since no such question was presented to or decided by, the court below. If the plaintiff desired to raise the validity of the law under which the conviction was had, he should have prosecuted error to the district court, and distinctly raised therein the constitutionality of the statute." See, also, State ex rel. Sorensen v. Knudtsen, 121 Neb. 270, 236 N. W. 696; State ex rel. McDonald v. Dyson, 106 Neb. 277, 183 N. W. 298; Johnson v. Richards, 155 Neb. 552, 52 N. W. 2d 737; Weekes v. Rumbaugh, 144 Neb. 103, 12 N. W. 2d 636, 150 A. L. R. 129; Howarth v. Becker, 128 Neb. 580, 259 N. W. 505; Hardy v. Hardy, 161 Neb. 175, 72 N. W. 2d 902. This follows the general rule applicable to civil and criminal cases alike. Ordinarily objections not presented to the trial court are not available on review and to make such error available for reversal in the appellate court it should be called to the attention of the district court and be affirmatively shown on record for review. It is fundamental that error may not be predicated on a ground not preserved by a proper objection. Fugate v. State, 169 Neb. 420, 99 N. W. 2d 868; Parker v. State, 164 Neb. 614, 83 N. W. 2d 347; Lorimer v. State, 127 Neb. 758, 257 N. W. 217; Thompson v. O'Grady, 137 Neb. 641, 290 N. W. 716. This follows the general rule applicable to criminal cases. In 24 C. J. S., Criminal Law, § 1676, p. 1163, it is stated: "In order to be preserved for review, constitutional questions ordinarily must have been properly and seasonably asserted in the lower court, and a ruling on such constitutional questions presented must be secured, * * *." (See extensive citation of cases under note 44, page 1163, supporting the above statement.) The general

rule as to both civil and criminal cases is stated in 4 C. J. S., Appeal and Error, § 234, p. 700: "It is a rule of general application that the constitutionality of a statute cannot be first questioned on appeal, *and this is especially true when the constitutionality of a statute depends on questions of fact as well as of law.*" (Emphasis supplied.)

Second, there is no evidence in the record to support the defendant's position. He calls upon this court to pass upon a medical scientific fact as the basis for determination as to the constitutionality of the presumption statute. Defendant offered no medical or scientific testimony. The sole expert testimony adduced was that of Robert Rist, the State's witness, who made the urine alcohol test. No question arises as to whether the statutory conditions for the admission of this testimony were supplied. We are asked to make a fact finding as to the status of scientific knowledge on this subject based upon a collection of articles and texts supplied in the briefs but not in evidence or supported by any expert testimony, nor offered under oath and subject to cross-examination.

This court cannot speculate on the comparative credibility of various articles and opinions set out in the briefs by the parties. They furnish no legal basis for a departure from the presumption of the validity and constitutionality of the statute. It requires no citation of authority that this court or the district court may not make an essential factual determination unless presented with and unless based upon competent and material evidence in the record.

The record also reveals that the defendant at no time by appropriate motion or objection, or by raising it in his motion for new trial, asserted the unconstitutionality of the application of section 39-727.01, R. S. Supp., 1963, as being ex post facto in its application to this case, although by its expressed provisions it applied to this type of prosecution. Under the same authority cited

above, this defense not having been asserted in the trial court, it may not be asserted for the first time on appeal here by assignment of error and argument in the brief.

Defendant argues that there was insufficient foundation for the admission in evidence of the test results of the urinalysis. He does not contend that the statutory requirements were not met. He says there was lack of proof of the purity of the chemicals used, that he was not apprised of his right to have the test administered by a physician or registered nurse, and that "proper procedures were not used in the collection of the urine specimen." The statute makes no such requirements for admissibility, nor does this court have the right to legislate any such requirements. In State v. Fox, *ante* p. 238, 128 N. W. 2d 576, our court held: "It was not the legislative intent that all possibility of inaccuracy or imperfection in the test should be excluded before being received in evidence. It is apparent that the intention of the Legislature was that such tests are admissible, and prima facie proof, whenever it be established that the statutory requirements are satisfied, * * *."

The objections urged go to the weight and credibility of the testimony and not to its admissibility. There is no merit to this contention.

Defendant contends generally that the evidence is insufficient to support the conviction but fails to point out in what respect it fails. The opinion testimony of the police officers alone as to intoxication would be sufficient to support the verdict and the judgment. We have examined the evidence and it is ample to support the verdict and judgment.

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

AFFIRMED.

JUNE OLINE, ADMINISTRATRIX OF THE ESTATE OF ROLAND O. OLINE, DECEASED, APPELLANT, V. NEBRASKA NATURAL GAS COMPANY, A CORPORATION, APPELLEE.

131 N. W. 2d 410

Filed November 20, 1964. No. 35830.

1. **Workmen's Compensation.** In order to recover under the Workmen's Compensation Act, the plaintiff must prove that the death or disability of the workman was the result of an accident arising out of and in the course of the employment.
2. ———. The words "arising out of" refer to the origin or cause of the accident and are descriptive of its character, while the words "in the course of" refer to the time, place, and circumstances of the accident.
3. ———. Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved.
4. ———. The rule of liberal construction of the Workmen's Compensation Act is related to determination of the scope of the act and does not apply to evidence produced to establish a claim for compensation.
5. ———. In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard.
6. ———. The general rule is that if an employee is injured while absent from the employment for lunch, the injury does not arise out of nor in the course of the employment.
7. **Workmen's Compensation: Appeal and Error.** An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record, and to entitle the plaintiff to a recovery he must sustain the burden of proof by a preponderance of the evidence that the workman suffered an accident arising out of and in the course of his employment.
8. **Workmen's Compensation.** An award under the Workmen's Compensation Act may not be based upon possibilities, probabilities, or conjectural evidence.

Appeal from the district court for Dawson County: WILLIAM F. COLWELL, Judge. Affirmed.

William S. Padley, for appellant.

Stewart & Stewart, for appellee.

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

BROWER, J.

This action was brought in the Nebraska Workmen's Compensation Court by June Oline, Administratrix of the Estate of Roland O. Oline, deceased, plaintiff, against Nebraska Natural Gas Company, a corporation, which will at times herein be called the company, to recover for the accidental death of the plaintiff's intestate under the Workmen's Compensation Act of the State of Nebraska. It was brought on behalf of the decedent's widow and three minor children.

A trial before a single judge of said compensation court resulted in a finding that the plaintiff had failed to maintain the burden of proving that the accident resulting in the death of the decedent arose out of and in the course of his employment, and dismissed the petition.

The plaintiff thereupon waived a hearing before the entire Nebraska Workmen's Compensation Court and elected to appeal directly to the district court for Dawson County, Nebraska. On appropriate pleadings filed therein by the parties to raise the issue herein discussed, a trial de novo was held in said district court which resulted in a similar finding that the plaintiff had failed to prove by a preponderance of evidence that the decedent's death arose out of and in the course of his employment by the defendant, and the petition filed in that court was likewise dismissed because thereof.

The motion of plaintiff for a new trial having been overruled, the plaintiff has brought the matter to this court by appeal.

The plaintiff assigns error to the trial court: In failing to find that decedent's death arose in the course of his employment; in failing to find the plaintiff proved a prima facie case; and in failing to find the burden of showing that decedent was operating the motor vehicle

on his own time during the period of travel from his place of employment to his home for lunch had shifted to defendant.

There is no dispute of substance with respect to the facts herein. Roland O. Oline met his death in a railroad crossing accident on December 28, 1961, in the city of Gothenburg, Nebraska. On that day and for more than 11 years previously he had been employed by the defendant in the operation of its natural gas distribution system in Gothenburg. He had been a faithful, conscientious, and efficient employee. His duties were generally: Servicing gas lines; the installation and servicing of appliances; repair of the gas lines; adjusting and regulating valves controlling the flow of gas in the defendant's lines; digging ditches for such lines; connecting new customers and disconnecting old customers; and in some instances, reading meters and making collections. His regular employment was on a weekly basis of 44 hours a week, coming to work at 8 a.m., and continuing until noon. After an hour off for lunch he regularly would return at 1 p.m., and work until 5 p.m.

The defendant company employed at Gothenburg a manager, an office girl, and three workmen. The three workmen which included the decedent were all engaged in much the same work. They assisted one another and at times worked together. The company also had three pickup trucks. One was used by the manager and another by the other two workmen. Apparently the deceased had been employed by the company for a longer period than either of the other workmen. Although it was not particularly assigned to him, he alone had used the third pickup regularly. He drove it in his work for the company and in going to and from work, and so used it in going home for lunch. It was kept at his premises all night. Decedent and the other workmen were on emergency call. Their names were listed in the local telephone directory as being subject to such call on behalf of the company. If called at night or at the noon

hour by reason of an emergency, they were supposed to respond to the call. They kept track of their own time for such irregular work and gave a slip showing it to the office girl.

The southern portion of Gothenburg is traversed by the main line of the Union Pacific Railroad. The streets are laid out parallel with or at right angles to the tracks. They will be referred to herein as running east and west, and north and south, although their direction is not true with that of the compass.

The company's office is on the west side of Lake Avenue which extends north and south through the city and is paved, being also State Highway No. 47. The office is a little south of the northeast corner of Block 9 of the Original Town of Gothenburg. Lake Avenue intersects with Eighth Street, which is also U. S. Highway No. 30, at the southeast corner of said Block 9. U. S. Highway No. 30 runs east and west parallel with and adjacent to the Union Pacific right-of-way on its north. This right-of-way is 400 feet wide. South of the right-of-way, Seventh Street extends east and west adjoining and parallel to the right-of-way also. There are three streets or highways in the city limits of Gothenburg which have crossings on them across these railway tracks. One some distance west of those mentioned hereafter is of no significance in this opinion. The main crossing is on Lake Avenue, or Highway No. 47, and it is the only one of them that is paved. The decedent's residence was on the south side of Seventh Street in the fifth block east of the Lake Avenue railroad crossing. It is therefore about 6 blocks plus the 400 feet of right-of-way and the width of U. S. Highway No. 30 from the company's office going south on Lake Avenue and then east on Seventh Street.

On the morning of December 28, 1961, the deceased reported to work at the company office at 8 a.m., with the pickup. He was joined there by Donald Turnquist, another one of the workmen and a fellow employee.

Together shortly after 8 a.m., they drove in the company pickup to the McVay-Olesen Funeral Home 1 block north and 2 blocks east of the office. They were there engaged in moving a wall gas furnace from the front office to a garage.

There is a shop and repair room, separated by a partition from the office, at the back of the gas company building from which doors lead to the office in front and outside to a parking space at the rear. In the shop there are supplies and fittings such as might be generally necessary in doing the work of the company. Between 10 and 10:30 a.m., both men returned to the office but it is not shown why they did so. Turnquist, who testified, did not recall whether or not they returned although he does remember having coffee with Oline at the "Lake Avenue Lunch" later in the morning.

Having completed a phase of their work, although installing the vent remained to be done, they left the funeral home. As near as Turnquist could recall except for the vent they were all hooked up and ready to go. To do that, shutting off the gas was not necessary. Turnquist said they intended to come back after lunch. Turnquist looked at his watch on leaving and remembers it was then 20 minutes until noon. They drove in the company pickup from the funeral home directly to the parking space back of the office entering in the alley which runs east and west through the block from Lake Avenue and turned north into the parking spot. Turnquist got out of the pickup and went to his own car which he had left there. Oline said to him as he left the pickup, "'I will see you after lunch.'" Turnquist had to back his car out before Oline could get the pickup out. Turnquist drove away while Oline was still in the pickup and the witness says he did not observe what Oline did thereafter and never saw him again. Turnquist stopped to get some groceries and then went home.

Oline, being of longer service with the company, supervised the work when they were together. There

was no conversation between them concerning why they left the funeral home before noon. Nothing was said by Oline about going to the border station mentioned later herein. They just left together. They had not talked specifically about going back to the funeral home after lunch. Turnquist and another employee, however, finished it the next day after Oline's death. Turnquist and the deceased had no conversation as to what Oline intended to do and he did not mention having any other duty to perform. Turnquist had never ridden home with Oline and did not know the route he usually took.

Roger Peden, a witness and employee of the Cozad Ditch Company who lived at Gothenburg and knew Oline, while on his way to his company's diversion dam where there was ice trouble, was held up on the north side of the Lake Avenue railroad crossing by the presence of a freight train standing on the tracks. He said he came there about 11:40 and was in his International ½-ton pickup accompanied only by his 5-year-old son. After Peden had been there about 5 minutes, Oline drove up in the company pickup from behind. Peden did not wait for the traffic to clear but backed up on the depot platform and turned about. In doing so, he greeted Oline by his nickname and called out, " 'Hi, Swede.' * * * 'It's just about noon.' " Oline responded to Peden saying, " 'You are going the wrong way.' " Peden explained to him that he was going to the "diversion" down off the highway. He did not see Oline again or observe him following. Peden then drove onto U. S. Highway No. 30 and proceeded on eastward to another of the three crossings about half a mile east. Turning there and crossing the tracks he observed a freight train coming from the east about a quarter or a half a mile from the crossing. Completing the crossing he drove about a half mile south and then a quarter of a mile to the diversion, got out, and while holding an ice bar breaking ice he heard the noon whistle blow at Gothenburg.

The evidence shows it was usually blown quite accurately as to time. Oline was killed when his pickup was struck by this same freight train at this crossing. The damage to the pickup appeared to be on the left front side. The south end of the crossing where the accident occurred intersects Seventh Street about 1 block east of the decedent's home. To reach the border station Oline would have had to drive approximately 5 blocks past his home westward on Seventh Street.

The plaintiff contends there is testimony which raises an inference that Oline was going to the border station of the company to regulate the gas pressure and therefore was on his employer's business at the time of the accident. The defendant company obtains its supply of gas from the Kansas-Nebraska pipeline. It comes in under a high pressure of from 400 to 700 pounds per square inch. It is reduced to the pressure of 10 to 30 pounds, depending on the weather, which appears a sufficient reduction to serve the older portion of the system in Gothenburg. This first reduction occurs at the border station. The new portion which is further north is a low pressure system. For this latter portion the pressure is further reduced to ounces, the pressure in residential areas being 6 ounces per square inch generally. There are six of these stations in Gothenburg. The regulator stations making the second reduction being all on the north side of the tracks in the residential and business districts. The regulation is done by hand with a crescent wrench requiring the presence of a man.

In the wintertime this regulation at the border station is usually done two or three times a day. Its frequency depends on the weather and the use of gas. If the weather turns cold, the pressure is stepped up somewhat and if it becomes warm it is reduced. The regulators are generally adjusted in the morning when the use of gas furnaces and appliances is stepped up by the customers. Sudden changes in weather also require adjusting these regulators. There is a gauge near the outside shop door

which indicates the pressure and if the pressure at the border station is changed it shows on the gauge. It is also necessary to watch the pressure at the Twentieth Street station, which is farthest from the border station. The pressure at the Twentieth Street station and the gauge and a pressure chart in the back end of the office would disclose the need of attention at the border station. In the winter one of the employees generally adjusts the regulators on coming to work. The three workmen and the manager generally make the adjustments although Turnquist, the youngest in point of service, did so rarely. Apparently the three workmen take turns by the week in the regulation of these stations in early morning before the manager comes to work although it seems that this is not always followed. Sometimes the one who comes the earliest tends to it. The men occasionally regulated them on their own initiative on weather changing. The week of the accident it appears Aubushon, the third workman, was the one to make the early morning adjustment at the border station and the manager says as he recalls he had done so. The manager, Wayne Gronewold, testified he again regulated the border station and another known as the D Street station, the latter being a short distance from the office, that morning between 10 and 11 o'clock. This was done because the weather had warmed up somewhat. The pressure was not then cut down very much. He had also sent Oline himself "up the hill" to regulate the Twentieth Street station during the period while he was present at the office between 10 and 10:30. Oline had returned after about 15 minutes and reported that he had attended to this adjustment. Oline's adjustment at the Twentieth Street station and the manager's at the border station were made about the same time. The manager and office girl both testified that when Oline was at the office with Turnquist it was reported to him that the manager had made the adjustment at the border station. Neither the manager nor

the secretary saw Oline again after he left the office. If there was too much pressure it would not damage the system unless "it got tremendous," but it would result in blowing out pilot lights and water heaters.

The plaintiff puts great stress on the location of the border station being on Seventh Street about 6 blocks west of the east crossing where the accident happened. At the same time it appears the decedent's residence was only about 1 block west of the crossing on the same street. It is argued that it may be inferred that Oline was enroute to that station and not to his home. The Lake Avenue crossing where he first went would have taken him within 1 block of this station but it was also his shortest route to his home. It is urged that noon had not come when he left the funeral home and that Oline was a faithful, conscientious, and efficient employee. From all of which plaintiff contends a prima facie case has been made.

In completing the résumé of the evidence, the following should be mentioned. Oline's wife was away from home on the day of the accident and knows nothing of his actions. There is no testimony concerning the length of time the freight train continued to block the Lake Avenue crossing after the witness Peden drove away. Nothing is shown concerning the weather that day at Gothenburg after the adjustment at the border and other stations at or near 10 a.m., which had been reported to the decedent. There is testimony that the company was not too exacting as to the time the men came to work or left depending a little on whether they had previously worked a little overtime or vice versa.

The statutory provisions of the Nebraska Workmen's Compensation Act applicable to the case before us should here be set out as follows. Section 48-101, R. R. S. 1943, provides in part: "When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, of which the actual or lawful imputed

negligence of the employer is the natural and proximate cause, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury."

Another provision which is pertinent to and explanatory of the section of the statute already quoted, reads in part as follows: "(6) Without otherwise affecting either the meaning or the interpretation of the abridged clause, personal injuries arising out of and in the course of employment, it is hereby declared: Not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen, and not to cover workmen who, on their own initiative, leave their line of duty or hours of employment for purposes of their own." § 48-151, R. R. S. 1943.

In construing this statute, this court has held in Seger v. Keating Implement Co., 157 Neb. 560, 60 N. W. 2d 598: "A compensable injury within the provisions of the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.

"Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. * * *

"The rule of liberal construction of the Workmen's Compensation Act is related to determination of the scope of the act and does not apply to evidence produced to establish a claim for compensation. * * *

"In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a devia-

tion as to constitute a break in the employment and to create a formidable independent hazard."

The case of Berry v. School District, 154 Neb. 787, 49 N. W. 2d 617, involved a situation where a school teacher was injured while in the act of returning from lunch at the high school building. The court held: "The general rule is that if an employee is injured while absent from the employment for lunch, the injury does not arise out of nor in the course of the employment."

In Appleby v. Great Western Sugar Co., Inc., 176 Neb. 102, 125 N. W. 2d 103, this court in its syllabi stated: "In order to recover under the Workmen's Compensation Act, the plaintiff must prove that the death or disability of the workman was the result of an accident arising out of and in the course of the employment. * * *

"The words 'arising out of' refer to the origin or cause of the accident and are descriptive of its character, while the words 'in the course of' refer to the time, place, and circumstances of the accident."

An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record, and to entitle the plaintiff to a recovery he must sustain the burden of proof by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment. Klentz v. Transamerican Freightlines, Inc., 173 Neb. 53, 112 N. W. 2d 405.

The deceased died because of the collision at the railroad crossing. What does this evidence show as to why he was at the railroad crossing at that time? Was he attending the company's business or on that of his own? Was he on his way to lunch? Was he going to the border station? Was he going on a call for his employer no one else knew about? The testimony of Turnquist furnishes some light on these questions. They had finished one phase of the work at the funeral home. Installing the vent remained. Although no conversation

between the deceased and Turnquist was related, the latter said they intended to return. They left their work at 20 minutes until noon. The two employees drove to the parking lot and Oline then said, " 'I will see you after lunch.' " Turnquist had to back out before Oline could go. This he did, going to get his groceries and then home. Oline had said nothing of checking the border station at noon. Oline appeared at the Lake Avenue crossing at a quarter to noon and drove up behind Peden in the company pickup. It was on his direct and closest way both to the border station and his home. Peden did not wait for the traffic to clear but backed up, turned about, and went to the east crossing. He said the train involved in the fatal accident was a quarter to a half mile east. How long before the traffic cleared is not shown. In a very short time the deceased was killed at the same crossing within a block and a half from his home. It was necessary to cross the tracks either to arrive at his home or to go to the border station. Under these circumstances, is the evidence sufficient to make a prima facie case that he was en route to the border station and upon the business of his employer when no change in the weather is shown and no directions for him to check the regulator were shown? Whether there is enough shown to determine that he was going to lunch is not the question before us. The real question is: Has it been affirmatively shown that he was on his employer's business at the time of the accident? The burden to prove that the accident arose in the course of the decedent's employment was on the plaintiff. Klentz v. Transamerican Freightlines, Inc., *supra*. An award under the Workmen's Compensation Act may not be based upon possibilities, probabilities, or conjectural evidence. Seger v. Keating Implement Co., *supra*.

The plaintiff having failed to prove the accident causing the decedent's death arose out of the course of his employment, the trial court was correct in its finding in

favor of the defendant and dismissing the plaintiff's petition, and its judgment must be and is affirmed.

AFFIRMED.

J. WILSON NANCE, APPELLANT, V. AMES PLAZA, INC., ET AL., APPELLEES.

131 N. W. 2d 569

Filed December 4, 1964. No. 35603.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. On motion for rehearing. See *ante* p. 88, 128 N. W. 2d 564, for original opinion. Motion for rehearing overruled.

Eisenstatt, Lay, Higgins & Miller, for appellant.

Kennedy, Holland, DeLacy & Svoboda, David A. Svoboda, and Stoehr, Rickerson, Sodoro & Caporale, for appellees.

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

WHITE, C. J., SPENCER and BOSLAUGH, JJ., dissenting.

We respectfully dissent on the action of the court in overruling the motion for rehearing. We are of the opinion that reargument should have been granted in this case.

Plaintiff sustained injuries when he slipped and fell on an icy sidewalk at the Ames Plaza, a shopping center in Omaha, Nebraska, owned by the defendant. The trial court directed a verdict at the close of the plaintiff's evidence, so the only question presented is the legal effect of the undisputed evidence in the case adduced by the plaintiff. The problem in the case is the determining of what reasonable inferences can be drawn and be adduced from the plaintiff's evidence. The evi-

dence shows that the accident happened shortly after noon on December 20, 1961. The plaintiff was a drug salesman employed by the Pitman-Moore Company. He had arrived at the Ames Plaza at about 12:15 p.m. He had parked his car on the east side of an office building described as building "B." He went from his car to a restaurant in a bowling alley which is located directly north of building "B." After the plaintiff had finished his lunch he left the bowling alley by the main entrance and walked directly south toward building "B." In doing so he crossed a sidewalk on the south side of the bowling alley and a parking area between the bowling alley and building "B" and arrived at a sidewalk which is along the north side of building "B." The sidewalk adjacent to the bowling alley was clear. The parking area between the sidewalks was covered with packed snow and ice. The sidewalk adjacent to building "B" is approximately 8 feet wide. There is a curb at the edge of the parking area which is 6 inches high. There was a small ridge of snow along the curb at the edge of the parking area.

The plaintiff testified: "Q. Well, as you went on across the way, just describe your motion and what you observed and what happened. A. As I approached the sidewalk I looked at it. Because of the slope in the street there, I wanted to go to the sidewalk to go up because it appeared to be clear; the street was packed and could be dangerous to walk on, and so as I approached the sidewalk I observed it, it was cleaned off from where I could see it. Q. What color was it, Mr. Nance? A. Light-colored concrete. Q. Now, in passing onto the sidewalk area, do you recall what foot you stepped onto the area with? A. I stepped over the ridge of snow with my right foot and placed it on the sidewalk. Q. And in going over this ridge of snow that you mentioned, did you step in that or over it? A. I stepped over it. Q. And did you have any difficulty getting over it or maneuvering over it? A. No. Q.

Well, describe the step that you would take to go over it so that we can understand your movement as you go onto the sidewalk. A. Well, I had to raise my right foot higher than you would in a normal step to clear the snow. I had on oxford rubbers instead of the four-bucklers, so I didn't want to wade through the ridge; I stepped over it. Q. All right, and you come down on your right foot; is that correct? A. That's right. Q. Did you come down on the sidewalk area? A. You mean did I put my foot on the sidewalk area? Q. Yes. A. Yes. Q. And that is your right foot? A. That's right. Q. Tell us what happened when you did that. A. My right foot didn't stop, it sailed on out onto the sidewalk. Q. And what happened to you? A. I had—I mean, as I put my right foot down, I was pushing with my left foot to raise it up over the snow then, and my right foot went out and I fell down with my hands behind me and caught myself; a severe twist as I went. As the right foot went out, I tried to get my left foot under me and twisted and fell on my hands. Q. Where did you end up in the sidewalk area? A. My hands were on the sidewalk, my feet were extended over towards the building." The plaintiff further testified that after he had slipped and fallen he saw that there was a "thin glaze of ice" on the sidewalk; that he had not noticed the glaze prior to the time that he stepped on it; and that the glaze extended over a considerable area of the sidewalk and extended from a point 10, 15, or 20 feet west of where he fell to near the entrance to the building "B" on the north side of the building near the east wall.

At the time the plaintiff fell he was on his way from the bowling alley to his automobile for the purpose of obtaining his sample case. He then intended to call at the office of Dr. Minthorn which was located in building "B."

In our previous opinion on this matter we held as follows: "In truth it may not be said with any degree of certainty where the location of the area on the sidewalk

on which the plaintiff fell is, or even the location of the particular sidewalk."

The plaintiff testified that as he was walking south from the bowling alley toward building "B" he walked directly to a sign on the wall of building "B." The sign is shown in exhibits Nos. 4, 15, and 16 which are photographs of the north side of building "B." When these exhibits are given proper consideration, the location of the area on the sidewalk on which the plaintiff fell is shown with reasonable certainty. The inference is clear from this testimony that the plaintiff fell on the sidewalk that was immediately in front of the sign on the wall of building "B."

The plaintiff alleged that the defendant knew or should have known of the icy condition of the sidewalk at the location where the plaintiff slipped and fell. In our previous opinion in this case we called attention to the testimony of Helen Rigdon, an employee of Dr. Murray F. Minthorn, the customer on whom the plaintiff proposed to call on the premises of the defendant. In our previous opinion we found that the location of the ice upon which the plaintiff slipped was not more clearly placed than being on the sidewalk outside of Dr. Minthorn's office as this employee, Helen Rigdon, was going to her car. We will briefly review the testimony both with relation to the location of the ice upon which this witness slipped and her testimony as to her notification to the employee of the defendant who was in charge of the maintenance of this sidewalk. Mrs. Rigdon testified that she had slipped on some ice on the sidewalk outside of Dr. Minthorn's office between 5:30 and 6 p.m., on December 19, 1961; that she was going out to her car which was parked on the north side of the building about four cars from the entrance; that the condition of the sidewalk was "very icy"; that "there was snow and ice packed on it"; and that there was no sand or rock, salt, or ice remover on top of the sidewalk.

Mrs. Rigdon further testified that on the morning of

December 20, 1961, before she went to work, she went to the bowling alley at about 8:30 a.m. to get a cup of coffee and that at that time she had a conversation with Roland Waite.

The managing agent of the defendant testified that Waite assisted in the management of the shopping center and that his duties included the general maintenance of the structure as well as the maintenance of the common area; that his duties with respect to the common area of the sidewalk north of the building were to "keep the area clear of snow, or debris, or whatever the case may be"; that, concerning ice, it was part of his duties to clear it of ice or to put something on it; and that the defendant had something that could be applied to ice to make it safe for walking.

Mrs. Rigdon testified that she told Waite that "he had better get something on that ice, that I had slipped on it the night before"; that "he should do something about the ice on that sidewalk before someone really fell, that I had slipped on it myself"; and that Waite replied, "All right."

With respect to the location of the place where she had slipped on the ice, Mrs. Rigdon testified: "Q. And where, exactly, did you slip on the ice, Mrs. Rigdon? A. It was right in front of the building there about the fourth car down the sidewalk. Q. Well, when you say 'right in front of the building' had you just left the north entranceway of what they described as Building B? A. Yes, sir. Q. That is the building you are located in? A. Yes, sir. Q. And what did you do at that time, turn to the west? A. Yes, sir, I did. Q. And were you walking along the sidewalk adjacent to the Building B then? A. Right. Q. And you slipped on that sidewalk then at that time? A. Yes, sir. Q. About four car fronts down from the doors, is that your testimony? A. Yes, sir."

With respect to her conversation with Waite, Mrs. Rigdon testified: "Q. Had you encountered Mr. Waite

before in the bowling alley or at the Plaza? A. I had seen him that morning at the bowling alley and told him that I had slipped on there and that was a sheet of ice on the sidewalk. * * * Q. And on that morning did you see Roland Waite? A. Yes, I did. I saw him in the bowling alley and told him that he had better put something on the ice, that I had slipped on it the night before. Q. You had a conversation with him about the condition of the ice? A. Yes, I did. Q. What was the conversation again, Mrs. Rigdon? A. I told him that he should do something about the ice on that sidewalk before someone really fell, that I had slipped on it myself. * * * Q. What did you say to him, Mrs. Rigdon? A. I told him he had better get something on that ice, that I had slipped on it the night before. Q. And what ice were you referring to? A. The ice on the north sidewalk. * * * Q. That is by Dr. Minthorn's office? A. Yes."

It seems to us that the evidence shows with reasonable certainty the location of the area where Mrs. Rigdon slipped on a "sheet of ice" the night before the plaintiff fell; that the place where Mrs. Rigdon slipped was near the place where the plaintiff fell; that her statements to Waite were sufficient to notify him that an icy condition existed on the sidewalk along the north side of building "B" at the place where the plaintiff fell; and that the location where the plaintiff fell was on a sidewalk maintained by the defendant and recognized by the defendant itself as an area that was maintained and should have been maintained for the safe passage of customers on the premises.

In our previous opinion, we held that there was no evidence that there was anything to indicate that the point where the plaintiff stepped onto the sidewalk was a proper place for him to enter upon it. The evidence shows that the sidewalk and the parking area were adjacent to each other in the shopping center. They were placed that way so that persons using the parking area could step from the parking area onto the sidewalk at

any point. We cannot see where there is any evidence to show that the plaintiff stepped onto the sidewalk in crossing this parking area at a place that was not intended by the owners and by the defendant to be used as such. We think that the jury could find from the evidence that in this commercial shopping center, with the parking areas and sidewalks immediately adjacent to each other, that the defendant intended that the plaintiff could enter the sidewalk from any point in the parking area where it was convenient for him to do so. The situation is not analogous to a public street with parallel sidewalks, in which the entranceways are designated by the public authorities through defined crosswalks, etc., and pedestrian traffic is not permitted in between.

Further, if the defendant owed the duty to maintain the area, where the plaintiff slipped, in a safe and proper condition, we fail to see where the point of his entrance would have any relation to the proximate cause of the accident.

We feel the evidence, therefore, is to the effect, construed in the most favorable light to the plaintiff, that the plaintiff was properly using the sidewalk at the time and place in question, that what he slipped on was not a natural accumulation of ice and snow which was open and obvious and therefore not actionable, but rather a thin coat of transparent ice which the jury could find was not apparent to a person exercising ordinary care under the circumstances. There is direct evidence that prior to the accident the defendant had been warned that there was a transparent coat of ice on the sidewalk. In our previous opinion, we called attention to the fact that in the testimony there was nothing which gave it that appearance (icy), and the ice thereon (in the location where the plaintiff fell) was not observable except on close inspection. This is a case where the defendant business inviter did not take proper precautions and safeguards to warn and protect its cus-

tomers from the transparent icy condition after it had been warned. We think that there was sufficient evidence for the jury to determine, under all the circumstances, that the defendant was negligent in the performance of its duty to maintain the premises in question for the safe passage of pedestrians using ordinary care under the circumstances.

DONNIE P. POOL, APPELLEE, V. ARTHUR ROMATZKE ET AL., APPELLANTS.

131 N. W. 2d 593

Filed December 4, 1964. No. 35709.

1. **Automobiles: Negligence.** It is a general principle that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead and the rule applies to driving in the daytime where vision is shortened by storms or other physical conditions.
2. **Negligence: Trial.** Where different minds may reasonably draw different conclusions from the adduced evidence or if there is a conflict in the evidence as to whether or not it establishes negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to a jury.
3. **Trial.** It is the duty of the trial court without request to submit to and properly instruct the jury upon all material issues presented by the pleadings and the evidence.
4. **Negligence: Trial.** It is the uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to specific acts so alleged and supported. The failure to do so, whether or not requested to do so, is error.

Appeal from the district court for Dawson County: NORRIS CHADDERDON, Judge. Reversed and remanded.

Ivan A. Blevens, for appellants.

Stewart & Stewart and Dier & Ross, for appellee.

Heard before WHITE, C. J., CARTER, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. SMITH, District Judge.

SPENCER, J.

This is an action by Donnie P. Pool, plaintiff and appellee, hereinafter referred to as plaintiff, against Arthur Romatzke, defendant and appellant, hereinafter referred to as defendant, to recover for damages sustained allegedly because of the negligent operation of defendant's automobile. Although there were other parties to the action in the district court, the contesting parties in this court are the plaintiff Donnie P. Pool and the defendant Arthur Romatzke. The cause was submitted to a jury, which returned a verdict for the plaintiff. Defendant, after the overruling of his motion for judgment notwithstanding the verdict or in the alternative for a new trial, perfected an appeal to this court.

The defendant, his two sons, and his father-in-law were hunting on a county east-west dirt road about 8 3/10 miles north and 7/10 of a mile east of Overton, Nebraska, in the early afternoon of Saturday, October 24, 1959. The party had driven into a driveway or lane leading to an abandoned farmstead which opened onto this road from the south. The day was clear, visibility was good, and the road was dry. The general area was hilly. The farm driveway was 4 6/10 feet lower than the crest of the hill to the west, which was 163½ feet from the center of the driveway. The crest of the hill is a plateau not over 50 feet in length. Traffic approaching from the west cannot see the farm lane until it reaches the top part of the hill.

The defendant backed his station wagon north out of the farm lane onto the east-west road after he and his party had hunted the farmstead area. The testimony of the defendant's witnesses is substantially that the defendant backed across to the north side of the east-west road, stopped his station wagon, put it in drive, and

started to move forward to the east. When the plaintiff's car came over the crest, the testimony of the defendant's witness is that the defendant's station wagon had moved forward approximately a foot and then was stopped. At that time, they testified there was a clearance space of approximately 12 to 13 feet south of the station wagon. There was no contact between the vehicles. The plaintiff's car took the borrow pit on the south side of the road, passed the defendant's station wagon, ran up over the driveway, and out into a field east of the farm lane.

Plaintiff's evidence is to the effect that as soon as his car came up onto the crest of the hill where he could see to the east, he saw the defendant's station wagon in the center of the road 35 feet away, backing up the hill toward him. There was no room to pass on either side, so he took the ditch to avoid hitting the station wagon. At the time he approached the crest of the hill, he was traveling 40 to 45 miles an hour. He had no recollection of what happened after he took the ditch. The distance from the crest of the hill to where the plaintiff's car left the roadway ditch was 181 feet. The plaintiff's car ended up in a field approximately 29 feet south of the roadway.

Plaintiff testified that about 2 months after the accident, he had a conversation with the defendant about it. On that occasion the defendant told him that at the time plaintiff came over the hill, "he was backing up that hill, and he said, 'I guess I—' he said, 'I thought I saw some pheasants;' he was backing up the hill."

Defendant's several assignments of error may be grouped into two categories: First, plaintiff was guilty of negligence as a matter of law, which precludes any recovery herein; and, second, the instructions of the court were prejudicially erroneous in several particulars. It is apparent that there is a serious disagreement between the parties on all material questions of fact, so that a jury question was presented unless the plaintiff

was guilty of negligence more than slight as a matter of law.

Defendant relies heavily on Most v. Cedar County, 126 Neb. 54, 252 N. W. 465, in which we said: "It is a general principle that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead and the rule applies to driving in the daytime where vision is shortened by storms or other physical conditions." In that case, plaintiff, while operating a motorcycle in the daytime to the west over the crest of a hill, collided with a county road maintainer which was coming up the hill to the east. The evidence was uncontradicted that it was necessary to operate a maintainer on the left side of the road in the face of oncoming traffic. The court found that it was the duty of the county to maintain the road; that the equipment used was suitable for that purpose; that it was necessary that the equipment be operated in the direction of the oncoming traffic; that there was ample room for the plaintiff to have passed the maintainer on its south side at a safe place; and found that there was no actionable negligence on the part of the county, and that the negligence of the plaintiff was the proximate cause of the accident and the resulting injuries.

A case more nearly in point on the facts with those of the instant case is Thurow v. Schaeffer, 151 Neb. 651, 38 N. W. 2d 732, in which we held: "The general rule with exceptions, which provides that it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway that he cannot stop or turn aside in time to avoid an obstruction discernible within the range of his vision ahead, should embrace in the exceptions all situations wherein reasonable minds may differ on the question of whether or not the operator of the automobile exercised the care and prudence required of a reasonably careful and prudent person under

the circumstances of the particular situation." We also said in that case: "Where different minds may reasonably draw different conclusions from the adduced evidence or if there is a conflict in the evidence as to whether or not it establishes negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to a jury."

Thurow v. Schaeffer, *supra,* involved a combine on the wrong side of the road and an automobile driving over the crest of the hill where the combine could not be seen until the crest was reached. There was no direct collision, but the plaintiff's automobile turned over in avoiding the combine. In that case, we held that the rule of stopping within the range of vision ahead is not an arbitrary one and is subject to certain exceptions which are substantially the same as regards daytime and nighttime driving, and held the question of plaintiff's negligence to be one for the jury.

For the purpose of defendant's motion for judgment notwithstanding the verdict, we must assume that the defendant's station wagon was 35 feet in front of the plaintiff in the center of the road, and was backing up toward the crest of the hill when the plaintiff came over the crest; that there was insufficient clearance on either side of the station wagon; and that it was necessary for the plaintiff to take the ditch if a collision was to be avoided. Because of the similarity of the factual situation involved, Thurow v. Schaeffer, *supra,* rather than Most v. Cedar County, *supra,* is controlling herein. The trial court correctly overruled defendant's motion for judgment notwithstanding the verdict. The question of the negligence of the defendant and of the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, were all questions to be submitted to the jury under proper instructions.

In instruction No. 1, the trial court described the nature of the action; the fact that plaintiff had sued the

defendant; and that the plaintiff claimed the defendant was negligent in the operation of his motor vehicle "in various particulars which may be summarized as follows," and then sets out five specifications of acts of negligence charged against the defendant. The court then disposed of the defendant's answer in the following paragraph: "The defendant Arthur Romatske (sic) admits that he was on the county road as claimed by the plaintiff on said day; denies that he was negligent in any manner; and claims that if the plaintiff's car was damaged and the plaintiff was injured that the accident resulted because of the negligence of the plaintiff at the time and place in question."

The defendant's answer, after a general denial, sets out the defendant's version of the facts in great detail, alleging that the accident was caused solely and proximately by the negligence of the plaintiff, and then alleged: "* * * which said acts of negligence were as follows, to-wit:

"(a) Driving at a high, negligent and dangerous rate of speed on a dirt and gravel road, to-wit: 60 miles per hour.

"(b) By driving his said automobile at a rate of speed in excess of the rate at which said vehicle could be stopped within the range of vision of objects in front of plaintiff on said highway.

"(c) By losing control of his said automobile as he crested the knoll above described.

"(d) By failure to have his automobile under control.

"(e) By failure to reduce the speed of his said automobile when approaching and cresting the knoll.

"(f) Failure to maintain a proper lookout.

"(g) Failure to observe other objects on the highway, within his assured, clear vision.

"(h) That plaintiff drove his automobile in such a manner as to indicate a willful and careless disregard for his own safety."

Nowhere in the instructions was the jury told which

acts of the plaintiff the defendant considered to be negligent. Nor was the jury in any way apprised of defendant's theory of defense as detailed in his answer. What we said in Ripp v. Riesland, 176 Neb. 233, 125 N. W. 2d 699, is applicable herein: "It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence.

"It is the uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to the specific acts so alleged and supported. The failure to do so, whether or not requested to do so, is error."

Evidence was adduced which, if believed by the jury, would sustain some of the defendant's specifications of negligence. These, therefore, were material issues which the defendant was entitled to have properly presented to the jury. We determine that the instructions of the trial court did not adequately present the defendant's theory of the case to the jury, and that the failure to do so constituted prejudical error.

Defendant attacks several portions of instruction No. 5 given by the trial court. We deem it necessary to refer only to the inclusion in the instruction of the third paragraph which sets out statutory provisions governing the parking of a vehicle on the highway. That portion of the instruction covering the parking of a vehicle on the highway is not applicable to the facts adduced herein. The testimony adduced on behalf of the defendant is either that the defendant's station wagon was moving slightly forward or stopped suddenly because of the emergency created by plaintiff's car coming over the crest of the hill. It was plaintiff's testimony that defendant's station wagon was backing up the hill when he observed it. The inclusion of the element of parking on the highway in the instruction could have been confusing and is erroneous.

For the reasons given, the judgment of the district

court is reversed and the cause is remanded with directions to grant a new trial.

REVERSED AND REMANDED.

MIDWEST EMPLOYERS COUNCIL, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

131 N. W. 2d 609

Filed December 4, 1964. No. 35734.

1. **Officers: Injunction.** A resident taxpayer, as such, and without proof of peculiar interest or injury to himself, may enjoin the illegal expenditure of money by a public board or officer.
2. **Municipal Corporations: Injunction.** A litigant, instead of resorting to an equitable remedy, is not obliged to take the risk of prosecution, fine, imprisonment, and loss of property in order to test the constitutionality of a city ordinance.
3. **Municipal Corporations.** A home rule charter is a grant of power to a city and not a limitation of general power. The grant of power is to be construed strictly against the public officials of a home rule charter city.
4. ———. A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto. It 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.
5. **Municipal Corporations: Labor.** The state is vested with the power and has entered the field of labor, and has not delegated to the city of Omaha any power to legislate by its city council ordinances relating to labor relations and practices, and civil rights.
6. **Municipal Corporations.** When the Legislature has enacted a law affecting municipal affairs, which are also of statewide concern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield.

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

Kennedy, Holland, DeLacy & Svoboda and Clarence E. Heaney, Jr., 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 appellees.

Leo Eisenstatt, Arnold Forster, Sol Rabkin, Paul Hartman, Robert C. Oberbillig, McGrath, North & Macnamara, and Thomas D. Carey, for amici curiae.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, and BROWER, JJ., and DIERKS, District Judge.

MESSMORE, J.

This action was brought by the Midwest Employers Council, Inc., a Nebraska corporation, and the United States Check Book Company, a Nebraska corporation, plaintiffs, against the City of Omaha, a municipal corporation of the metropolitan class, the mayor and councilmen of the city, members of the human relations board of the city, the acting director of the human relations board, and the chief of police of the city, defendants. This action was brought by the plaintiffs pursuant to the Nebraska Uniform Declaratory Judgments Act, sections 25-21,149 to 25-21,164, R. R. S. 1943, and the object of the action was to obtain an adjudication that ordinance No. 22026, passed by the city council for the city on February 6, 1962, and having an effective date of February 22, 1962, was null and void, and to enjoin the defendants from enforcing this ordinance against the plaintiffs. The ordinance seeks to regulate employment practices in private business within the city of Omaha.

Both the plaintiffs and the defendants moved for a summary judgment on the basis that there was no genuine issue of material fact, and that each party was entitled to a judgment as a matter of law.

The trial court entered a summary judgment holding that the city of Omaha had the power to pass ordinance

No. 22026; that the state had not preempted the field of labor relations and fair employment practices; that the ordinance did not violate the Constitution of this state except as hereinafter noted; that the ordinance did not create a new board without a majority vote of the electors of the city of Omaha in contravention of the Omaha home rule charter; and that the ordinance did violate either Article I, section 3, or Article III, section 18, of the Constitution of this state, or both, in connection with its definition of an "employer," a "person," and the penal portion of the ordinance. The court found that the ordinance had a severability clause, and held that the ordinance was a valid and constitutional enactment, excepting only the following portions which it declared to be invalid and unconstitutional: Section 14.04.030. "Unfair Employment Practices Prohibited * * *. Unfair employment practices are hereby prohibited." Section 14.04.060. "Penalty for violations. Any person, persons, firm or corporation who violates any of the provisions of this Chapter, shall, upon conviction, be fined in any sum not to exceed Five Hundred Dollars ($500.00) or be sentenced to be imprisoned not to exceed six months in jail, or any combination of such fine and imprisonment for each offense, at the discretion of the Court."

The court rendered judgment enjoining the city, its mayor, and chief of police from directly or indirectly enforcing the ordinance as against the plaintiffs to the extent that the ordinance was declared invalid and unconstitutional.

The plaintiffs filed a motion for new trial, and the defendants also filed a motion for new trial. Both motions for new trial were overruled. The plaintiffs appealed to this court.

Pursuant to a stipuation filed in this court, the appeal of the defendants was dismissed, without prejudice to their right to file a cross-appeal, and the plaintiffs were designated as appellants and the defendants as appellees.

The Midwest Employers Council, Inc., is a corporation

organized and existing under the laws of this state with its principal place of business in the city of Omaha, and is a taxpayer of the city of Omaha.

The United States Check Book Company is a corporation organized and existing under the laws of this state, with its principal place of business in the city of Omaha, and is a taxpayer of the city of Omaha.

The City of Omaha is a municipal corporation of the metropolitan class organized and existing under and by virtue of the Constitution and laws of this state, and is governed by a home rule charter.

The appellants' amended petition alleged that the City of Omaha was without power to legislate in the field of fair employment practices and civil rights as between its citizens because such power has neither been expressly nor impliedly granted to the city by either the Constitution or statutes of this state; because fair employment practices and civil rights are matters of statewide concern and not matters of purely local or municipal governmental concern; and because the state has preempted the field of civil rights and fair employment; that the ordinance is violative of certain Articles and sections of the Constitution of this state; that the ordinance contravenes Article IV, sections 4.04 and 4.08 of the home rule charter of the city for 1956, in that the ordinance purports to broaden and enlarge the power of the human relations board, and, in effect, creates a new board without a majority vote of the electors of the city; that the appellants are taxpayers of the city and subject to ordinance No. 22026; and that the appellees will, unless enjoined from doing so, enforce ordinance No. 22026 of the city against the appellants. The petition then prayed that the court take jurisdiction of this matter and find ordinance No. 22026 of the city to be illegal, invalid, and unconstitutional; that the court permanently enjoin the appellees, and each of them, from in any manner enforcing the ordinance as against the appellants; and that the ordinance be declared null and void.

The appellees' answer was in effect a general denial of the plaintiffs' petition and amended petition, except such allegations as were specifically admitted in the answer; and prayed for a dismissal of the appellants' petition and that the court find ordinance No. 22026 to be constitutional and valid.

The facts were stipulated by the parties and are as follows: On February 6, 1962, the city council of the city of Omaha passed ordinance No. 22026 having an effective date of February 22, 1962. Both appellants in this action, the Midwest Employers Council, Inc., and the United States Check Book Company, Nebraska corporations, have their principal offices in the city of Omaha; both employ more than three employees and are accordingly subject to ordinance No. 22026; and both are taxpayers of the city. The appellees will enforce ordinance No. 22026 against the appellants unless they are enjoined from doing so. Ordinance No. 22026 purports to add a new chapter to the Omaha municipal code entitled "Fair Employment Practices" which would, among other things, make it unlawful for an employer of three or more persons, except nonprofit social clubs, fraternal, charitable, educational, or religious associations or corporations from discriminating on the basis of race, religious creed, color, national origin, or ancestry.

All of the above matters were agreed to by the parties and appear in the statement of facts. It is also agreed in the statement of facts that the admissions and stipulations show that the city of Omaha expended public funds in the amount of $174.72 in advertising for an executive assistant to administer ordinance No. 22026; that the appellants are both subject to the provisions of ordinance No. 22026; and that the appellees would enforce the ordinance against the appellants.

The appellants' pertinent assignment of error is that the trial court erred in holding that the City of Omaha had the power to enact a fair employment practices ordinance, and particularly ordinance No. 22026 for the

following reasons: Such power has neither been expressly nor impliedly granted to the city by the Constitution or statutes of this state; and such fair employment practices and civil rights are matters of statewide concern and not of purely local concern and municipal governmental concern.

In Niklaus v. Miller, 159 Neb. 301, 66 N. W. 2d 824, this court said: "We have often held that: '* * * in this jurisdiction the law has long been settled beyond debate that a resident taxpayer, as such, and without proof of peculiar interest or injury to himself, may enjoin the illegal expenditure of money by a public board or officer.' Woodruff v. Welton, 70 Neb. 665, 97 N. W. 1037. See, also, Martin v. City of Lincoln, 155 Neb. 845, 53 N. W. 2d 923; * * *.

"These cases rest on the sound principle that each taxpayer has such an individual and common interest in public funds as to entitle him to maintain an action to prevent their unauthorized appropriation."

The City of Omaha expended public funds in the sum of $174.72 for the purpose of implementing the ordinance. A taxpayer may invoke the interposition of a court of equity to prevent the illegal expenditure of public money without showing any interest peculiar to himself.

As said in Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N. W. 2d 150: "A litigant, instead of resorting to an equitable remedy, is not obliged to take the risk of prosecution, fine, imprisonment, and loss of property in order to test the constitutionality of a city ordinance."

Under the above-cited authorities there is no doubt that the trial court and this court have jurisdiction of this matter.

Article XI, section 5, of the Constitution of this state provides: "The charter of any city having a population of more than one hundred thousand inhabitants may be adopted as the home rule charter of such city by a majority vote of the qualified electors of such city voting upon the question, and when so adopted may

thereafter be changed or amended as provided in Section 4 of this article, subject to the Constitution and laws of the state."

There is no question in this case with reference to the city of Omaha adopting its new charter in 1956.

There arises in this case the question of whether the city charter of the city of Omaha is a grant of power or a limitation of power. The appellants contend that a grant of power exists, while the appellees contend that a limitation of power exists.

In Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622, supplemental opinion, 157 Neb. 768, 61 N. W. 2d 556, this court said in the original opinion, quoting with approval from Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490: "'The power conferred upon municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects.' See, also, Reid v. City of Omaha, 150 Neb. 286, 34 N. W. 2d 375; Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649.

"The home rule charter adopted by the city of Omaha is a grant as distinguished from a limitation of power. Being a grant of power the charter is to be contrued according to the same rules as a legislative act containing the same provisions in determining what authority is thereby granted the city government. See, Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643; Falldorf v. City of Grand Island, 138 Neb. 212, 292 N. W. 598; * * *.

"A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto. It therefore 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. Wagner v. City of Omaha, *supra*."

In Peterson v. Vasak, 162 Neb. 498, 76 N. W. 2d 420, this court said: "A city is a political subdivision of the state, created as a convenient agency for the exercise of such governmental powers of the state as may be entrusted to it by constitutional provision or legislative act. Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649; Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622, supplemental opinion, 157 Neb. 768, 61 N. W. 2d 556; State v. Kubik, 159 Neb. 509, 67 N. W. 2d 755. * * * The governmental authority known as the police power is inherently an attribute of state sovereignty and belongs to subordinate governmental divisions when and as conferred by the state either through its Constitution or by valid legislation. Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 213 N. W. 835; City of Omaha v. Glissmann, 151 Neb. 895, 39 N. W. 2d 828; * * * Annotations, 86 A. L. R. 659, 117 A. L. R. 1117; * * *."

In Philson v. City of Omaha, 167 Neb. 360, 93 N. W. 2d 13, which was decided after the home rule charter of 1956 was adopted, this court said: "The city of Omaha is a city of the metropolitan class operating under a home rule charter. A home rule charter is a grant of power to a city as distinguished from a limitation of general power. The grant of power is to be construed strictly in favor of the public and against the public officials of the charter city. Where the charter specifies a method of exercise of a power, such method constitutes the measure of the power. A city council cannot, therefore, extend its powers by the enactment of an ordinance beyond the limits prescribed in its charter. Manners v. City of Wahoo, 153 Neb. 437, 45 N. W. 2d 113; Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490."

As stated in 7 McQuillin, Municipal Corporations (3d ed.), § 24.430, p. 383: "While a municipality must ob-

serve and itself not violate constitutional or statutory guaranties of equality of civil rights irrespective of race or social condition, insofar as these guaranties bind municipal governments, a municipal corporation ordinarily is without power to legislate upon, or extend, equality of civil rights." Section 24.431, p. 383, provides in part: "Employer-employee relationships for the most part are subject to state rather than municipal regulation; * * *."

Some argument appears in the appellees' brief, citing Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643, that the 1956 home rule charter of the city of Omaha is not a grant of power by the electorate of the city, but is a limitation of the power of the city council only, therefore the city has the power to pass any ordinance unless the charter specifically prohibits it, and the rules heretofore announced do not apply.

It is significant that the case of Philson v. City of Omaha, *supra,* was decided subsequent to the effective date of the 1956 charter of the city of Omaha, and declared the home rule charter of the city of Omaha to be a grant of power. Our research discloses that this court has declared city charters to be a grant of power. We are unable to find any case in this jurisdiction holding that a city charter is a limitation of power of the city council only.

From an examination of the city charter of the city of Omaha, we are unable to find any express authority which granted the city council power to pass legislation pertaining to fair employment practices or civil rights. Neither does the city charter fairly imply that the city council is vested with the power to pass such an ordinance. There is no grant of such power to the city by any law passed by the Legislature, nor any existing statutory law or constitutional right granted to the city of Omaha applicable to the city's right to warrant the passage of the ordinance here considered. It is apparent that the city council of the city of Omaha, in passing

the ordinance in question, exceeded its power. The matters of fair employment practices and civil rights are matters of statewide and not of local concern. The city of Omaha, when its charter was adopted in 1956, never acquired any power delegated to it by the Legislature to pass an ordinance relating to fair employment practices or civil rights.

Chapter 48, R. R. S. 1943, entitled "Labor," discloses that the state by its Legislature has extensively entered the field of labor. Article 1 relates to workmen's compensation; article 2, to employment regulations; article 3, to child labor; article 4, to health and safety regulations; article 5, to employment agencies; article 6, to employment security; and other articles relate to the subject of labor but need not be set forth.

Section 81-101, R. R. S. 1943, creates the Department of Labor. Section 81-102, R. R. S. 1943, relates to the appointment of a Commissioner of Labor for the Department of Labor. Section 81-401, R. R. S. 1943, sets out various duties of the Department of Labor among which are to foster, promote, and develop the welfare of wage earners; to improve working conditions; and to advance opportunities for profitable employment.

Section 20-101, R. R. S. 1943, provides: "All persons within this state shall be entitled to a full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, public conveyances, barber shops, theatres and other places of amusement, subject only to the conditions and limitations established by law and applicable alike to every person."

Section 48-214, R. R. S. 1943, provides in part: "It is hereby declared to be the policy of this state that no representative agency of labor, in collective bargaining with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of work, shall, in such collective bargaining, discriminate against any person because of his race or color. The Department of Labor shall be and hereby is charged

with the duty of enforcement of this policy in conformity with Article I of the Constitution of Nebraska * * *."

Section 48-215, R. R. S. 1943, prohibits racial discrimination by firms producing or distributing military or naval supplies.

From the above cited, it is obvious that the Department of Labor, created by the Legislature of this state, is vested with the power and responsibility of enforcing employment regulations within the state.

On three occasions the Legislature of this state has refused to pass fair employment practices legislation. See, Legislative Journal, Sixty-ninth Session, 1959, pp. 26 and 1363; Legislative Journal, Seventy-second Session, 1961, pp. 323 and 1522; Legislative Journal, Seventy-third Session, 1963, pp. 197 and 2017. This action by the Legislature is tantamount to a declaration by it that, although it controls labor-management relations and employment relations, it does not, at least to the the present time, desire to legislate with respect to discrimination because of race, creed, or color in private employment.

As shown by the above, the state, by its Legislature, legislated specifically in the field of fair employment practices.

Legislative bill No. 724, of the 1963 Legislature, was an act relating to labor; to prohibit unjust discrimination in employment because of age; to provide for penalties; and to provide for enforcement of the act. This bill was approved by the Governor on July 5, 1963. §§ 48-1001 to 48-1006, R. S. Supp., 1963.

From the above it is apparent that the state, through its Legislature, has entered the field relating to labor relations and practices, and civil rights, and has not delegated to the city of Omaha any power to legislate by its city council the aforesaid matters.

This court in several opinions has stated that when the Legislature has enacted a law affecting municipal affairs, but which are also of statewide concern, such

law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield. See, Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894; Nagle v. City of Grand Island, 144 Neb. 67, 12 N. W. 2d 540; Michelson v. City of Grand Island, 154 Neb. 654, 48 N. W. 2d 769, 26 A. L. R. 2d 1346.

The appellees cross-appealed, assigning as error that the trial court erred in holding that the definition of "employer" contained in ordinance No. 22026 violated Article I, section 3, or Article III, section 18, if not both, of the Constitution of this state.

We have heretofore set forth the court's ruling in this respect. We find such ruling to be correct and this matter need not be further discussed. The appellees' cross-appeal is denied.

We hold ordinance No. 22026 of the city of Omaha to be unconstitutional in its entirety for the reason that the state, through the Legislature, did not delegate to the city of Omaha the power to permit its city council to legislate on fair employment practices and civil rights by passing ordinance No. 22026; and for the further reason that the power relating to labor relations and practices, and civil rights, lies in the state, and such matters are of statewide concern and not of local concern nor municipal government concern.

Other matters are raised with reference to the constitutionality of the ordinance in question which need not be determined in the light of our holding.

The judgment of the trial court should be and is reversed and the cause remanded to the trial court with directions to render judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CLAYTEE BRAZIER, APPELLANT, V. LOWELL D. ENGLISH, APPELLEE.

131 N. W. 2d 601

Filed December 4, 1964. No. 35736.

1. **Automobiles: Negligence.** Generally it is negligence as a matter of law for a motorist to drive a motor vehicle on a highway in such manner that he cannot stop in time to avoid a collision with an object within the range of his vision.
2. **Trial.** It is only when the evidence is undisputed, or but one reasonable inference or conclusion could be drawn from the evidence, that the question is one of law for the court.
3. ———. Where from the testimony before the jury different minds may draw different conclusions or inferences, or where there is conflict in the evidence, the matter at issue must be submitted to the jury.
4. **Automobiles: Negligence.** The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it.

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

Shrout, Hanley & Foley, for appellant.

Gross, Welch, Vinardi, Kauffman, Schatz & MacKenzie, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, and BROWER, JJ., and DIERKS, District Judge.

SPENCER, J.

This action was brought in the district court for Douglas County by Claytee Brazier, plaintiff and appellant, hereinafter referred to as plaintiff, against Lowell D. English, defendant and appellee, hereinafter referred to as defendant, for damages alleged to have been sustained in a rear-end collision. The case was submitted to the jury on the issue of the alleged negligence and contributory negligence of the parties. The jury returned a verdict for the defendant on the plaintiff's petition,

and for the plaintiff on defendant's cross-petition. Plaintiff has perfected an appeal to this court.

The collision in question occurred at the intersection of Twenty-fourth and Franklin Streets in the city of Omaha, Nebraska, sometime between 7:15 and 7:30 a. m., on June 6, 1961. It had rained earlier that morning, but at the time of the accident the sky was clear although the street was wet. The facts are in considerable conflict on many points, but for the purposes of this opinion it is necessary to only briefly sketch the differing versions. Plaintiff testified that he drove west on Clark Street to Twenty-fourth Street, where Clark Street forms a "T" intersection with Twenty-fourth Street, Clark Street not being cut through to the west. Plaintiff stopped at the stop sign, looked both ways, and observed a car which he believed to be the defendants, 3½ blocks north on Twenty-fourth Street. He executed his turn to the south into the west or curb lane, put on his directional turn signal, and approached the intersection of Franklin Street, which other evidence indicates is 160 feet south of Clark Street. He did not observe the defendant's car after he turned onto Twenty-fourth Street.

Plaintiff further testified that when he reached the intersection of Franklin Street and Twenty-fourth Street, he started to turn into Franklin Street, but was stopped by a pedestrian using the crosswalk. Two pedestrians crossed in front of his car from the north to the south, and while he was waiting for a pedestrian coming from the south, the right rear of his car was struck by the defendant's vehicle. It was his testimony that when he stopped his car it was pointing southwest, with the rear half in Twenty-fourth Street. After the impact, his car was pointing north and was in Franklin Street. Plaintiff testified he was thrown from the right side of his car by the impact, and that his right shoulder hit the curb.

It was the defendant's testimony that his car was in

the west or curb lane, about three car lengths from Clark Street on Twenty-fourth Street when the plaintiff turned south off Clark Street and pulled into the left lane, or the one nearest the centerline.

Defendant testified that he was driving 20 to 25 miles per hour, and estimated the plaintiff's speed to have been about the same. He testified that when the plaintiff was about 40 feet from Franklin Street, he changed lanes, driving in front of and about two car lengths ahead of the defendant. When the plaintiff reached Franklin Street, he started to turn right and then made a sudden stop. Defendant had no chance to do anything but attempt to stop, which he did, and was able to slow his vehicle to 5 miles per hour by the time it slid into the rear of the plaintiff's vehicle.

Defendant testified that after the impact, the plaintiff was still behind the steering wheel of his vehicle, and that he got out of it on the left, or the driver's side. It was his testimony that the plaintiff at no time gave a signal of any nature, either by use of his directional signals or by hand, of his intention to turn or stop. Defendant further testified that as soon as the plaintiff alighted from his car, defendant asked him why he had not given a signal for his turn, and got no response.

The photos in evidence and the defendant's testimony indicate that there was no damage to plaintiff's automobile. Plaintiff suggests this was so because the defendant's vehicle ran under that of the plaintiff. The testimony of the patrolman, who investigated the collision before the vehicles were moved, was that plaintiff's vehicle was still facing southwest after the impact and the defendant's vehicle was to the rear and was not under plaintiff's vehicle. It was also the patrolman's testimony that the plaintiff said he sustained no injuries, and further plaintiff did not mention being thrown from his vehicle in his version of the accident.

Plaintiff assigns as error the submission of the issue

of contributory negligence, and the giving of instructions Nos. 13, 15, and 17.

Generally, it is negligence as a matter of law for a motorist to drive a motor vehicle on a highway in such manner that he cannot stop in time to avoid a collision with an object within the range of his vision. Schwartz v. Hibdon, 174 Neb. 129, 116 N. W. 2d 187. Plaintiff urges the rule, but does not argue its specific applicability to the facts in this case.

Assuming the defendant was guilty of some negligence, as the jury must have found when it returned a verdict for the plaintiff on the defendant's cross-petition, that fact does not preclude the jury, on the evidence adduced, from also finding the plaintiff guilty of contributory negligence. It is only when the evidence is undisputed, or but one reasonable inference or conclusion could be drawn from the evidence, that the question is one of law for the court. Where, as here, from the testimony before the jury, different minds may draw different conclusions or inferences, or where there is a conflict in the evidence, the matter at issue must be submitted to the jury. See Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610. It is apparent that there was sufficient evidence from which the jury could find negligence upon the part of the plaintiff which was the proximate cause of the collision. Contributory negligence was therefore one of the issues to be submitted to the jury.

Plaintiff's remaining assignments of error are that he was prejudiced by the giving of instructions Nos. 13, 15, and 17. Instruction No. 13 covers the duty of a driver turning from a direct course at an intersection, or changing from one lane to another. Plaintiff concedes that the instruction was a correct statement of the law, but asserts that it has no applicability to the facts in this case. It is apparent that the plaintiff is ignoring the testimony of the defendant and the theory of the defense which requires the giving of instruction No. 13.

Instruction No. 15, as plaintiff admits, is a standard emergency instruction, while instruction No. 17 is an instruction on comparative negligence. Both instructions are appropriate and proper instructions where applicable. Plaintiff does not attack them as incorrect statements of the law, but urges their inapplicability to the facts herein.

In Stanley v. Ebmeier, 166 Neb. 716, 90 N. W. 2d 290, we said: "The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it."

Under the evidence adduced, the jury could find that the plaintiff cut over to defendant's lane of traffic, started a right turn without signaling an intention to do so, and then suddenly and without warning stopped his vehicle so that the rear end was directly in front of defendant's vehicle. This would raise the issue of sudden emergency. It would also raise the issue of contributory negligence, and, as heretofore suggested, under all of the evidence adduced would require an instruction on comparative negligence.

We determine that all of the instructions challenged were appropriate and proper instructions herein, and that the plaintiff's assignments are without merit. Under the facts and circumstances of this case, we hold that the issues of the defendant's negligence and the plaintiff's contributory negligence were properly submitted to the jury, and that the verdict rendered is sustained by the evidence.

For the reasons given, we conclude that the judgment should be and hereby is affirmed.

AFFIRMED.

BENNETT A. ROBINS, APPELLANT, V. GERALD F. SANDOZ, APPELLEE.

131 N. W. 2d 648

Filed December 4, 1964. No. 35741.

1. **Automobiles: Negligence.** 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.
2. ———: ———. In a case where reasonable minds may differ on the question of whether or not the operator of the automobile exercised the care, caution, and prudence required of a reasonably careful, cautious, and prudent person under the circumstances of the particular situation the questions of negligence and contributory negligence are for the jury.

Appeal from the district court for Sheridan County: ALBERT W. CRITES, Judge. Affirmed.

Frank F. Aplan, Charles A. Fisher, and Charles F. Fisher, for appellant.

Everett A. Anderson and Michael V. Smith, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. FLORY and ROBERT L. SMITH, District Judges.

FLORY, ROBERT L., District Judge.

This is the second appearance of this cause in this court. See Robins v. Sandoz, 175 Neb. 5, 120 N. W. 2d 360. The case was first tried to a jury on the petition of the plaintiff and an answer and cross-petition of the defendant. After all the evidence was in the court dismissed the defendant's cross-petition and directed a verdict for the plaintiff. The defendant appealed and this court reversed the judgment and remanded the cause saying: "* * * there was evidence adduced sufficient for the submission of the pleaded defense for a determination by the jury, and accordingly the judgment of the district court is reversed and the cause remanded for

a new trial *on all of the issues presented by the pleadings.*" (Emphasis supplied.) Accordingly, the case was retried to a jury on the petition of the plaintiff, the answer and cross-petition of the defendant, and the reply and answer of the plantiff. The jury returned a verdict for the defendant on his cross-petition. Judgment was rendered, plaintiff filed a motion for new trial which was overruled, and plaintiff brought this appeal.

The facts are basically as set out in our former opinion. They will be briefly summarized. On July 4, 1961, at about 9 p.m., plaintiff stopped his gray 1960 Buick automobile headed north on an asphalt highway about 2 miles south of White Clay, Sheridan County, Nebraska, because the right rear tire had become flat. The night was dark but the weather was good. He had the wheel jacked up and was at the rear of the car in the process of changing the tire when his automobile was struck from the rear by an automobile driven by the defendant. The trunk lid of plaintiff's automobile was up at the time. Both vehicles were severely damaged. The defendant had met and passed an automobile traveling in the opposite direction approximately 100 feet to the south of plaintiff's automobile and testified that upon seeing plaintiff's automobile he only had time to whip the wheel to the left and yell before striking it. He also testified that he was traveling 55 to 60 miles per hour at the time. The traveled surface of the highway was approximately 23 feet wide. The northbound lane was 10 feet 8 inches and the southbound lane was 12 feet. The lanes were marked by a white line and the surface was gray or charcoal in color. The east shoulder was approximately 2 feet wide.

There is conflicting evidence as to whether the lights were burning on plaintiff's automobile. There is evidence by which a jury could find either way. Also in dispute is the location of plaintiff's automobile with relation to the white centerline and the east shoulder. The evidence is conflicting and varies from its left side being

at the white line to its right side being on the shoulder. The investigating officer located a gouge mark in the surface of the highway, that fit a bent jack base found near the scene, 70 inches west of the east edge of the hard surface and a flat tire scuff mark 49 inches west of the east edge. These marks show in the pictures introduced as exhibits. The location of plaintiff's automobile was also a jury question.

Section 39-757, R. R. S. 1943, provides: "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such highway; Provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred feet in each direction upon such highway. Whenever any peace officer shall find a vehicle standing upon a highway in violation of the provisions of this section, he is hereby authorized to move such vehicle or require the driver or person in charge of such vehicle to move such vehicle to a position permitted under this section. The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position." Under the facts of this case an emergency as contemplated by the statute existed and plaintiff had a temporary right to stop. However, the issue as to his negligence, if any,

in so doing and the degree thereof is a question of fact for the jury. Robins v. Sandoz, *supra.*

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 headlamps. Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473. There has been no departure from this as a general rule in the later cases. Robins v. Sandoz, *supra.*

There are, however, exceptions to the rule. In Anderson v. Robbins Incubator Co., 143 Neb. 40, 8 N. W. 2d 446, we said: "Where the evidence is such that reasonable minds might draw different conclusions therefrom, the questions of negligence and contributory negligence are for the jury." In Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610, we said: "It would appear, therefore, that the general rule with exceptions, * * * (the Roth rule) should embrace in the exceptions all situations wherein reasonable minds may differ on the question of whether or not the operator of the automobile exercised the care, caution and prudence required of a reasonably careful, cautious and prudent person under the circumstances of the particular situation. Any lesser limitation of this general rule would have the effect of destroying, to that extent, the fundamental concept of negligence, and, to that extent, of transferring a jury function to the judge." See, also, Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422; Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576, 42 A. L. R. 2d 1; Monasmith v. Cosden Oil Co., 124 Neb. 327, 246 N. W. 623; Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622. Therefore, under the facts and circumstances of this case we conclude that the defendant's negligence, if any, and the degree thereof is a fact question for the jury.

From the evidence in this case the jury could have found the plaintiff negligent and the defendant free from negligence or both negligent and that the plaintiff's

negligence was gross in comparison with that of the defendant under the comparative negligence statute. § 25-1151, R. R. S. 1943. We hold that the verdict is sustained by the evidence thereby disposing of plaintiff's contentions that the trial court erred in refusing to direct a verdict for the plaintiff and against the defendant on his cross-petition, in submitting the case to the jury on the defendant's cross-petition, and in allowing the verdict to stand because of not being sustained by the evidence or law.

Plaintiff further contends that the trial court erred in giving instructions Nos. 3 and 12. Instruction No. 3 contains defendant's allegations of negligence on the part of plaintiff. There is evidence to support these allegations. Instruction No. 12 covers comparative negligence and is without error. These contentions are without merit.

The conclusion is that the judgment should be and is affirmed.

AFFIRMED.

IN RE APPLICATION OF UNITED MINERAL PRODUCTS COMPANY.

UNITED MINERAL PRODUCTS COMPANY, APPELLEE, V. NEBRASKA RAILROADS OF WESTERN TRUNK LINES COMMITTEE, APPELLANT.

131 N. W. 2d 604

Filed December 4, 1964. No. 35744.

1. **Appeal and Error.** The amount of damages recoverable in a proceeding on an appeal or supersedeas bond depends primarily upon the conditions of the bond, construed in conjunction with the governing statutes.
2. **Public Service Commissions: Railroads.** The Nebraska State Railway Commission has the power to regulate the rates and services of, and to exercise a general control over, all railroads engaged in the transportation of freight or passengers within the state.

3. ———: ———. **Rates and charges duly established by the Nebraska State Railway Commission, until altered or set aside, have the effect of a legislative enactment.**
4. ———: ———. **In determining the reasonableness of a freight charge, the season of the year during which the rates are in force may be considered.**
5. **Public Service Commissions: Appeal and Error. On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.**
6. ———: ———. **An appeal proceeding divests the Nebraska State Railway Commission of jurisdiction only as to matters under review and does not preclude it from proceeding as to collateral and independent matters.**

Appeal from the Nebraska State Railway Commission. Reversed.

Mason, Knudsen, Berkheimer & Endacott, for appellant.

Nelson, Harding & Acklie and Richard A. Peterson, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. FLORY and ROBERT L. SMITH, District Judges.

BROWER, J.

This action was commenced by a motion of the United Mineral Products Company, hereinafter referred to as the appellee, filed on July 9, 1963, with the Nebraska State Railway Commission, referred to hereinafter as the commission, for an order fixing the amount due from the Nebraska Railroads of Western Trunk Lines Committee, hereinafter referred to as the appellant, under a supersedeas bond given by the appellant when it appealed to this court from a previous order of the commission granting a reduction of freight rates to the appellee.

The proceeding in which the supersedeas bond had been

given had resulted in the commission making an order on June 19, 1962, fixing railroad joint line rates on limestone from Weeping Water, Nebraska, to Ord, Allen, and Hastings, Nebraska, for a 3-months' period beginning July 1, 1962, and ending September 30, 1962, unless sooner changed, canceled, or extended. The appellant Nebraska Railroads of Western Trunk Lines Committee which consists of the Missouri Pacific Railroad Company, Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company, Chicago & North Western Railway Company, and Chicago, Rock Island & Pacific Railroad Company, appealed the rate-fixing order of the commission to this court and filed the supersedeas bond in question approved by the commission in the amount of $6,000. The amount due under this bond is the question in dispute. On May 3, 1963, this court affirmed the rate order of the commission, its opinion being set out in United Mineral Products Co. v. Nebraska Railroads, 175 Neb. 285, 121 N. W. 2d 492. In that opinion the fact that the rate fixed was for the temporary period hitherto set out was not mentioned as that fact was not necessary for this court's decision at that time.

There are no disputed facts in this proceeding. During the pendency of the appeal, the appellee shipped limestone to Ord, Nebraska, at the old, higher rates which the appellee paid. Shipments were not made to Allen or Hastings. The difference in the new and the old rate which had existed before the order appealed from was 82 cents a ton. The new rate reduced the old in that amount. It is stipulated that the shipments of the appellee up to and including September 30, 1962, resulted in an overpayment of $1,782.14. It is further stipulated that other shipments to Ord were made by the appellee between the 30th day of September 1962, and November 2, 1962, and that the overpayment if the later shipments are to be also taken into account is $2,678.63. The only dispute between the parties is the difference of $896.49 between these figures.

The appellant filed an objection to the appellee's motion stating that it was willing to pay the overcharges in said amount of $1,782.14 on the shipments made only up to and including September 30, 1962, the date of the expiration of the temporary rate, but contended the shipments subsequent to that time were not properly chargeable to it.

On October 16, 1963, the commission found the new lower rate applied after September 30, 1962, and that in addition to the overcharge of $1,782.14 for shipments to September 30, 1962, there was the further overcharge of $896.49 owed by the appellant to appellee because of shipments made in October and November 1962, making a total due of $2,678.63. The commission determined that the latter amount was due under the supersedeas bond. A rehearing having been denied, the matter has been brought to this court by the appellant's appeal.

On December 30, 1963, the appellant paid the said sum of $1,782.14 to appellee. A receipt for this payment was filed in the proceeding, a condition of which is that the payment and acceptance was not a waiver of the claims or rights of either party with regard to the applicable rate for such shipments made in October or November 1962.

The supersedeas bond given in the present case was that provided for in section 75-408, R. R. S. 1943, which reads as follows: "In no case shall the filing of a supersedeas bond suspend the putting in force or operation of any decision, regulation, rate, schedule or order of the State Railway Commission of any nature whatsoever, unless such supersedeas bond is conditioned and in sufficient amount, to be approved by the commission, to insure the prompt refunding, by the appealing common carrier to the parties entitled thereto, of all charges which such common carrier may collect or receive pending the appeal in excess of those fixed or authorized by the final decision in the cause by the

Supreme Court." The bond was conditioned in accordance with this statute.

The general rule is: "The amount of damages recoverable in a proceeding on an appeal or supersedeas bond depends primarily upon the conditions of the bond, construed in conjunction with the governing statutes." 5 Am. Jur. 2d, Appeal and Error, § 1058, p. 472. See, also, 5B C. J. S., Appeal & Error, § 2072, p. 707.

In Farmers Union Livestock Commission v. Union P. R.R. Co., 135 Neb. 689, 283 N. W. 498, this court held: "The railway commission has the power to regulate the rates and services of, and to exercise a general control over, all railroads engaged in the transportation of freight or passengers within the state.

"Rates and charges duly established by the railway commission, until altered or set aside, have the effect of a legislative enactment." The same rule was applied in Shields Co. v. Chicago, B. & Q. R.R. Co., 133 Neb. 722, 276 N. W. 925.

The text in 13 C. J. S., Carriers, § 297, p. 678, states: "In determining the reasonableness of a freight charge, the season of the year during which the rates are in force may be considered. Thus a carrier may properly charge lower rates on coal in the summer months in order to keep its coal cars and coal crew employed during that season of the year, provided such rates are offered in good faith to all persons on equal terms."

"On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made." Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

An appeal proceeding divests the Nebraska State Railway Commission of jurisdiction only as to matters under review and does not preclude it from proceeding

as to collateral and independent matters. 4 Am. Jur. 2d, Appeal and Error, § 355, p. 834. This rule has hitherto been applied by this court in Publix Cars, Inc. v. Yellow Cab & Baggage Co., 130 Neb. 413, 265 N. W. 240. In that case it was held that the decision of the commission under consideration was in no way dependent on the outcome of a previous appeal which was then pending before this court in the case of Publix Cars, Inc. v. Yellow Cab & Baggage Co., 130 Neb. 401, 265 N. W. 234, but the later action of the commission concerned an independent question.

We will next consider the facts in this case and apply to them the rules of law we have cited. The appellee made application to the commission in which it stated that substantial quantities of lime dust would be required at projects near the named destination points of Ord, Allen, and Hastings during the period from July 1, 1962, through August. It alleged the projects would be awarded by competetive bids. It set out that the rate from the appellee's plant at Weeping Water to the named terminals discriminated against the appellee when compared to the rate from Ashland, Nebraska, from which point lime dust was shipped by its competitors to those points. Appellee requested a reduction in the rate for a period of 90 days from July 1, 1962, unless sooner changed, canceled, or extended. This temporary rate was all that the appellee requested. At the conclusion of the hearing this temporary rate was all that the findings and order of the commission granted. The appeal to this court from the order granting the temporary rate by the commission was all that was appealed and was all that was before this court. By stipulation it is shown that the prior rate was $4.30 per ton and that the temporary rate was $3.48 per ton, the difference being the 82 cents as hitherto stated. The order of the commission did not purport to make any change in the rate subsequent to the 30th day of September 1962.

The appellee cites certain cases including Walter v. Gillan, 129 Neb. 514, 262 N. W. 33, and Carroll v. Polfus, 98 Neb. 657, 154 N. W. 213, to the effect that where a supersedeas bond has been given, the power of the district court to proceed in that case is suspended.

It also cites Moritz v. State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545, to the effect that the provisions for an appeal from the commission to the Supreme Court is similar to appeals from the district court provided for in section 25-1912, R. S. Supp., 1963. It contends when the notice of appeal and the docket fee were timely filed, jurisdiction of the Supreme Court over the case was complete and a supersedeas bond being filed, further orders would have to await our decision.

The appellee, therefore, contends that the commission had no power to fix new rates after the Supreme Court acquired jurisdiction in United Mineral Products Co. v. Nebraska Railroads, *supra,* and that consequently the new rates would continue until the Supreme Court had acted. The appellee, however, had misconceived the existing situation which resulted by reason of the appeal. All that this court had before it was a temporary rate to September 30, 1962. Aside from the temporary change in the rate, the old rate still existed and again went into effect after the 30th of September. Although the temporary order could not be changed by the commission pending the appeal, the appellee could have asked the commission to put into effect new or reduced rates after September 30, or the commission by appropriate procedure might have acted to do so on its own motion.

On July 9, 1963, the appellee filed its motion for an order fixing the amount due upon the bond which was not acted upon by the commission until October 16, 1963. It is apparent that nothing had been done by the commission to change the rate after September 30, 1962. The old rates applied until altered or set aside. Shields Co. v. Chicago, B. & Q. R.R. Co., *supra.*

The appellee further contends that when this court affirmed the commission's order granting the temporary rate it held the previous rates unreasonably discriminatory and preferential and that its action established that fact and the new rates continued by reason thereof. This argument is fallacious in that whatever this court held was with reference to the granting by the commission of the temporary rate. That was all that was before the court at that time. It is the province of the commission and not the court to fix or change rates. The court merely upheld the commission in entering its temporary order holding that under the evidence its action was not arbitrary or unreasonable.

The commission's action in finding the amount due under the supersedeas bond had the effect of changing the rates retroactively which it is not authorized to do. Farmers Union Livestock Commission v. Union P. R.R. Co., *supra.*

It follows that the order of the commission under the circumstances was not sustained by the evidence and because thereof its action was arbitrary and without its jurisdiction. The order of the commission in holding the appellant liable upon its supersedeas bond for overpayments during the months of October and November 1962, must be and is reversed.

REVERSED.

IRA PAINTER ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

131 N. W. 2d 587

Filed December 4, 1964. No. 35766.

1. **Constitutional Law: Eminent Domain.** The words "or damaged" contained in Article I, section 21, of the Constitution of Nebraska, include all actual damages resulting from the exercise of the power of eminent domain which diminish the market value of private property.

2. **Streets.** The owner of property abutting on a street is not entitled as against the public to access to his land at all points on the boundary between it and a street. The measure of the right of the property owner is reasonable ingress and egress under all the circumstances.
3. **Eminent Domain: Highways.** An abutting landowner has no vested interest in the flow of traffic past his premises. Ordinarily the mere diversion of traffic alone, regardless of the fact that a part of condemnee's land is taken for which compensation is paid, will not support a judgment for consequential damages to the remaining land.
4. ———: ———. The fact that a property owner or those desiring to enter his property may have to travel a circuitous and longer route to reach certain points because of traffic regulations changing the direction of traffic does not give rise to an injury different in kind from that sustained by the general public, and affords no basis for an action for damages.
5. **Eminent Domain: Streets.** Incidental damages sustained by an owner of real property because a street was changed from a two-way street to a one-way street adjacent to condemnee's property are the result of the exercise of the police power, and are not ordinarily compensable in eminent domain proceedings.
6. **Trial: Appeal and Error.** Instructions which are more favorable to an appellant than that to which he is entitled are not ordinarily subject to a claim of error.
7. **Eminent Domain: Damages.** The amount of damages sustained by a landowner for land taken for a public use is peculiarly of a local nature to be determined by a jury and this court will not ordinarily interfere with the verdict if it is supported by the evidence.

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

McGinley, Lane, Mueller & Shanahan and Frank B. Morrison, Jr., for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., James F. Peterson, and Richard L. Dunning, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. FLORY and ROBERT L. SMITH, District Judges.

CARTER, J.

This is an action by plaintiffs against the State of Nebraska to recover compensation for the appropriation of 573.84 square feet of land in an eminent domain proceeding, and for damages to the remainder of plaintiffs' land resulting from such appropriation. The jury returned a verdict for the plaintiffs in the amount of $286.92 with interest. Plaintiffs have appealed.

Plaintiffs are the owners of a tract of land which is 207 feet north and south, and 200 feet east and west, in Grand Island, Nebraska. The land lies in the southwest corner of Section 22, Township 11 North, Range 9 West of the Sixth P. M. in Hall County. Old Highway 281, referred to in this record as Locust Street, lies along the west side of plaintiffs' land. Fonner Park Road lies along the south side of plaintiffs' land and intersects with Locust Street at the southwest corner of plaintiffs' tract. By a previous taking, 502.90 square feet had been taken from plaintiffs' land for rounding the northeast corner of the intersection. An additional 47.04 square feet was taken in this proceeding for that purpose. The remainder of the land taken was a 3-foot strip along the west side of plaintiffs' land from its northwest corner south 175.6 feet to the point of the previous taking.

Plaintiffs' land was occupied by the following structures: A building used as a tavern located on the south end of the tract facing Locust Street, a building on the north side of the tract facing Locust Street, formerly used as a cafe but which was vacant at the time of the taking, and a garage building located 32 feet to the rear of the tavern. The size, construction, and condition of the buildings were fully described in the record. An expert fixed the value of the buildings as follows: The tavern at $6,000, the cafe at $7,500, and the garage at $500.

The evidence shows that there was considerable commercial, industrial, and residential development in the area and to the south of it in the last few years. It

is not disputed that this has resulted in an increase of real estate values. Locust Street is a heavily travelled street which intersects a main east-west highway to the south. Fonner Park Road is a much used street, although its peak traffic is seasonal. Because of the heavy traffic on Locust Street and the safety hazards at its intersection with Fonner Park Road, the State undertook the widening of Locust Street and the construction of islands in the approaches to the intersection. Previous to the taking and construction, traffic moved in and out of plaintiffs' property from the west at any point. After the construction, egress and ingress from the west was by three 30-foot curb cuts. On the south an entrance 28 feet in width remained as before, although some interference is claimed because of the island constructed in Fonner Park Road. The island constructed in Locust Street extends north more than 207 feet along the west side of plaintiffs' property and prevents southbound traffic from turning onto it from the west. The island in Fonner Park Road extends east of the west line of the south entrance and requires a sharp left turn to enter plaintiffs' property by traffic approaching from the west. Plaintiffs produced evidence that they have lost parking space for approximately 6 automobiles because of the highway construction. The evidence shows that 65 to 70 percent of plaintiffs' customers come from the north on Locust Street. It is asserted that the one-way lanes at the islands fence out plaintiffs' customers to their damage.

Plaintiff Ira Painter fixed the value of the land before the taking at $45,000 and its value after the taking at $22,500. J. H. Nitzel, a real estate broker with 30 years experience, placed the value of the property before the taking at $35,000 and $17,500 after the taking. D. W. McDannel, a real estate appraiser and licensed real estate broker, fixed the value of the land taken at $286.92 and the value of the remaining land before and after the taking at $31,713.08. John Thomazin, a licensed realtor,

fixed the value of the land taken at $470.55 and the value of the remaining land before and after the taking at $33,529.45.

On cross-examination the plaintiff Ira Painter testified that the construction of the islands in Locust Street and Fonner Park Road was a primary factor in determining the diminution of the value of the property after the taking. The witness Nitzel also testified the fencing-in of plaintiffs' property by the islands was considered by him as damage to the property. The State moved to strike the evidence of these witnesses for the reason that the construction of the islands afforded no basis for the allowance of damage to the remaining property. The objection was overruled. The petition filed in the district court alleges damages due to the construction of the islands along the west side of plaintiffs' property in Locust Street. A motion to strike this allegation was overruled. The construction of the islands and their control of the direction of traffic as a limitation on access is necessarily a controlling issue on the alleged insufficiency of the verdict.

We point out that the petition of taking did not purport to take a controlled access to plaintiffs' property. The plaintiffs do not assert that the three 30-foot curb cuts on the west side of their property are in themselves an unreasonable limitation of access. The basic contention is that the construction of the islands fences in plaintiffs' property and is a primary cause of the damages alleged.

The right of access of an abutting property owner to a public road is not an unlimited one. He is entitled to reasonable access and the state in the exercise of its police power may limit access to abutting private property if reasonable access remains. Fougeron v. County of Seward, 174 Neb. 753, 119 N. W. 2d 298; Phillips Petroleum Co. v. City of Omaha, 171 Neb. 457, 106 N. W. 2d 727, 85 A. L. R. 2d 570. The leaving of three 30-foot curb cuts on the west side of plaintiffs' property

constituted a reasonable access thereto. It is not arguable that the regulation of ingress and egress under the situation here shown was an unreasonable exercise of the police power. The plaintiffs are entitled to the value of the land taken and any damages to the remaining land that result from such taking.

It is here contended that the construction of islands in the streets which prevented left turns onto plaintiffs' property from the west constituted a compensable damage. The general rule is that an abutting landowner has no vested interest in the flow of traffic past his premises and that any damages sustained because of a diversion of traffic is not compensable. This rule applies where a road or street is relocated. Board of County Commissioners of Santa Fe County v. Slaughter, 49 N. M. 141, 158 P. 2d 859; Warren v. Iowa State Highway Commission, 250 Iowa 473, 93 N. W. 2d 60. It also applies where one-way streets are created. Eighth Avenue Coach Corp. v. City of New York, 170 Misc. 243, 10 N. Y. S. 2d 170; City of Memphis v. Hood, 208 Tenn. 319, 345 S. W. 2d 887. It likewise applies to the control of turns by double lines, islands, and median strips. Iowa State Highway Commission v. Smith, 248 Iowa 869, 82 N. W. 2d 755, 73 A. L. R. 2d 680; Brady v. Smith, 139 W. Va. 259, 79 S. E. 2d 851. Mere circuity of travel to and from real property, resulting from a lawful exercise of the police power in controlling traffic, does not of itself constitute an impairment of the right of ingress and egress to and from such property where the resulting interference is but an inconvenience shared in common with the general public and is necessarily in the public interest in making highway travel safer and more efficient. If the owner has the same access to the general highway system as before, this injury is the same in kind as that suffered by the general public and is not compensable. Fougeron v. County of Seward, *supra;* State ex rel. Merritt v. Linzell, 163 Ohio St. 97, 126 N. E. 2d 53; Warren v. Iowa State Highway Commission,

supra. The fact that the construction of the islands in the instant case was concurrent with the construction of the widened street is not a material factor. The rule is the same as if the islands had been constructed without the taking of any property by eminent domain. City of Memphis v. Hood, *supra*.

The situation may be summed up as follows: Property owners abutting upon a public thoroughfare have a right to reasonable access thereto. This right of ingress and egress attaches to the land. It is a property right as complete as ownership of the land itself. But as to damages claimed by reason of a change in the flow of traffic by placing medians in the center of a street, they result from the exercise of the police power by the state and are noncompensable as being incidental to the doing of a lawful act. As such, they are wholly unrelated to the taking of the land for the purpose of widening the street and constitute no element of damage to the land remaining after the taking.

The plaintiffs assert that the case of Phillips Petroleum Co. v. City of Omaha, *supra*, is authority for their position. We do not so construe that case. We quite agree that in a proper case the exercise of the police power may result in a taking or damaging in the constitutional sense, as stated in that opinion. But the primary holding of the opinion on this point is: "Appellant was liable to appellee for damages to the remainder of the property which resulted from the construction of the improvement in the streets for which the condemnation power was exercised." Applying the rule to the instant case, plaintiffs are entitled to recover damages to the land not taken which result from the taking of the 3-foot strip of ground and putting it to public use. The construction of the islands and the change of traffic direction resulting therefrom was not the result of the taking of the 3-foot strip, and the noncompensability of the damage resulting from the control of traffic is no more an element of damage than at points where such

traffic controls are installed where no taking by eminent domain is required.

The trial court permitted the plaintiffs to show the construction of the islands and the change in traffic direction as a damage to the remaining property. By instruction No. 4, the trial court told the jury that plaintiffs were entitled to recover the fair and reasonable market value on August 23, 1962, of the land actually taken and in addition thereto the amount of consequential damages, if any, resulting to the remainder of plaintiffs' land by reason of such taking and in controlling and limiting the right of access thereto. The instruction is more favorable to the plaintiffs than that to which they were entitled under the evidence adduced. The State has not cross-appealed, it evidently being satisfied with the verdict of the jury. The plaintiffs complain of the failure of the trial court to define the word "access" as used in instruction No. 4. No request was made to the court to define the term. In any event, the trial court permitted the introduction of all evidence offered by the plaintiffs relating to access, such evidence going beyond that which plaintiffs could properly show. The instruction was more favorable to plaintiffs under the evidence than that to which they were entitled and they are in no position to complain.

Substantially the same objection is made to instructions Nos. 5 and 7. The rule of damages announced in Phillips Petroleum Co. v. City of Omaha, *supra;* Dawson v. City of Lincoln, 176 Neb. 311, 125 N. W. 2d 908; and other cases, are cited in support of plaintiffs' contention. The rule is that, under Article I, section 21, of the Constitution, the condemnee is to recover for all property taken or damaged resulting from the exercise of the right of eminent domain which diminished the market value of the property. In some jurisdictions the noncompensability for constructing islands, double lines, turn controls, and other safety measures and regulations for expediting the handling of traffic, is considered an

exception to the general rule. In one sense of the word this is so. The real distinction is, we think, that such damages are not the result of the taking, but grow out of the exercise of the police power in controlling the direction of traffic which has no relation to any loss of access in the constitutional sense. Instructions Nos. 5 and 7 are more favorable to the plaintiffs than that to which they were entitled and consequently are not prejudicial to plaintiffs.

Plaintiffs further complain of instruction No. 5 in the use of the word "privileged" in stating: "In deciding the fair and reasonable market value of land the jury is privileged to consider the purpose for which it is used, any use to which the land is adapted and for which it is available and for which it may be reasonably anticipated in the immediate future, the condition, situation and surroundings of the land, and every fact and circumstance shown in the evidence bearing upon its value." The same complaint is made as to the use of the word "may" in another part of the instruction stating "there may be taken into account" certain evidence. We do not think the use of the words "privileged" and "may" make the instruction prejudicially erroneous. To hold otherwise would call for too much refinement of language. It would be better, however, to say that "it is your duty to consider," or similar words, and thereby remove any inference that the consideration of the evidence referred to was permissive only.

The contention is advanced that the verdict is inadequate and not supported by the evidence. The verdict of the jury was for $286.92, the exact amount of damage testified to by the witness McDannel. The verdict is within the scope of the evidence. All of the evidence tendered by the plaintiffs was permitted to go to the jury for its consideration, including the evidence of damage caused by the construction of the islands in the streets which damage we hold to be noncompensable.

In addition thereto, the jury was permitted to view the premises.

The evidence shows a taking of a 3-foot strip of ground along the west side of plaintiffs' land. Three 30-foot curb cuts were provided for egress and ingress to and from the street. The jury could find, as it did, that plaintiffs had reasonable access to and from Locust Street. Evidence of noncompensable damages was admitted in evidence which was heard and considered by the jury, and to which the State asserts no error and elects to abide the judgment. Other than the loss of parking spaces for 6 automobiles there is little evidence, if any, of damage to the remaining property resulting from the improvement in the streets for which the power of eminent domain was exercised. Plaintiffs complain that the jury gave no credence to their evidence of damage resulting from the construction of the islands and the fencing in of plaintiffs' property against southbound traffic. This complaint is groundless in that the evidence was incompetent and, if not considered by the jury as asserted, the effect was to cure the error in its admission. The weight and credibility of testimony in a condemnation action is peculiarly of a local nature to be determined by a jury. Kennedy v. Department of Roads & Irrigation, 150 Neb. 727, 35 N. W. 2d 781. Where, as here, the jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which it may consider in connection with other competent evidence, and a verdict so found will not be disturbed unless clearly wrong. Leffelman v. City of Hartington, 173 Neb. 259, 113 N. W. 2d 107; Chaloupka v. State, 176 Neb. 746, 127 N. W. 2d 291.

We find no error in the record prejudicial to the rights of the plaintiffs. The verdict is within the scope of the evidence and is sustained thereby. The instructions contained no error prejudicial to plaintiffs, in fact they

were more favorable to plaintiffs than they had any right to expect.

Under the record presented here the judgment is correct and it is affirmed.

AFFIRMED.

EVERETT L. HASKETT, APPELLEE, V. NATIONAL BISCUIT COMPANY, A CORPORATION, APPELLANT.

131 N. W. 2d 597

Filed December 4, 1964. No. 35850.

1. **Workmen's Compensation. A workman is entitled to recover compensation for neurosis if it is a proximate result of his injury and results in disability.**
2. **———. Where an accident combines with a preexisting condition to produce disability, the injured workman may recover compensation.**

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

Albert Lustgarten, for appellant.

Stoehr, Rickerson, Sodoro & Caporale and William M. Homan, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. FLORY and ROBERT L. SMITH, District Judges.

BOSLAUGH, J.

This is a proceeding under the Workmen's Compensation Act brought by Everett L. Haskett as plaintiff. The plaintiff was employed by the National Biscuit Company, the defendant, as a deliveryman. On May 2, 1962, while making a delivery at a grocery store in Omaha, Nebraska, the plaintiff was injured when an overhead metal door struck the plaintiff on the left shoulder, knocking him backward and to the floor. The plaintiff claims that he is totally disabled as a result of the accident.

The compensation court found that the accident of May 2, 1962, arose out of and in the course of the plaintiff's employment; that as a result of the accident the plaintiff was temporarily totally disabled from May 2, 1962, to January 29, 1963; that the plaintiff had been paid the compensation due him for total temporary disability; that he should recover medical expense in the amount of $187; and that the plaintiff had failed to prove that he suffered any disability after January 29, 1963, as a result of the accident. The plaintiff waived rehearing before the compensation court and appealed directly to the district court from the award of the compensation court.

The district court found that the plaintiff was totally disabled as a result of the accident of May 2, 1962; that the plaintiff was entitled to compensation at the rate of $37 per week under subsection (1) of section 48-121, R. R. S. 1943, for not to exceed 300 weeks and at the rate of $27.50 per week thereafter; that the defendant should provide and pay for future medical services that are reasonably necessary; and that if prior to 300 weeks plaintiff's total disability shall cease, the parties will be entitled to a determination of the extent of the plaintiff's partial disability, if any, resulting from the accident. Defendant's motion for new trial was overruled and it has appealed.

The plaintiff testified that when he was knocked down on May 2, 1962, he could hear something grating or grinding in his left hip or the lower part of his back, and that "terrific" pain radiated up and down his leg. The plaintiff laid on the floor for 7 or 8 minutes before he could get up. When the plaintiff did stand up he was at first unable to put any pressure or weight on his leg. The plaintiff sat on the bumper of the truck and rested for awhile before he returned to his work.

The plaintiff returned to the defendant's warehouse about an hour and a half after the accident. He reported the accident to the defendant's shipping clerk and

office manager and then went to see his physician, Dr. Murphy. The plaintiff was complaining of pain in his hip, leg, and lower back. Dr. Murphy diagnosed the plaintiff's injury as a lumbosacral strain with nerve root pressure on the left side.

At the request of the defendant, the plaintiff consulted Dr. Hamsa, an orthopedic surgeon, on June 13, 1962. Dr. Hamsa diagnosed the plaintiff's injury as a lumbosacral region sprain with S-1 nerve root pressure, left side. Dr. Hamsa prescribed a high chair-back brace for support and recommended that the plaintiff gradually increase his activity to tolerance. Dr. Hamsa noted that if the plaintiff failed to improve, he might become a laminectomy problem. Dr. Hamsa later recommended physical therapy treatment. The plaintiff failed to improve and on October 16, 1962, Dr. Hamsa reported to the defendant that he was unable to explain the plaintiff's difficulties on the basis of positive orthopedic findings and suggested consultation with another orthopedic surgeon.

On November 7, 1962, Dr. Gross, an orthopedic surgeon, made an orthopedic and neurological examination of the plaintiff. Dr. Gross concluded that the plaintiff had no orthopedic disease or pathology. Dr. Gross expressed no opinion as to a psychiatric basis for the plaintiff's complaints.

On November 27, 1962, the plaintiff was examined by Dr. Waters, an orthopedic surgeon. Dr. Waters reported that he found no orthopedic disease or injury which could account for the plaintiff's symptoms. Dr. Waters suggested that psychiatric evaluation might determine the basis for the plaintiff's complaints.

On March 27, 1963, the plaintiff was examined by Dr. Weingarten, an orthopedist at the Veterans Administration Hospital in Omaha, Nebraska. Dr. Weingarten's diagnosis of the plaintiff was: "1. Strain, lumbosacral spine. 2. Conversion reaction. (It is this examiner's opinion that the neuropsychiatric problem is causing the

greatest disability of the two diagnoses.)"

On March 29, 1963, the plaintiff was examined by Dr. Farrell, a psychiatrist or neuropsychiatrist. Dr. Farrell testified that it was his opinion that the plaintiff's complaints were the result of a nervous condition, or anxiety hysteria brought on by the injury resulting from the accident on May 2, 1962; that the plaintiff's emotional tension had been converted into physical symptoms which is referred to as a conversion reaction; and that the plaintiff's disability is the result of and was caused by the accident of May 2, 1962.

On April 30, 1963, the plaintiff was examined by Dr. Jones, a psychiatrist and neurologist. Dr. Jones testified that it was his opinion that the plaintiff's symptoms were in a large measure, if not entirely, on a psychiatric or nervous basis; that his symptoms were due to a combination of conversion and tension phenomena which produced pain in the low back region radiating down his leg and up his back; and that the plaintiff had a hysteroid personality which made him vulnerable to the development of conversion and tension symptoms. Dr. Jones also testified that it was his opinion that the accident in which the door fell and struck the plaintiff on the shoulder set off the conversion symptoms in the plaintiff.

The evidence shows that the plaintiff sustained an accident on May 2, 1962, which arose out of and in the course of his employment. The evidence further shows that the plaintiff has been disabled since the date of the accident and is unable to work at this time.

The plaintiff complains of pain in his lower back, left hip, and left leg. He has difficulty sitting or sleeping. He walks with a limp and has difficulty moving about. He stands with a list of approximately 20 degrees to the left, with the left shoulder markedly lower than the right, and with all of the muscles of the back tensed. He also has a mild thoracic kyphosis or rounding of the back.

The plaintiff is 46 years of age and has an eighth

grade education. He has done farm work, has driven trucks and a taxicab, and has worked as a bellhop. The plaintiff started to work for the defendant in 1942. In 1944 and 1945, the plaintiff served in the Navy as a motor machinist. While in the Navy, the plaintiff's back was injured when he was struck by a hatch door. The plaintiff was confined in a naval hospital for several months as a result of that back injury. He received a medical discharge for chronic arthritis with a disability rating of 20 percent.

After being discharged from the Navy, the plaintiff returned to his job as a deliveryman for the defendant. He then worked steadily until May 2, 1962, except for a 5-week period in 1956. The plaintiff testified that in 1956 he suffered from fatigue. A report of Dr. Murphy concerning this incident states that the plaintiff's illness was a psychoneurotic anxiety state. The report further states that the plaintiff was able to return to work, that the prognosis was good, and that there was no permanent disability.

Dr. Jones, who examined the plaintiff on April 30, 1963, stated that it was his opinion that the plaintiff should return to work as soon as possible. In May 1963, the plaintiff went back to work for the defendant. He was put to work on the shipping floor assembling loads. The plaintiff worked about 6 hours the first day. He left at noon on the second and third days. On the fourth day the plaintiff worked about 4 hours. On the following day the plaintiff telephoned the defendant's shipping clerk and stated that he would be unable to work because of pain in his hip and leg. Later that day the defendant's office manager called the plaintiff and said that the defendant could not carry the plaintiff any longer because he was not able to work a full day. The plaintiff has not worked since May 1963.

The defendant's office manager testified that he observed the plaintiff while he was working in May 1963, that the plaintiff did not seem to be functioning nor-

mally, and that he seemed to be a man honestly in discomfort. The defendant does not seriously contend that the plaintiff is a malingerer and the evidence would not support such a finding.

The controversy in this case is whether the evidence is sufficient to support an award of compensation for disability which results from anxiety hysteria or a conversion reaction. A workman is entitled to recover compensation for neurosis if it is a proximate result of his injury and results in disability. Lee v. Lincoln Cleaning & Dye Works, 145 Neb. 124, 15 N. W. 2d 330; Dietz v. State, 157 Neb. 324, 59 N. W. 2d 587; Rexroat v. State, 142 Neb. 596, 7 N. W. 2d 163; Marler v. Grainger Bros., 123 Neb. 517, 243 N. W. 622.

The evidence in this case shows that as a result of the accident of May 2, 1962, the plaintiff suffered an injury to his back, a lumbosacral sprain, and has developed an anxiety hysteria, or conversion reaction, which has resulted in disability. Both Dr. Farrell and Dr. Jones testified that the accident was the precipitating cause of the psychiatric condition which resulted in the plaintiff's present disability.

There is evidence that the plaintiff was predisposed to develop such a condition, and that the same injury to another person might not have resulted in a similar disability. But that is no defense. Where an accident combines with a preexisting condition to produce disability, the injured workman may recover compensation. Cole v. Cushman Motor Works, 159 Neb. 97, 65 N. W. 2d 330.

The judgment of the district court is correct and it is affirmed. The plaintiff's attorneys are allowed a fee of $500 for their services in this court. § 48-125, R. R. S. 1943.

AFFIRMED.

INDEX

Acknowledgments.

An acknowledgment is the act by which a party who has executed an instrument goes before a competent officer and declares or acknowledges the same as his genuine and voluntary act and deed. McCauley v. Stewart ---------- 759

Actions.

1. Jurisdiction of the subject matter of an action cannot be conferred on a tribunal not empowered to entertain jurisdiction by acquiescence or consent. KBR Rural Public Power Dist. v. Kidder 228
2. The existence of a right is one matter, the availability of a particular remedy in which that right may be asserted is distinctly a separate matter. Case v. State ---------- 404
3. In actions in court in this jurisdiction plaintiffs have the liberty of prosecuting, and defendants have the liberty of defending, in their own proper persons, and without the assistance of an attorney. Weiner v. Schrempp ---------- 583

Administrative Law.

Rule stated as to power of courts by injunction to control the decisions of administrative agencies. Galstan v. School Dist. of Omaha ---------- 319

Adoption of Children.

1. Requirements of statute on adoption of children stated. McCauley v. Stewart ---------- 759
2. Under statute, consents to adoption of children must be witnessed and also acknowledged before an officer authorized to acknowledge deeds. McCauley v. Stewart ---------- 759
3. The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed. McCauley v. Stewart 759
4. Adoption proceedings do not depend upon equitable principles. Where the essential statutory requirements have not been met, equity cannot decree an adoption. McCauley v. Stewart ---------- 759
5. To warrant an adoption under statute, referred to in opinion, it must clearly appear that the natural

parents, if living, had abandoned the child for a period of at least 6 months. McCauley v. Stewart 759
6. In adoption proceedings the welfare of the child is not material until either relinquishments, signed, witnessed, and acknowledged as provided for by statute, or abandonment as prescribed by statute, have been established. McCauley v. Stewart ---- 759

Adverse Possession.

1. The statutory period for the establishment of title to real estate by adverse possession in Nebraska is 10 years. Fitch v. Slama ---------- 96
2. Nature of proof required to establish title to real estate by adverse possession stated. Fitch v. Slama 96
3. It is the visible and hostile possession, with an intention to possess land occupied under a claim that it belongs to the possessor, that constitutes its adverse character. Ordinarily, the hidden or remote view, or the belief of the possessor in taking possession, does not relate itself to the adverse character of the possession. Fitch v. Slama ---------- 96
4. Title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continuous, notorious, and adverse possession thereof, claiming title to the same against all persons for 10 years. Fitch v. Slama --------- 96
5. Possession of real estate for a period long enough to ripen into a good title, must be characterized by opposition to, and inconsistency with, the constructive possession of the legal proprietor. Fitch v. Slama ---------- 96
6. Claimants to title by adverse possession are not entitled to relief unless they establish by a preponderance of the evidence that they have occupied the land in question for the entire statutory period. Fitch v. Slama ---------- 96
7. Acts of dominion must, to be effective against a true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice that his lands are in the adverse possession of another. A mere temporary use of land by a trespasser at intervals, whether remote or frequent, is not enough. Fitch v. Slama ---------- 96
8. In determining whether particular acts of ownership indicate an adverse possession, the usual and ordinary use of similar lands by their owners should be taken into consideration. Krumwiede v. Rose 570

9. Irrespective of the character of ownership asserted, acts of dominion over the land must, to be effective as against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. Krumwiede v. Rose 570
10. A mere temporary use of the property by a trespasser at intervals, whether such intervals are remote or frequent, is not enough. Krumwiede v. Rose 570
11. The primary test of adverse possession is the actual, continuous, notorious, and adverse possession of the property under claimed ownership during the period of 10 years. Krumwiede v. Rose 570
12. Rule as to necessary elements of an easement by prescription stated. Pierce v. Rabe 745
13. To establish a prescriptive right to an easement, all of the elements of a prescriptive use and enjoyment must be established by clear, convincing, and satisfactory evidence. Pierce v. Rabe 745
14. Presumption and burden of proof to establish an easement by prescription stated. Pierce v. Rabe 745

Appeal and Error.

1. An appeal in a proceeding to approve boundaries of a sanitary and improvement district is tried de novo in the Supreme Court. Zwink v Ahlman 15
2. Generally speaking only the evidence contained in the bill of exceptions may be considered by this court on appeal. Zwink v. Ahlman 15
3. Where articles of incorporation of sanitary and improvement district were shown to have been considered by trial court, they may be considered as if made a part of the bill of exceptions. Zwink v. Ahlman 15
4. The district court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. Zwink v. Ahlman 15
5. Counsel in referring to matters which he subsequently does not attempt to prove may be guilty of inexcusable misconduct prejudicial to the opposing side, justifying, in the case of proper objection, a new trial or a reversal. Lybarger v. State 35
6. The admission or rejection of photographs in evidence is largely within the discretion of the trial

court. Error may not be predicated thereon in the absence of a showing of an abuse of discretion. Reorganized Church of Jesus Christ v. Universal Surety Co. ---------- 60

7. In a condemnation proceeding, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong. Lansman v. State 119

8. Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. Lansman v. State 119

9. In an action at law wherein a jury has been waived the findings of fact by the court have the same force and effect as the verdict of a jury, and if they are supported by competent evidence they will not be disturbed on appeal. Lincoln Welding Supply Co. v. Western Contracting Corp. ---------- 160

10. In an equity case, the Supreme Court will take into consideration the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other. Van Donselaar v. Conkey -------- 169

11. Where a requested instruction is substantially covered by another instruction it is not error to refuse the request. State v. Lewis ---------- 173

12. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo upon the record. To entitle the plaintiff to a recovery he must sustain the burden of proof by a preponderance of the evidence that the workman suffered an accident arising out of and in the course of his employment. Runyons v. Mavis & Sons, Inc. 179
Oline v. Nebraska Nat. Gas Co. ---------- 851

13. An appeal from the judgment of the district court involving statutory allowances, rights of homestead, and determination of interest of surviving spouse is triable de novo in the Supreme Court. Parker v. Comstock ---------- 197

14. In an appeal from the county court the district court is without jurisdiction to try a counterclaim for an amount in excess of the jurisdiction of the county court. KBR Rural Public Power Dist. v. Kidder ---------- 228

15. In an appeal to the Supreme Court from the district court, on a judgment on an appeal from the county court, the appellate jurisdiction of the Su-

preme Court is limited to the issues presented to the county court and the appellate jurisdiction of the district court. KBR Rural Public Power Dist. v. Kidder ---------- 228

16. Procedure for appeal under the Civil Service Act outlined. Ackerman v. Civil Service Commission -- 232

17. Error in the admission of evidence is presumed to be prejudicial unless it clearly appears from the record in the case that it did not affect unfavorably the party against whom it was admitted. Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co. ---------- 287

18. Instructions to the jury should be considered as a whole and if they fairly submit the case, they are not erroneous. Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co. ---------- 287

19. Legislation affecting the merits of a controversy adopted subsequent to a trial in district court dealing with a subject matter with which the Legislature has the power to act retroactively is an exception to the requirement that only assignments of error assigned in the trial court may be inquired into in the Supreme Court. Kometscher v. Wade -------- 299

20. In case of a change of law providing for civil penalties the Supreme Court, if the law so provides, will apply it to a case pending on appeal rather than apply the law in effect when the judgment was rendered. Kometscher v. Wade ---------- 299

21. Interested parties have the right of appeal from the action of the county superintendents in dissolving school districts and attaching the area to another or other districts. Board of Education v. Winne ---------- 431

22. Rule as to trial of equity cases de novo in the Supreme Court stated. Stibor v. Farrell ---------- 437
Krumwiede v. Rose ---------- 570
Pierce v. Rabe ---------- 745

23. The discretion of the trial court with respect to awarding or changing the support of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Johnson v. Johnson -- 445

24. Functions of trial and appellate courts with respect to a view of the premises stated. Wiese v. Klassen 496

25. An error of law occurring at the trial will not ordinarily be considered by the Supreme Court

unless it has been properly presented to the trial court and properly preserved. Thompsen v. Miller 530
26. An error in the rejection of evidence relating to damages in a negligence action is not prejudicial where the jury finds that the plaintiff had no cause of action against the defendant. Thompsen v. Miller 530
27. An instruction which assumes an undisputed fact is not erroneous. Boardman v. McNeff 534
28. In passing upon the validity of zoning ordinances, an appellate court should give great weight to the determination of local authorities and local courts especially familiar with local conditions. Wolf v. City of Omaha 545
29. An appellant on appeal to the Supreme Court must set out particularly each error asserted and intended to be urged for the reversal, vacation, or modification of a judgment or final order alleged to be erroneous. The Supreme Court may, at its option, consider a plain error not specified in the appellant's brief. Northwestern Public Service Co. v. Juhl 625
30. 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 that is done, the judgment will not ordinarily be reversed for such defects. O'Brien v. Anderson 635
31. A litigant may not change his position in the Supreme Court and set up issues not raised in the trial court. Arthur Fulmer St. Louis, Inc. v. Auto-Re-Nu-Inc. 671
32. Where an issue is relied upon by the parties at the trial, insisted upon as a defense, and relied upon by the trial court as an issue in the case, it may not be successfully asserted for the first time on appeal that it has been waived. Stacey v. Pantano 694
33. On appeal to the district court in a workmen's compensation case the hearing is by review of the transcript of the proceedings from the Nebraska Workmen's Compensation Court. Spangler v. Terry Carpenter, Inc. 740
34. On appeal to the Supreme Court in a workmen's compensation case the consideration is de novo on the record from the district court. Spangler v. Terry Carpenter, Inc. 740
35. If an instruction is not sufficiently specific in some respect, it is the duty of the party to offer a re-

quest to supply an omission, and unless this is done, the judgment will not be reversed for such defect. Baylor v. Tyrrell ---------- 812

36. An essential factual determination may not be made by the district court or the Supreme Court unless based upon competent evidence in the record. State v. Schwade ---------- 844

37. The amount of damages recoverable in a proceeding on an appeal or supersedeas bond depends primarily upon the conditions of the bond, construed in conjunction with the governing statutes. United Mineral Products Co. v. Nebraska Railroads ---- 898

38. Manner of consideration of appeal from order of railway commission, administrative or legislative in character, to Supreme Court stated. United Mineral Products Co. v. Nebraska Railroads ---- 898

39. An appeal divests the railway commission of jurisdiction only as to matters under review and does not preclude it from proceeding as to collateral and independent matters. United Mineral Products Co. v. Nebraska Railroads ---------- 898

40. Instructions which are more favorable to an appellant than that to which he is entitled are not ordinarily subject to a claim of error. Painter v. State 905

Attorney and Client.

1. In actions in court in this jurisdiction plaintiffs have the liberty of prosecuting, and defendants have the liberty of defending, in their own proper persons, and without the assistance of an attorney. Weiner v. Schrempp ---------- 583

2. It is the duty of the Supreme Court to maintain the integrity of the legal profession by disciplining lawyers who indulge in practices designed to bring the courts or the profession into disrepute. State ex rel. Nebraska State Bar Assn. v. Rhodes ------ 650

3. The evidence adduced in a disciplinary proceeding is reviewed de novo in the Supreme Court to determine if discipline should be imposed, and, if it should, the extent thereof. State ex rel. Nebraska State Bar Assn. v. Rhodes ---------- 650

4. While a disciplinary proceeding is not criminal in nature, in view of the momentous consequences to the person charged, the presumption of innocence applies, and his culpability must be established by a clear preponderance of the evidence. That is, the

court must be satisfied to a reasonable certainty that the charges are true. State ex rel. Nebraska State Bar Assn. v. Rhodes ---------- 650

5. A license to practice law in this judisdiction is granted on the implied understanding that the party receiving it shall at all times demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit to himself, the profession, and the courts. State ex rel. Nebraska State Bar Assn. v. Rhodes ---------- 650

6. The purpose of a disbarment proceeding is not so much to punish an attorney as it is to determine, in the public interest, whether he should be permitted to continue to practice law. State ex rel. Nebraska State Bar Assn. v. Rhodes ---------- 650

7. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitute grounds for suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Rhodes ------ 650

8. Regardless of an attorney's frame of mind, his conduct in a courtroom must at all times conform to his oath as a lawyer, and to the Canons of Professional Ethics in full force and effect in this state. State ex rel. Nebraska State Bar Assn. v. Rhodes -------- 650

9. Abuse of a former judge, directed toward his action as a judge, is conduct which would tend to bring discredit on the judiciary. State ex rel. Nebraska State Bar Assn. v. Rhodes ---------- 650

10. The terms "Kangaroo Court" and "Kangaroo Judge" are terms of contempt and utter disrespect, and their use tends to bring discredit on the judiciary. State ex rel. Nebraska State Bar Assn. v. Rhodes ------ 650

11. The fact that an attorney believes a characterization of a court as a "Kangaroo Court" to be correct is no defense in a disbarment action, because a lawyer is presumed to know the proper method of securing redress if he feels aggrieved by the actions of a court. State ex rel. Nebraska State Bar Assn. v. Rhodes ---------- 650

12. Where an attorney acts pro se, he is charged with the same responsibility as if acting for a client, and as such must avoid the violation of the Canons of Professional Ethics governing that relationship. State ex rel. Nebraska State Bar Assn. v. Rhodes -- 650

Automobiles.

1. Knowledge that an accident has happened and that an injury has been inflicted is an essential element of the crime of leaving the scene of a personal injury accident in violation of motor vehicle statute. State v. Snell ---------- 396
2. By statute it is unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of intoxicating liquor, and punishment is provided for such offense. State v. Berg ---------- 419
3. By statute certain tests are provided which may be made to determine the alcoholic content present in the body fluid of a person charged with driving a motor vehicle while under the influence of intoxicating liquor. State v. Berg ---------- 419
4. An issue concerning gross negligence under our guest statute must be decided on the particular facts and circumstances of each case. Thorpe v. Zwonechek 504
5. If there is evidence of imminent danger apparent to the driver of an automobile, and if he is timely warned by the passenger but persists in negligent driving, heedless of the consequences of his negligent driving, there is sufficient evidence to submit the case to a jury. Thorpe v. Zwonechek ---------- 504
6. Conditions affecting the visibility of a motorist impose upon a driver the duty to exercise a degree of care commensurate with the existing circumstances. Thompsen v. Miller ---------- 530
7. Provisions of motor vehicle guest statute recited. O'Brien v. Anderson ---------- 635
8. Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. O'Brien v. Anderson ---------- 635
9. Duty of driver of automobile with respect to children near his line of travel stated. Odom v. Willms 699
10. When the evidence shows that defects in the mechanism of an automobile did not contribute to an accident and that the accident would have occurred irrespective of such defects, such defects cannot be said to be the proximate cause of the accident or a cause which proximately contributed to it. Odom v. Willms ---------- 699
11. The failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger

or to misjudge its speed does not ordinarily constitute contributory negligence as a matter of law. Beck v. Trustin ---------- 788

12. Whether a party failed to look or looked and failed to see a motor vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching motor vehicle was within the limit of danger that reasonable minds could not differ thereon. Beck v. Trustin ---------- 788

13. Statutory rule as to sufficiency of headlights of motor vehicle stated. Beck v. Trustin ---------- 788

14. Rule requiring motorist to be able to stop or turn aside within the range of his vision stated. Pool v. Romatzke ---------- 870

15. Generally it is negligence as a matter of law for a motorist to drive a motor vehicle on a highway in such manner that he cannot stop in time to avoid a collision with an object within the range of his vision. Brazier v. English ---------- 889

16. The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it. Brazier v. English ---------- 889

17. 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 ---------- 894

18. The questions of negligence and contributory negligence are for the jury where reasonable minds may differ as to whether the operator of a motor vehicle exercised the care and caution of a reasonably prudent person. Robins v. Sandoz ---------- 894

Banks and Banking.

There is no reasonable difference between banks and other corporations with respect to the purpose of the deduction allowed in section 77-706, R. R. S. 1943, which justifies a double tax effect on the stockholders of a bank and not on the stockholders of other business corporations. First Nat. Bank & Trust Co. v. County of Lancaster ---------- 390

Bills and Notes.

1. The burden of proving usury as a defense to an action on a promissory note rests upon the party alleging it, unless usury is apparent on the face of the note. Murphy Finance Co. v. Fredericks ---------- 1
2. Presentment for payment is not necessary in order to charge the person primarily liable upon a promissory note. Arthur Fulmer St. Louis, Inc. v. Auto-Re-Nu-Inc. ---------- 671

Burglary.

Burglary is defined by statute as one separate and distinct offense. As so defined it is the willful, malicious, and forcible breaking and entering of any of the structures there named with the intent to commit any of the offenses specified therein. Case v. State ---------- 774

Carriers.

1. A railroad company is primarily liable as the initial carrier for a wrongful delivery of goods. Elgin Mills, Inc. v. Chicago & N. W. Ry. Co. ---------- 110
2. A railroad company is liable in conversion for the delivery of goods without the surrender of an order bill of lading properly endorsed, except where the delivery was justified as provided by the Uniform Bill of Lading Act. Elgin Mills, Inc. v. Chicago & N. W. Ry. Co. ---------- 110
3. Under the Uniform Bill of Lading Act, a railroad company is justified in delivering goods to a person lawfully entitled to the possession of the goods. Elgin Mills, Inc. v. Chicago & N. W. Ry Co. ------ 110
4. Where a shipper consigns goods on a shipper's order bill of lading and retains the order bill of lading in his possession, the delivery of the goods without obtaining the bill of lading properly endorsed is a delivery to a person entitled to possession, where it is shown that such delivery was in conformity with an agreement between the shipper and the consignee for a specified purpose contrary thereto. Elgin Mills, Inc. v. Chicago & N. W. Ry. Co. ---- 110
5. Where it is shown that a loss occurred because of a breach of contract between the shipper and consignee, and not because of a misdelivery by the railroad company, the railroad company is exonerated from liability for a misdelivery of the goods. Elgin Mills, Inc. v. Chicago & N. W. Ry. Co. 110

6. The general powers of the railway commission are the regulation of rates, service, and general control of common carriers. Village of Louisville v. Chicago, B. & Q. R.R. Co. ---------- 491
7. The railway commission is required to fix classifications of rates for transportation of freight and passengers, and to give notice of hearing thereon. United Mineral Products Co. v. Nebraska Railroads 802
8. An attack upon a rate of a carrier is required to come after its establishment and notice, and not prior thereto. United Mineral Products Co. v. Nebraska Railroads ---------- 802
9. As to joint rates it is the duty of railway companies and common carriers doing business in this state to establish reasonable joint line rates. United Mineral Products Co. v. Nebraska Railroads ------ 802
10. If common carriers fail to establish reasonable joint line rates it becomes the duty of the railway commission, on its own motion or on the application of some one interested, to establish reasonable joint line rates by original fixation or by change and revision. United Mineral Products Co. v. Nebraska Railroads ---------- 802
11. The establishment or fixation of rates on motion of the commission or on behalf of interested parties requires 10 days' notice to the carriers involved and a hearing, and notice and a grant of hearing to interested parties making complaint. United Mineral Products Co. v. Nebraska Railroads ------ 802
12. The validity of rates which common carriers may exact depends upon whether or not there has been a compliance with the statutory procedures. United Mineral Products Co. v. Nebraska Railroads ------ 802
13. A rate once established continues to be the legal rate until legally canceled, and subsequent tariffs naming new rates cannot carry the new rate into lawful effect. United Mineral Products Co. v. Nebraska Railroads ---------- 802
14. Joint rates may not be canceled or modified except upon hearing and with notice to all parties affected thereby. United Mineral Products Co. v. Nebraska Railroads ---------- 802
15. Where there is a failure of the railway commission to comply with the statutory procedures in the establishment of a joint line rate, its findings are void and of no effect. United Mineral Products Co. v. Nebraska Railroads ---------- 802

Checks.

1. The gist of the offense of passing an insufficient fund check is an intention to defraud and a knowledge that at the time of the making of such check there are insufficient funds for its payment upon presentation. State v. Martin ---------- 209
2. The offense of issuing a check without sufficient funds is complete when the check is issued with knowledge and the intent to defraud, even though no one is defrauded thereby. State v. Martin ---- 209
3. Evidence examined and held sufficient to warrant the trial court's giving an instruction relating to statutory presumptions arising from failure of a defendant to pay a check within 5 days after receiving notice of dishonor. State v. Martin ------ 209

Constitutional Law.

1. By the terms of Article VIII, section 2, of the Constitution of Nebraska, the Legislature is empowered to exempt from taxation by general law property which is owned and used exclusively for educational, religious, or charitable purposes, when such property is not owned or used for financial gain or profit to the owner or user. Young Women's Christian Assn. v. City of Lincoln ---------- 136
2. 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. State Securities Co. v. Ley ---------- 251
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. State Securities Co. v. Ley ---------- 251
4. Rule respecting classification of persons, corporations, and property for purposes of legislation stated. State Securities Co. v. Ley ---------- 251
5. Legislative Bill 11 adopted by the Seventy-fourth (Extraordinary) Session of the Legislature of Nebraska, 1963, is a special law regulating interest on money and granting to certain groups special and exclusive privileges, immunities, and franchises in violation of the Constitution of Nebraska, Arti-

cle III, section 18, and Article I, section 16. State Securities Co. v. Ley ---------- 251

6. The benefits of a retirement act awarded to a member thereof who renders services under the act creating the system after its enactment are not a grant of extra compensation after the services are rendered and in violation of Article III, section 19, of the Constitution of Nebraska. Gossman v. State Employees Retirement System ---------- 326

7. When the State deducts from salary an amount to create a pension or retirement fund without the direction or consent of a salaried official or employee, the amount withheld is not a tax within the provisions of Article VIII, section 1, of the Constitution of Nebraska. Gossman v. State Employees Retirement System ---------- 326

8. In reviewing the reasonableness of a retirement act, all of the provisions of the act must be construed together and if the total plan provides a comprehensive and reasonable scheme for the retirement of public employees and sets up reasonable requirements as a condition of their employment, it may not be declared invalid. Gossman v. State Employees Retirement System ---------- 326

9. Denial to banks of deduction for tax purposes of actual value of shares of stock of other Nebraska corporations was a violation of Article VIII, section 1, of the Constitution of Nebraska. First Nat. Bank & Trust Co. v. County of Lancaster ---------- 390

10. The establishment of two methods of valuation of property in the same class for taxation purposes results in a want of uniformity prohibited by Article VIII, section 1, of the Constitution of Nebraska. First Nat. Bank & Trust Co. v. County of Lancaster 390

11. A provision of the Bill of Rights of the Constitution of the United States which is fundamental and essential to a fair trial is made obligatory upon the states by the Fourteenth Amendment; the Sixth Amendment's guaranty of counsel is one of these fundamental rights. Case v. State ---------- 404

12. The due process clause of the Fourteenth Amendment to the Constitution of the United States guarantees the assistance of counsel, unless that right is intelligently and understandingly waived by the accused. Case v. State ---------- 404

13. Courts must indulge every reasonable presumption against a waiver of fundamental constitutional rights,

and do not presume acquiescence in their loss. Case v. State ---------- 404

14. Where the constitutional infirmity of a state criminal trial without counsel is manifested, and there is no allegation or showing of affirmative waiver of counsel, a resulting conviction is unconstitutional and the accused is entitled to relief therefrom. Case v. State ---------- 404

15. Where the statute states the elements of the offense, it is sufficient, under Article I, section 11, of the Constitution of Nebraska, if the information describes the offense in the language of the statute. State v. Jarrett ---------- 459

16. The Legislature while in special session can transact no business except that for which it was called together. Arrow Club, Inc. v. Nebraska Liquor Control Commission ---------- 686

17. The proclamation calling a special session may state the purpose for which the Legislature is convened in broad, general terms or it may limit the consideration to a specified phase of a general subject. The Legislature is free to determine in what manner the purpose shall be accomplished, but it must confine itself to the matters submitted to it by the proclamation. Arrow Club, Inc. v. Nebraska Liquor Control Commission ---------- 686

18. The Legislature while in special session may enact legislation relating to, germane to, and having a natural connection with the purpose for which it was convened. Arrow Club, Inc. v. Nebraska Liquor Control Commission ---------- 686

19. The purpose or subject as stated in the proclamation is to be determined by an analysis and construction of the proclamation as in the case of any written instrument. Arrow Club, Inc. v. Nebraska Liquor Control Commission ---------- 686

20. The presumption is always in favor of the constitutionality of legislation. An act should be held to be within the call for a special session if it can be done by any reasonable construction. Arrow Club, Inc. v. Nebraska Liquor Control Commission 686

21. The exercise of police power may or may not involve the taking of private property and it may or may not involve mere noncompensable inconvenience to the owner thereof. The distinction is not whether it is a valid exercise of police power but whether or

not the property itself is taken or damaged. Balog v. State ---------- 826

22. The right of an owner of property abutting on a street or highway to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without due process of law and compensation for his loss. Balog v. State ---- 826

23. The right of a landowner or lessee to just compensation for property taken or damaged for public use is guaranteed by the Constitution. Balog v. State 826

24. Statutes requiring railroads to fence right-of-way are still constitutional notwithstanding changed conditions in transportation. Linenbrink v. Chicago & N. W. Ry. Co. ---------- 838

25. Where the Legislature determines a public policy of the state by a proper exercise of the police power, changing conditions which tend to make the result inequitable and unjust are ordinarily for the Legislature and not the courts. Linenbrink v. Chicago & N. W. Ry. Co. ---------- 838

26. For a question of constitutionality to be considered in the Supreme Court, it must be properly raised in the trial court. If it is not raised in the trial court, it may not be considered by the Supreme Court. State v. Schwade ---------- 844

27. All actual damages resulting from the exercise of the power of eminent domain, which diminish the market value of private property, may be recovered under the Constitution. Painter v. State -- 905

Contracts.

1. In the absence of fraud, mistake, or ambiguity, an agreement reduced to writing is the only competent evidence of the contract. Reorganized Church of Jesus Christ v. Universal Surety Co. ---------- 60

2. If a written contract contains a complete obligation without ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included therein. Reorganized Church of Jesus Christ v. Universal Surety Co. ---------- 60

3. A written contract expressed in unambiguous language is not subject to interpretation or construction. The intention of the parties to such a contract must be determined from its contents. Re-

organized Church of Jesus Christ v. Universal Surety Co. ---------- 60

4. When a written contract has been unconditionally delivered, a contemporaneous oral agreement, providing that the contract is not to be performed if a certain condition or contingency should occur, cannot be shown. Reorganized Church of Jesus Christ v. Universal Surety Co. ---------- 60

5. There can be no implied contract where there is an express agreement between parties relative to the same subject matter. Ryan v. Nelson ---------- 130

6. As a general rule, in case of breach of contract to return specific property, the measure of damages is the market value at the time of breach. Lincoln Welding Supply Co. v. Western Contracting Corp. 160

7. In a proper case a party may include as damages loss sustained of gains which have been prevented. Lincoln Welding Supply Co. v. Western Contracting Corp. ---------- 160

8. Where a party has received into his possession the goods of another he may by contract fix the amount of his liability. Lincoln Welding Supply Co. v. Western Contracting Corp. ---------- 160

9. The evidence herein is not sufficient to prove a valid and enforceable contract between the plaintiff and the deceased whereby plaintiff was to have all deceased's property at her death. Neylon v. Parker 187

10. A binding oral agreement or understanding may be implied from conduct and circumstances. It may be shown by circumstantial evidence and the admissions of the parties sought to be charged. Woods v. Woods ---------- 542

11. It is sufficient, if the facts and circumstances, together with the words of the parties used at the time, are such that reasonable persons in conducting the ordinary affairs of business would be justified in inferring such a contract or agreement. Woods v. Woods ---------- 542

12. When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment. Bishop Cafeteria Co. v. Ford ---------- 600

13. Rule as to the admissibility of parol evidence to vary or add to the consideration expressed in a written instrument stated. Bishop Cafeteria Co. v. Ford ---------- 600

14. A contract is not ambiguous because it may be difficult to construe. The construction of a contract is a matter of law for the court under pertinent rules of interpretation. Bishop Cafeteria Co. v. Ford ---------- 600
15. A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used. Bishop Cafeteria Co. v. Ford 600
16. When the provisions of a contract together with the facts and circumstances that aid in ascertaining the intent of the parties thereto are not in dispute, the proper construction of such contract is a question of law. Bishop Cafeteria Co. v. Ford 600
17. In the construction of a contract, the instrument must be construed as a whole giving force and effect to all of the provisions of the contract. Kent v. Dairyland Mut. Ins. Co. ---------- 709

Corporations.

1. The purpose of section 77-706, R. R. S. 1943, is to allow corporations a deduction of the value of domestic corporation stock in order to prevent double taxation of property. First Nat. Bank & Trust Co. v. County of Lancaster ---------- 390
2. It is a uniform rule applied in the liquidation of a corporation that the rights of participation in the distribution of the assets depend on the corporation's memorandum and articles of incorporation. Squires v. The Balbach Co. ---------- 465
3. In the decisions the term "memorandum" is employed generally to describe the documentary records properly enacted by a corporation having controlling effect in the exercise of its corporate and fiscal functions. Squires v. The Balbach Co. ---------- 465
4. In the absence of specified rights or limitations all stockholders are entitled to share equally in liquidated surplus assets. Squires v. The Balbach Co. ---------- 465
5. Provisions in corporate articles and memoranda that holders of preferred stock shall be paid the par value of their stock before any liquidation dividends are paid to the holders of common stock is exhaustive and means that the preferred stock shall have its par preference on liquidation and nothing more. Squires v. The Balbach Co. ---------- 465

Costs.

The pay, expenses, and mileage of jurors are not authorized by statute to be taxed as costs, and an order of the trial court to that effect is erroneous. State ex rel. City of St. Paul v. Rutten ---------- 633

Courts.

1. An appeal from the ruling in the county court on statutory allowances, rights of homestead, and the determination of the interest of a surviving spouse is triable as a suit in equity. Parker v. Comstock 197
2. The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute. Parker v. Comstock ---------- 197
3. Jurisdiction of the subject matter of an action cannot be conferred on a tribunal not empowered to entertain jurisdiction by acquiescence or consent. KBR Rural Public Power Dist. v. Kidder ---------- 228
4. The Supreme Court of this state has the undoubted right to decide upon its own jurisdiction and the jurisdiction of the courts of this state to which its appellate power extends. Case v. State ---------- 404
5. An essential factual determination may not be made by the district court or the Supreme Court unless based upon competent evidence in the record. State v. Schwade ---------- 844

Criminal Law.

1. A discharge of a defendant, who has given bail for his appearance, will not be granted even though he is not brought to trial before the end of the third term of court where the record discloses that the delay was pursuant to agreement by the county attorney and defendant's counsel. State v. Lewis 173
2. Under statute, an adjournment of the trial for more than 20 days is not prohibited where it appears that such adjournment was with the consent of the accused. The consent of defendant's attorney is binding upon the defendant. State v. Lewis ---------- 173
3. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information that the trial court will be justified in directing a verdict of not guilty. State v. Martin ---------- 209
4. The gist of the offense of passing an insufficient fund check is an intention to defraud and a knowledge

that at the time of the making of such check there are insufficient funds for its payment upon presentation. State v. Martin ---------- 209
5. The offense of issuing a check without sufficient funds is complete when the check is issued with knowledge and the intent to defraud, even though no one is defrauded thereby. State v. Martin ------ 209
6. Evidence examined and held sufficient to warrant the trial court's giving an instruction relating to statutory presumptions arising from failure of a defendant to pay a check within 5 days after receiving notice of dishonor. State v. Martin ---------- 209
7. 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. Snell ---------- 396
State v. Berg ---------- 419
8. A voluntary statement made by the defendant at a preliminary examination before a magistrate is admissible as an admission or confession at a subsequent trial. State v. Snell ---------- 396
9. In the absence of a showing that the defendant was represented by counsel, or of an effective waiver of the right to counsel, evidence that the defendant entered a plea of guilty at a preliminary examination in the county court was not admissible. State v. Snell ---------- 396
10. Rule stated as to when evidence of the commission of another crime may be shown. State v. Snell -- 396
11. A defendant may not predicate error on the admission of evidence to which no objection is made at the time it is offered. State v. Snell ---------- 396
12. Knowledge that an accident has happened and that an injury has been inflicted is an essential element of the crime of leaving the scene of a personal injury accident in violation of motor vehicle statute. State v. Snell ---------- 396
13. Where the constitutional infirmity of a state criminal trial without counsel is manifested, and there is no allegation or showing of affirmative waiver of counsel, a resulting conviction is unconstitutional and the accused is entitled to relief therefrom. Case v. State ---------- 404
14. A plea of guilty must be freely and understandingly made by one competent to know the consequences thereof. Case v. State ---------- 404
15. 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. State v. Ohler ---------- 418
State v. Berg ---------- 419
State v. Koziol ---------- 648

16. In a criminal case, 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. Berg ---------- 419

17. The pay, expenses, and mileage of jurors are not authorized by statute to be taxed as costs, and an order of the trial court to that effect is erroneous. State ex rel. City of St. Paul v. Rutten ---------- 633

18. The Supreme Court has the right to reduce a sentence rendered by the district court in a criminal case when in its opinion it is excessive, and to render such sentence against the accused as in its opinion may be warranted by the evidence. State v. Paul ---------- 668

19. Where a sentence has been imposed by the district court within statutory limits it will not be disturbed in the absence of abuse of discretion. State v. Paul 668

20. An indeterminate sentence given for a crime of violence is erroneous but not void. Draper v. Sigler 726

21. The imposition of an indeterminate sentence requires the person convicted to serve the maximum sentence specified unless sooner released by the Board of Pardons. Draper v. Sigler ---------- 726

22. When an offense is not designated by the statute creating it as either a felony or a misdemeanor, the grade of the offense is determined by the maximum punishment authorized by the statute. Case v. State ---------- 774

Damages.

1. In eminent domain proceedings, an owner of land is entitled to recover such compensation as specially affects him, and not such as is suffered by the community generally or such as differ only in degree, and not in kind, from those suffered in common by the people of the whole neighborhood. Lybarger v. State ---------- 35

2. Rule as to recovery of special damages in eminent domain proceedings stated. Lybarger v. State ---- 35
3. As a general rule, in case of breach of contract to return specific property, the measure of damages is the market value at the time of breach. Lincoln Welding Supply Co. v. Western Contracting Corp. 160
4. In a proper case a party may include as damages loss sustained of gains which have been prevented. Lincoln Welding Supply Co. v. Western Contracting Corp. ---------- 160
5. Where a party has received into his possession the goods of another he may by contract fix the amount of his liability. Lincoln Welding Supply Co. v. Western Contracting Corp. ---------- 160
6. A person to whom another has tortiously caused harm is entitled to compensatory damages if he establishes by proof the extent of such harm and the amount of his damage with reasonable certainty. Schwab v. Allou Corp. ---------- 342
7. Damages for a permanent injury may not be based on speculation, probabilities, or uncertainty but must be shown by competent evidence that such damage is reasonably certain as the proximate result of the pleaded injury. Schwab v. Allou Corp. ---------- 342
8. An instruction which informs the jury of the nature of present worth, without fixing any rate of interest or rigid formula, and requires it to reduce future damages to their present worth, is proper. An example is not essential. Thorpe v. Zwonechek 504
9. An error in the rejection of evidence relating to damages in a negligence action is not prejudicial where the jury finds that the plaintiff had no cause of action against the defendant. Thompsen v. Miller 530
10. Evidence which shows with reasonable certainty that a plaintiff's injury is permanent will sustain a judgment for damages for such an injury. Boardman v. McNeff ---------- 534
11. In cases where there has not been a rescission, the remedy is damages for the fraud. The burden in such cases is on the person alleging the fraud or misrepresentation to prove it and the amount of his damages. The measure thereof is the difference between the article or thing if it had been as represented and its actual value. Beveridge v. Miller-Binder, Inc. ---------- 734
12. When the alleged measure of damages is challenged by objections to the pleading or evidence, by

a motion for a directed verdict, or by a tender of an instruction, the correct measure of damages must be given to the jury and there must be evidence in the record to support it. Beveridge v. Miller-Binder, Inc. ---------- 734

13. Where there is a material variance in the measure of damages and the evidence, and objection thereto is timely made, a judgment obtained thereon cannot stand. Beveridge v. Miller-Binder, Inc. ---------- 734

14. The amount of damages for pain and suffering has no legal rule for its measure and rests largely in the sound discretion of the jury. Baylor v. Tyrrell -- 812

15. It is not error for counsel in final argument to the jury to suggest flat amounts of recovery for different periods of pain, suffering, and disability, if such different periods of pain and suffering bear some real relation to differences demonstrated in the evidence. Baylor v. Tyrrell ---------- 812

16. The verdict of a jury in a personal injury case will not be set aside unless it is so clearly exorbitant as to indicate passion and prejudice, or disregard of the evidence, or controlling rules of law. Baylor v. Tyrrell ---------- 812

17. Loss of earning capacity, as distinct from loss of wages, salary, or earnings, is a separate element of damage. Baylor v. Tyrrell ---------- 812

18. Loss of earnings is an item of special damage and must be specifically pleaded and proved. Baylor v. Tyrrell ---------- 812

19. Proof of impairment of earning capacity may be had under general allegations of injury and damage. Baylor v. Tyrrell ---------- 812

20. Proof of an actual loss of wages or earnings is not essential to recovery for loss of earning capacity. Baylor v. Tyrrell ---------- 812

21. Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. Baylor v. Tyrrell ---------- 812

22. Recovery for mental suffering or anxiety may be had provided the mental suffering or anxiety is a reasonably certain result or is reasonably apprehended as a result of the injuries sustained. Baylor v. Tyrrell ---------- 812

23. Where the entire leasehold is taken, the measure

of damages is the value of the leasehold. Balog v. State ---------- 826

24. Where a part of a leasehold is taken or a leasehold is damaged, the measure of damages is the difference between the value of the leasehold immediately before and immediately after the taking. Balog v. State ---------- 826

25. It is the duty of the trial court to instruct the jury as to the proper basis upon which damages are to be assessed. Balog v. State ---------- 826

26. The amount of damages sustained by a landowner for land taken for a public use is peculiarly of a local nature to be determined by a jury. The Supreme Court will not ordinarily interfere with the verdict if it is supported by the evidence. Painter v. State ---------- 905

Deeds.

An instrument, although in form a deed, which by its terms is to operate only after the death of the maker or grantor, is testamentary in its character, and passes no present estate in the premises therein described. Neylon v. Parker ---------- 187

Descent and Distribution.

The rights of the administrator may be defeated if rents are not needed to pay debts, costs, and expenses, and rents subsequent to the death of deceased belong to the heirs unless so needed. Neylon v. Parker ---------- 187

Divorce.

1. When a marriage relation is extinguished by death prior to the time when a decree of divorce can go into effect, the subject matter is gone and the parties can never be divorced by operation of law. Parker v. Comstock ---------- 197

2. In a divorce action the money and property interests involved are only incidental to the principal object of the suit. Until the decree becomes operative as a divorce, the provisions of the decree, as to those incidental matters, cannot go into effect. Parker v. Comstock ---------- 197

3. The provisions of the divorce decree herein determining property rights did not become fully effective because of the death of the wife, and the surviving husband is not estopped by virtue of the

entry of the decree from asserting his rights as surviving husband of the deceased. Parker v. Comstock ---------- 197

4. Rule as to allowance of alimony and division of property in divorce case stated. Loukota v. Loukota 355

5. There is no mathematical formula by which an alimony award can be exactly determined. Generally speaking, awards of the Supreme 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. Loukota v. Loukota ---------- 355

6. In determining the provision to be made for the support of minor children in a divorce proceeding, their status and situation, and all other attendant circumstances should be considered, and an amount determined in accordance with the best judgment and sound discretion of the court. Johnson v. Johnson ---------- 445

7. Where there has been a change of circumstances, the same rule applies in determining whether child support payments should be increased or reduced. Johnson v. Johnson ---------- 445

8. If the circumstances of the parties change, or it is for the best interests of the children, the court may from time to time on its own motion or on the petition of either parent revise or alter the divorce decree so far as custody, care, and maintenance of the children are concerned. Johnson v. Johnson -- 445

9. The proceedings in a divorce case, with reference to an adjudication of child support, is a continuation of the divorce suit and one of its incidents. Johnson v. Johnson ---------- 445

10. The discretion of the trial court with respect to awarding or changing the support of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Johnson v. Johnson ---------- 445

11. A judgment for child support may be revised or altered at any time as to future payments if the circumstances of the parties change or it shall be to the best interests of the children. Walters v. Walters ---------- 731

12. A judgment for child support may be modified only upon a showing of facts or circumstances which

have occurred since the judgment was entered. The judgment is res judicata as to all matters existing at the time it was rendered. Walters v. Walters -- 731

13. A proceeding to modify a judgment for child support is not a retrial of the original case or a review of the equities of the original decree. Walters v. Walters ---------- 731

Drains.

1. The hearing before the trial court provided for in statute concerning the organization of sanitary and improvement districts is one in equity. Zwink v. Ahlman ---------- 15
2. Where articles of incorporation of sanitary and improvement district were shown to have been considered by trial court, they may be considered as if made a part of the bill of exceptions. Zwink v. Ahlman ---------- 15
3. Where the owner of lands included in a proposed sanitary and improvement district seeks to have such lands excluded on the ground that they will not be benefited, the burden is on the landowner to satisfy the court that they will not be benefited. Zwink v. Ahlman ---------- 15

Easements.

1. The hearing and determination as to whether or not an easement by prescription exists across the right-of-way of a railroad company is not regulatory and not within the jurisdiction of the railway commission. Village of Louisville v. Chicago, B. & Q. R.R. Co. ---------- 491
2. The mere fact that a purported easement by prescription crosses the right-of-way and tracks of a railroad company does not have the effect of lodging jurisdiction in the railway commission. The rights of a village in having such an issue determined are no different than those of any other person or entity. Village of Louisville v. Chicago, B. & Q. R.R. Co. ---------- 491
3. Subject to the easement of navigation, riparian owners are entitled to the possession and ownership of the soil formerly under the waters of the stream as far as the thread of the stream. Krumwiede v. Rose ---------- 570
4. Rule as to necessary elements of an easement by prescription stated. Pierce v. Rabe ---------- 745

5. To establish a prescriptive right to an easement, all of the elements of a prescriptive use and enjoyment must be established by clear, convincing, and satisfactory evidence. Pierce v. Rabe ------ 745
6. Presumptions and burden of proof to establish an easement by prescription stated. Pierce v. Rabe -- 745

Eminent Domain.
1. The evidence as to the adaptability of property for certain uses must be limited to uses reasonably anticipated in the immediate future. Lybarger v. State ---------- 35
2. Evidence as to the value of property for a particular use is not competent. Its adaptability for certain uses may be considered only in determining the reasonable market value of the land at the time it is taken or damaged. Lybarger v. State 35
3. Witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. Lybarger v. State ---------- 35
4. In eminent domain proceedings, an owner of land is entitled to recover such compensation as specially affects him, and not such as is suffered by the community generally or such as differ only in degree, and not in kind, from those suffered in common by the people of the whole neighborhood. Lybarger v. State ---------- 35
5. Rule as to recovery of special damages in eminent domain proceedings stated. Lybarger v. State -- 35
6. The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. Lansman v. State ---------- 119
7. In condemnation proceedings, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation. Lansman v. State ---------- 119
8. The amount of damages sustained by a landowner for land taken for a public use is peculiarly of a local nature to be determined by a jury. The Supreme Court will not ordinarily interfere with the

verdict if it is supported by the evidence. Lansman v. State ---------- 119
Painter v. State ---------- 905
9. In condemnation proceedings, the owner of real estate taken can testify as to its value. Lansman v. State ---------- 119
10. Either lay or expert witnesses may be allowed to testify as to the value of land taken in eminent domain proceedings, the weight and credibility of their testimony being for the jury. Lansman v. State 119
11. Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony. Lansman v. State 119
12. In a condemnation proceeding, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong. Lansman v. State 119
13. In a condemnation proceeding the weight and credibility of testimony of either lay or expert witnesses regarding value of land taken or value of the remainder immediately before and immediately after taking is for the jury. Lansman v. State -------- 119
14. Everything which affects the market value is to be taken into consideration. The burden of additional fencing, and like matters, are to be included, not by being added together item by item, but to the extent that, taken as a whole they detract from the market value of the property. Lansman v. State -- 119
15. Measure of damages for determination of value of leasehold stated. Balog v. State ---------- 826
16. Where the entire leasehold is taken, the measure of damages is the value of the leasehold. Balog v. State ---------- 826
17. Where a part of a leasehold is taken or a leasehold is damaged, the measure of damages is the difference between the value of the leasehold immediately before and immediately after the taking. Balog v. State ---------- 826
18. Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals, or the public safety any more than under a police regulation having no relation to such matters but only to the general welfare. Balog v. State ------ 826
19. The exercise of police power may or may not involve the taking of private property and it may or may not involve mere noncompensable inconvenience to the owner thereof. The distinction is not whether it is

a valid exercise of police power but whether or not the property itself is taken or damaged. Balog v. State ---------- 826

20. The right of a landowner or lessee to just compensation for property taken or damaged for public use is guaranteed by the Constitution. Balog v. State 826

21. An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway. Balog v. State ---------- 826

22. Whether the right of access to an existing highway has been destroyed or materially impaired is a question of fact which must be determined upon the particular facts in each case. Balog v. State 826

23. All actual damages resulting from the exercise of the power of eminent domain, which diminish the market value of private property, may be recovered under the Constitution. Painter v. State ---------- 905

24. An abutting landowner has no vested interest in the flow of traffic past his premises. Ordinarily the mere diversion of traffic alone, regardless of the fact that a part of condemnee's land is taken for which compensation is paid, will not support a judgment for consequential damages to the remaining land. Painter v. State ---------- 905

25. The fact that a property owner or those desiring to enter his property may have to travel a circuitous and longer route to reach certain points because of traffic regulations changing the direction of traffic does not give rise to an injury different in kind from that sustained by the general public, and affords no basis for an action for damages. Painter v. State ---------- 905

26. Incidental damages sustained by an owner of real property because a street was changed from a two-way street to a one-way street adjacent to condemnee's property are the result of the exercise of the police power, and are not ordinarily compensable in eminent domain proceedings. Painter v. State ---------- 905

Equity.

1. The hearing before the trial court provided for in statute concerning the organization of sanitary and improvement districts is one in equity. Zwink v. Ahlman ---------- 15

2. Where a court of equity has obtained jurisdiction of

a case for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation. Zwink v. Ahlman ---------- 15

3. In an equity case, the Supreme Court will take into consideration the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other. Van Donselaar v. Conkey 169

4. An action to quiet title to real estate and to enforce a contract and agreement is an equitable action and is tried de novo in the Supreme Court. Neylon v. Parker ---------- 187

5. An appeal from the ruling in the county court on statutory allowances, rights of homestead, and the determination of the interest of a surviving spouse is triable as a suit in equity. Parker v. Comstock 197

6. The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute. Parker v. Comstock ---------- 197

7. A court of equity, in dealing with legal rights, adopts and follows the rules of law in all cases to which those rules are applicable. Whenever there is an explicit statute or a direct rule of law governing the case in all its circumstances, a court of equity is as much bound by it as would be a court of law. McCauley v. Stewart ---------- 759

Estoppel.

An insurance company may be estopped from denying liability where, by its course of dealing and the acts of its agent, it has induced the insured to pursue a course of action to his detriment. Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co. ---------- 287

Evidence.

1. Courts will generally take judicial notice of geographical conditions. State ex rel. Finigan v. Norfolk Live Stock Sales Co., Inc. ---------- 31

2. The evidence as to the adaptability of property for certain uses must be limited to uses reasonably anticipated in the immediate future. Lybarger v. State ---------- 35

3. Evidence as to the value of property for a particular use is not competent. Its adaptability for certain

uses may be considered only in determining the reasonable market value of the land at the time it is taken or damaged. Lybarger v. State ---------- 35

4. Witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. Lybarger v. State ---------- 35

5. The parol evidence rule is not merely one of evidence but is a rule of substantive law. Reorganized Church of Jesus Christ v. Universal Surety Co. ---- 60

6. When a written contract has been unconditionally delivered, a contemporaneous oral agreement, providing that the contract is not to be performed if a certain condition or contingency should occur, cannot be shown. Reorganized Church of Jesus Christ v. Universal Surety Co. ---------- 60

7. Circumstantial evidence is defined as the attendant facts and circumstances from which a principal fact may be inferred by the usual processes of reasoning. Where the existence of the attendant facts and circumstances is testified to by witnesses, the evidence of the principal fact is said to be direct or positive. State v. Lewis ---------- 173

8. The evidence of witnesses as to acts done and words spoken by a defendant as the basis for an opinion that the defendant was under the influence of intoxicating liquor is direct or positive, and not circumstantial. State v. Lewis ---------- 173

9. Where opinion evidence is based on direct or positive evidence, as distinguished from circumstantial evidence, it will be considered by the jury in the same manner as other direct or positive evidence, and a request for a cautionary instruction may be denied without prejudicing the rights of the defendant. State v. Lewis ---------- 173

10. Evidence of custom and usage is not admissible to vary or contradict the clear and unambiguous terms of an express contract. Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co. ------ 287

11. Error in the admission of evidence is presumed to be prejudicial unless it clearly appears from the record in the case that it did not affect unfavorably the party against whom it was admitted. Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co. ---------- 287

12. A voluntary statement made by the defendant at a

preliminary examination before a magistrate is admissible as an admission or confession at a subsequent trial. State v. Snell ---------- 396

13. In the absence of a showing that the defendant was represented by counsel, or of an effective waiver of the right to counsel, evidence that the defendant entered a plea of guilty at a preliminary examination in the county court was not admissible. State v. Snell ---------- 396

14. Rule stated as to when evidence of the commission of another crime may be shown. State v. Snell -- 396

15. A defendant may not predicate error on the admission of evidence to which no objection is made at the time it is offered. State v. Snell ---------- 396

16. Limits of disclosure required under discovery statute stated. Mecke v. Bahr ---------- 584

17. Rule as to the admissibility of parol evidence to vary or add to the consideration expressed in a written instrument stated. Bishop Cafeteria Co v. Ford ---------- 600

18. Evidence of an offer or desire to compromise, consisting of a direct offer to buy peace, or settle a controversy without respect to legal liability, is not admissible against the person making it. Bishop Cafeteria Co. v. Ford ---------- 600

19. Objections to questions on cross-examination, which range beyond the scope of the direct examination, are properly sustainable on that ground. Odom v. Willms 699

20. The reception of evidence collateral to the main issue is within the sound legal discretion of the trial court. Balog v. State ---------- 826

Executors and Administrators.

1. By statute, the right of possession of all real as well as personal property is conferred on the executor or administrator until the estate has been settled. Neylon v. Parker ---------- 187

2. The rights of the administrator may be defeated if rents are not needed to pay debts, costs, and expenses, and rents subsequent to the death of deceased belong to the heirs unless so needed. Nelyon v. Parker ---------- 187

False Pretenses.

1. In the case of a charge of obtaining money by false pretenses, proof that the defendants received a check, which was paid, is sufficient to sustain

the allegation that the defendants obtained "money." State v. Jarrett ---------- 459

2. In the case of a charge of obtaining money by false pretenses, if the defendants received a check or draft which was paid, there is no variance in the charge and the proof. State v. Jarrett ---------- 459

Fences.

The purpose of fencing statutes is to protect lives and property. The changes in condition which require a statute once held valid to be declared invalid ordinarily apply to conditions which remove or reduce the need for and the purposes of the act. Linenbrink v. Chicago & N. W. Ry. Co. ---------- 838

Fixtures.

1. Articles which may or may not become attached to the freehold, according to circumstances, will retain their character of personalty by virture of a contract between vendor and vendee to that effect, when the rights of innocent purchasers relying upon their apparent character are not involved. Stibor v. Farrell ---------- 437
2. Buildings, such as corn cribs, situated upon a farm, are of a general class which a prospective buyer inspecting the farm would have a right to assume are a part of the freehold. They are not such as to put him upon inquiry in reference thereto, even though he may know that the farm is occupied by a tenant. Stibor v. Farrell ---------- 437
3. As between the vendor and purchaser of real estate, the rule for determining what is a fixture is strongly construed against the vendor. Whatever is essential for the purposes for which the realty is used, and which has actually or constructively been annexed is a fixture, and passes to the grantee unless it is excepted from the operation of the deed. Stibor v. Farrell ---------- 437

Fraud.

1. Fraud and misrepresentation are never presumed. Ordinarily, in a law action fraud and misrepresentation must be established by a preponderance of the evidence by the party alleging them. Murphy Finance Co. v. Fredericks ---------- 1
2. False representations, in order to found an action in the nature of deceit, must not consist merely of

promises to be performed in the future. Ordinarily they must be representations of existing facts. Beveridge v. Miller-Binder, Inc. ---------- 734

3. In cases where there has not been a rescission, the remedy is damages for the fraud. The burden in such cases is on the person alleging the fraud or misrepresentation to prove it and the amount of his damages. The measure thereof is the difference between the article or thing if it had been as represented and its actual value. Beveridge v. Miller-Binder, Inc. ---------- 734

Gas.

1. A natural gas company transmitting gas to its customers owes a duty to the public to exercise a degree of care commensurate with the danger involved in the transaction of its business. Whittington v. Nebraska Nat. Gas Co. ---------- 264
2. A gas company owes the duty to the general public to so operate its business and maintain its pipes as to prevent the escape of gas therefrom in such quantities as to become dangerous to life or property. Whittington v. Nebraska Nat. Gas Co. ---- 264
3. Public utility distributing natural gas for public use must exercise every reasonable precaution to avoid injury or death by escape of gas while it is being carried through its pipes to the consumer, and the care required must be commensurate with danger which it is the utility's duty to avoid. Whittington v. Nebraska Nat. Gas Co. ---------- 264
4. Public utility distributing natural gas for public use must not only install pipes and fittings of good material and workmanship but must see that equipment when installed and laid is maintained in a reasonably safe condition. Whittington v. Nebraska Nat. Gas Co. ---------- 264

Guaranty.

Where a guaranty agreement contains an absolute promise to pay the debt of another upon written demand, the filing of a petition satisfies the requirement of a written demand and the plaintiff is not required to allege or prove a written demand. Arthur Fulmer St. Louis, Inc. v. Auto-Re-Nu-Inc. 671

Habeas Corpus.

1. The writ of habeas corpus has been extended to,

and may be used in controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice. State ex rel. Cochrane v. Blanco ---------- 149

2. After the court's jurisdiction has been invoked by habeas corpus petition seeking custody of a child, the child is a ward of the court and its welfare lies in the hands of the court. State ex rel. Cochrane v. Blanco ---------- 149

3. The sufficiency of the statements of the petition of relator to justify a writ of habeas corpus may be tested before making return thereto by a motion to quash the writ. Case v. State ---------- 404

4. The remedy of habeas corpus is not demandable of course, but legal cause must be shown to entitle a petitioner to the benefit of it. Case v. State ---- 404

5. Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court. Case v. State 404

6. It is for the Supreme Court of this state to decide what issues are justiciable in an application for a writ of habeas corpus made to the courts of this state. Case v. State ---------- 404

7. Habeas corpus cannot be used as a substitute for a writ of error. Case v. State ---------- 404

8. Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant. Case v. State 404

9. Habeas corpus is a proper proceeding to determine the right to the custody of a minor child. Christopherson v. Christopherson ---------- 414

10. Ordinarily, the basis for the issuance of a writ of habeas corpus is an illegal detention, but in the case of a writ sued out for the detention of a child, the law is concerned not so much about the illegality of the detention as about the welfare of the child. Christopherson v. Christopherson ---------- 414

11. To obtain release by habeas corpus the judgment or sentence must be more than merely erroneous; it must be an absolute nullity. Draper v. Sigler --- 726

12. Habeas corpus is regarded as a collateral and not a direct proceeding when used as a means of attack upon a judgment sentencing a defendant. Draper v. Sigler ---------- 726

Highways.

1. If the owner of land encloses it with a fence and installs gates therein at the entrance and exit where the right-of-way is claimed across the tract, it is evidence that he recognizes the right of those who use the road to continue to use it. Pierce v. Rabe ---------- 745
2. It is not indispensable to the establishment of a highway by prescription that there has been no deviation in the line of travel. Slight changes in the line of travel are permitted. Pierce v. Rabe ---- 745
3. Rule as to effect of change of route of highway established by prescription stated. Pierce v. Rabe 745
4. Change in the course of a road after the right of the public is established by use for the statutory period does not defeat the public right to the use of the road as previously established. Pierce v. Rabe ---------- 745
5. The right of an owner of property abutting on a street or highway to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without due process of law and compensation for his loss. Balog v. State 826
6. An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway. Balog v. State ---------- 826
7. Whether the right of access to an existing highway has been destroyed or materially impaired is a question of fact which must be determined upon the particular facts in each case. Balog v. State ------ 826
8. An abutting landowner has no vested interest in the flow of traffic past his premises. Ordinarily the mere diversion of traffic alone, regardless of the fact that a part of condemnee's land is taken for which compensation is paid, will not support a judgment for consequential damages to the remaining land. Painter v. State ---------- 905
9. The fact that a property owner or those desiring to enter his property may have to travel a circuitous and longer route to reach certain points because of traffic regulations changing the direction of traffic does not give rise to an injury different in kind from that sustained by the general public, and affords no basis for an action for damages. Painter v. State 905

Indictments and Informations.

Where the statute states the elements of the offense, it is sufficient, under Article I, section 11, of the Constitution of Nebraska, if the information describes the offense in the language of the statute. State v. Jarrett ---------- 459

Infants.

1. The writ of habeas corpus has been extended to, and may be used in controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice. State ex rel. Cochrane v. Blanco ---------- 149
2. After the court's jurisdiction has been invoked by habeas corpus petition seeking custody of a child, the child is a ward of the court and its welfare lies in the hands of the court. State ex rel. Cochrane v. Blanco ---------- 149
3. The jurisdiction of a state to regulate the custody of infants found within its territory arises out of the power that every state 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. State ex rel. Cochrane v. Blanco ---------- 149
4. When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child, with due regard to the superior rights of a fit, proper, and suitable parent. State ex rel. Cochrane v. Blanco ---------- 149
5. The courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. State ex rel. Cochrane v. Blanco ---------- 149
6. The indifference of a parent for a child's welfare over a long period of time, and the willingness that others should assume the obligations of parents in his stead is a material element in determining whether a parent has forfeited or abandoned his natural right to the custody of the child. State ex rel. Cochrane v. Blanco ---------- 149
7. The desires of children 15 and 11 years of age should be given important, though not controlling, consideration in the determination as to whom their

custody should be awarded. State ex rel. Cochrane v. Blanco ---------- 149

Injunction.

1. The owner of real estate has the legal right to use and operate his land free from repeated acts of trespass. An injunction will issue to restrain such acts, especially where committed under a claim which indicates that the trespass will be continued. Van Donselaar v. Conkey ---------- 169
2. Equity will afford relief by the process of injunction against repeated acts of trespass, especially where committed under a claim which indicates a continuance and constant repetition of it. Van Donselaar v. Conkey ---------- 169
3. An injunction will not be granted unless the right is clear, the damage irreparable, and the remedy at law inadequate to prevent a failure of justice. City of Omaha v. Rubin ---------- 314
4. A writ of injunction is not wholly a writ of right and may be withheld, in the discretion of the court, when it is likely to inflict greater injury than the grievance complained of. City of Omaha v. Rubin 314
5. Rule stated as to power of courts by injunction to control the decisions of administrative agencies. Galstan v. School Dist. of Omaha ---------- 319
6. 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. Board of Education v. Winne ---------- 431
7. 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. Board of Education v. Winne ---------- 431
8. A resident taxpayer, as such, and without proof of peculiar interest or injury to himself, may enjoin the illegal expenditure of money by a public board or officer. Midwest Employers Council, Inc. v. City of Omaha ---------- 877
9. A litigant, instead of resorting to an equitable remedy, is not obliged to take the risk of prosecution, fine, imprisonment, and loss of property in order to test the constitutionality of a city ordinance. Midwest Employers Council, Inc. v. City of Omaha 877

Insurance.

1. The word "immediate" in referring to the notice required in an insurance policy means with reasonable celerity, with reasonable and proper diligence, and what is a reasonable time depends upon all the facts and circumstances of each particular case. Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co. ---------- 287
2. Proper construction of provision in fire insurance policy as to notice and proof of loss stated. Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co. ---------- 287
3. An insurance company may be estopped from denying liability where, by its course of dealing and the acts of its agent, it has induced the insured to pursue a course of action to his detriment. Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co. ---------- 287
4. A course of conduct by the agent of a fire insurance company which reasonably induces the insured to believe that the company will not require strict compliance with the notice of loss and proof of loss requirements of the policy constitutes a waiver of strict compliance with these requirements. Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co. ---------- 287
5. In the absence of a provision in the policy that the failure to furnish a proof of loss within the time required shall work a forfeiture of the insurance, the fact that the insured did not strictly comply with this requirement of the policy will not defeat recovery. Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co. ---------- 287
6. An insurance company may waive requirements of the policy concerning notice of loss and proof of loss by the conduct of its agents, and a provision in the policy requiring any waiver to be in writing has no reference to proof of loss and other requirements to be performed after a loss has occurred. Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co. ---------- 287
7. A provision in a fire insurance policy against an increase in hazard is generally considered to relate to a change in the use of the property and not to prohibit the making of necessary repairs to the property. Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co. ---------- 287

8. Limits of disclosure required under discovery statute stated. Mecke v. Bahr ---------- 584
9. A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured. Kent v. Dairyland Mut. Ins. Co. ---------- 709
10. An insurance policy should be construed in the same manner as any other contract in order to give effect to the intent of the parties at the time it was made. Kent v. Dairyland Mut. Ins. Co. ---------- 709
11. The language used in an insurance policy should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean. Kent v. Dairyland Mut. Ins. Co. ---------- 709
12. If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted. Kent v. Dairyland Mut. Ins. Co. ---------- 709
13. By statute no policy of insurance shall be issued upon any property except in the name of some party having an interest in the property. Kent v. Dairyland Mut. Ins. Co. ---------- 709
14. An insured is the person in whose favor the contract is operative and who is indemnified against, or is to receive a certain sum upon, the happening of a specified contingency or event. Kent v. Dairyland Mut. Ins. Co. ---------- 709
15. Where property is owned jointly, and so insured, one owner cannot cancel the policy of insurance without the consent of the coinsured. Kent v. Dairyland Mut. Ins. Co. ---------- 709

Interest.

1. Legislative Bill 11, adopted by the Seventy-fourth (Extraordinary) Session of the Legislature of Nebraska, 1963, and becoming operative December 16, 1963, is a bill for the regulation of interest on money. State Securities Co. v. Ley ---------- 251
2. 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. State Securities Co. v. Ley ---------- 251
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. State Securities Co. v. Ley ---------- 251
4. Legislative Bill 11 adopted by the Seventy-fourth (Extraordinary) Session of the Legislature of Nebraska, 1963, is a special law regulating interest on money and granting to certain groups special and exclusive privileges, immunities, and franchises in violation of the Constitution of Nebraska, Article III, section 18, and Article I, section 16. State Securities Co. v. Ley ---------- 251

Intoxicating Liquors.
1. The evidence of witnesses as to acts done and words spoken by a defendant as the basis for an opinion that the defendant was under the influence of intoxicating liquor is direct or positive, and not circumstantial. State v. Lewis ---------- 173
2. Testimony tending to prove that a person is under the influence of intoxicating liquor may come from a nonexpert witness and, after detailing the facts upon which his opinion is based, he may give his opinion as to whether or not such person is under the influence of intoxicating liquor. State v. Lewis 173
3. By statute it is unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of intoxicating liquor, and punishment is provided for a second offense. State v. Fox ---------- 238
4. By statute certain tests are provided which may be made to determine the alcoholic content present in the body fluid of a person charged with driving a motor vehicle while under the influence of intoxicating liquor. State v. Fox ---------- 238
State v. Berg ---------- 419
5. By statute, such tests to be considered valid shall be performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose. State v. Fox ---------- 238
6. A statute providing that a presumption of intoxi-

cation arises under a determination that the amount of alcohol in the subject's body fluid at the time in question is 0.15 percent or more by weight, as shown by chemical analysis, is in derogation of the common law and subject to strict construction. State v. Fox ---------- 238

7. By statute it is unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of intoxicating liquor, and punishment is provided for such offense. State v. Berg ---------- 419

8. The observations on the part of a witness are an essential part of his opinion on intoxication. Ordinarily such facts must be provided as a foundation for the reception of a lay witness' opinion testimony as to intoxication. State ex rel. City of St. Paul v. Rutten ---------- 633

9. Actual observations by a lay witness of a defendant charged with intoxication must be made within a time period reasonably related to the time it is charged he was intoxicated. State ex rel. City of St. Paul v. Rutten ---------- 633

10. Evidence as to the obtaining of a specimen of body fluid, including urine, at or near the time in question, is admissible as relevant and competent evidence on the issue of intoxication. State v. Schwade 844

Judges.

1. Abuse of a former judge, directed toward his action as a judge, is conduct which would tend to bring discredit on the judiciary. State ex rel. Nebraska State Bar Assn. v. Rhodes ---------- 650

2. The terms "Kangaroo Court" and "Kangaroo Judge" are terms of contempt and utter disrespect, and their use tends to bring discredit on the judiciary. State ex rel. Nebraska State Bar Assn. v. Rhodes ------ 650

3. The fact that an attorney believes a characterization of a court as a "Kangaroo Court" to be correct is no defense in a disbarment action, because a lawyer is presumed to know the proper method of securing redress if he feels aggrieved by the actions of a court. State ex rel. Nebraska State Bar Assn v. Rhodes ---------- 650

Judgments.

1. A motion for summary judgment is properly sustained where there is no genuine issue as to any

material fact and the moving party is entitled to judgment as a matter of law. Kidder v. Wright -- 222

2. A final judgment is one that disposes of the case either by dismissing it before hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant. Kometscher v. Wade 299

3. Legislative Bill 17, Seventy-fourth (Extraordinary) Session of the Legislature of Nebraska, 1963, found not to be applicable to judgments entered on the merits in the trial court and pending herein on appeal. Kometscher v. Wade ---------- 299

4. A judgment rendered by a court of competent jurisdiction determining the rights of the litigants on a cause of action or defense is an effectual bar against future litigation over the same right determined by such judgment, and is for all time, unless reversed or modified, binding on the parties and their privies in estate or in law. Summers v. Summers -------- 365

5. When the judgment is regular upon its face and was given in an action where the court had jurisdiction of the offense and of the person of the defendant, extrinsic evidence is not admissible to show its invalidity. Case v. State ---------- 404

6. In considering a motion for summary judgment the courts should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom. Bishop Cafeteria Co. v. Ford ---------- 600

7. It is not the purpose of the summary judgment procedure to require a plaintiff to reveal in detail the evidence he expects to produce to prove the allegations of his petition. Bishop Cafeteria Co. v. Ford ---------- 600

8. A motion for summary judgment is not a substitute for a demurrer, a motion to dismiss, or a motion for judgment on the pleadings. Bishop Cafeteria Co. v. Ford ---------- 600

9. The evidence offered on a motion for summary judgment is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, and affidavits which constitute only a part of the evidence available on a trial on the merits. Bishop Cafeteria Co. v. Ford ---------- 600

10. In order for the movant to obtain a summary judgment it must be shown: First, that there is no genuine issue as to any material fact in the case and,

second, that movant is entitled to judgment as a matter of law. Bishop Cafeteria Co. v. Ford ---- 600

11. When a trial by jury has been had, judgment must be rendered by the court and entered by the clerk in conformity to the verdict, unless it is special, or the court order the case to be reserved for future argument or consideration. Northwestern Public Service Co. v. Juhl ---------- 625

Juries.

The nature and extent of voir dire examination rests in the discretion of the trail court. If a party makes no challenge for cause and accepts the jurors, ordinarily he waives any objection to their selection as jurors. Thorpe v. Zwonechek ---------- 504

Labor.

The state is vested with the power and has entered the field of labor, and has not delegated to the city of Omaha any power to enact by its city council ordinances relating to labor relations and practices, and civil rights. Midwest Employers Council, Inc. v. City of Omaha ---------- 877

Landlord and Tenant.

1. In the absence of an agreement or circumstances indicating a contrary intent, the law will imply an agreement on the part of the tenant to pay the landlord the reasonable value for his use and occupation. Ryan v. Nelson ---------- 130
2. A lessor is bound to exercise reasonable care in keeping premises used in connection with but not demised to the lessee reasonably safe for those having lawful occasion to use them for the purpose for which they were intended. Schwab v. Allou Corp. ---------- 342
3. Rule as to liability of landlord to tenant for removal of ice or snow stated. Schwab v. Allou Corp. 342
4. Where the covenant for a renewal of a lease is general, the new lease is upon the same general terms and conditions as the old lease, which are applicable to the renewal period. Bishop Cafeteria Co. v. Ford ---------- 600
5. Whether a particular clause in an original lease is applicable to the new situation arising on the tenant's holding over depends, not upon the mere wording of the clause or whether the clause is

usual and ordinary, but upon the nature of the clause. Bishop Cafeteria Co. v. Ford ---------- 600

6. Where a tenancy is terminated between rent days, there is no apportionment of the rent so as to enable the lessor to recover a proportionate part. A lessor cannot apportion rent under a lease at an annual rent and recover for part of a year, where, under a proviso in the lease, he terminates the tenancy before the end of a rent year, if the lease does not provide for such apportionment. Bishop Cafeteria Co. v. Ford ---------- 600

7. In the absence of agreement to the contrary, rent does not accrue until the tenant has enjoyed the use of the land for the period for which it is payable. Bishop Cafeteria Co. v. Ford ---------- 600

8. Measure of damages for determination of value of leasehold stated. Balog v. State ---------- 826

Limitations of Actions.

1. Title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continuous, notorious, and adverse possession thereof, claiming title to the same against all persons for 10 years. Fitch v. Slama ---------- 96

2. An action brought to enforce the provisions of Firemen's Pension Act is an action upon a liability created by statute and, in the absence of a limitation in the act itself, is barred in 4 years from the time a suit may be maintained thereon. State ex rel. McIlvain v. City of Falls City ---------- 677

3. A special statute of limitations, where applicable, controls over a general statute of limitations because the special statute is the one that more properly expresses the legislative will. Stacey v. Pantano 694

Mandamus.

1. Mandamus is a proper remedy to require a city of the first class having a paid fire department to place a fireman on the retired list after he has served 21 years and elects to retire from active service. State ex rel. McIlvain v. City of Falls City 677

2. The discretion of a public officer cannot be controlled by mandamus, but when a specific duty is made plain by statute, and the officer is not given any discretion in the matter, one for whose benefit the duty is performed may compel its performance by

mandamus. State ex rel. McIlvain v. City of Falls City ---------- 677

Mortgages.

1. The recording act is intended to protect the security holder, not to give a mortgagor an opportunity to take advantage of those to whom he sells. Stibor v. Farrell ---------- 437
2. Affirmative action must be taken by the mortgagee to accelerate the maturity of mortgage debt. Until such action is taken, the provision for acceleration has no operation. United Benefit Life Ins. Co. v. Holman ---------- 682
3. The exercise of the option to accelerate the maturity of a debt provided for in an acceleration clause must be made in a manner clear and unequivocal, so as to leave no doubt as to the mortgagee's intention. United Benefit Life Ins. Co. v. Holman ---------- 682
4. The option to accelerate maturity of mortgage debt is effectively exercised by manifesting the fact in such a manner as to apprise the mortgagor of the mortgagee's intention. United Benefit Life Ins. Co. v. Holman ---------- 682
5. The institution of a suit is not an exclusive method of exercising the option provided in an acceleration clause. United Benefit Life Ins. Co. v. Holman -- 682
6. If a default exists in the payments due on a mortgage and the option to accelerate is exercised by the mortgagee, the effect thereof cannot be defeated by the mortgagor without the concurrence of the holder of the mortgage. United Benefit Life Ins. Co. v. Holman ---------- 682
7. The rightful exercise of the option, to accelerate the maturity date of the mortgage, terminates the right of the mortgagor to compel acceptance by the mortgagee of the defaulted monthly payments in arrears. United Benefit Life Ins. Co. v. Holman -- 682
8. A provision in a mortgage for the acceleration of the maturity date is not a forfeiture, is not forbidden by statute, is not contrary to public policy, and may be enforced. United Benefit Life Ins. Co. v. Holman 682
9. It is necessary for a mortgagee to plead and prove that no proceedings at law have been had for the recovery of the mortgage indebtedness. United Benefit Life Ins. Co. v. Holman ---------- 682
10. The allegation that no proceedings at law have been had, although a negative one, unless admitted,

must be proved in order to entitle the plaintiff to a decree of foreclosure. United Benefit Life Ins. Co. v. Holman ---------- 682

Motor Carriers.

1. The relation of carrier and passenger ordinarily terminates when the passenger alights from the bus safely on the curb. Odom v. Willms ---------- 699
2. Legislature is authorized to treat railroads and motor carriers as a separate class with respect to police power regulations such as fencing right-of-way. Linenbrink v. Chicago & N. W. Ry. Co. ------- 838

Municipal Corporations.

1. The Civil Service Act regulates the hiring and discharge of certain employees of the fire and police departments in the cities where it is applicable. It prohibits the discharge of employees for political or religious reasons but provides that employees may be discharged for cause. Ackerman v. Civil Service Commission ---------- 232
2. The tenure of an employee under the Civil Service Act is only during good behavior, and an employee may be discharged for any of the reasons which are listed in the statute. These reasons constitute cause for discharge. Ackerman v. Civil Service Commission ---------- 232
3. The Civil Service Act vests a wide discretion in the civil service commission but does not vest a similar discretion in the district court. Ackerman v. Civil Service Commission ---------- 232
4. Procedure for appeal under the Civil Service Act outlined. Ackerman v. Civil Service Commission 232
5. Power of the city of Omaha to zone the city and restrictions thereon stated. Wolf v. City of Omaha 545
6. To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory. Wolf v. City of Omaha 545
7. In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation. Wolf v. City of Omaha ---------- 545
8. In the exercise of police power delegated by the state Legislature to a city, the municipal legisla-

ture, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised. Wolf v. City of Omaha 545

9. What is the public good as it relates to zoning ordinances is, primarily, a matter lying within the discretion of the municipal body to which the power and function of zoning is committed. Unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere. Wolf v. City of Omaha ---------- 545

10. Every zoning ordinance effects some impairment of vested rights either by restricting prospective uses or by prohibiting continuation of existing uses, because it affects property already owned by individuals at the time of its enactment. Wolf v. City of Omaha ---------- 545

11. Whether a zoning ordinance is unreasonable, arbitrary, and discriminatory is related to its application to the particular property involved. Each case must be determined on its own facts. Wolf v. City of Omaha ---------- 545

12. A zoning ordinance may be amended from time to time as new and changing conditions warrant revision. Wolf v. City of Omaha ---------- 545

13. Public welfare must be considered from the standpoint of the objective of zoning and of all property within any particular use district, and it is not contemplated that preexisting nonconforming uses are to be perpetual. Wolf v. City of Omaha ------ 545

14. Where there is a direct conflict between a city ordinance and a state statute, the statute is the superior law. Arrow Club, Inc. v. Nebraska Liquor Control Commission ---------- 686

15. A city ordinance is inconsistent with a statute if it is contradictory in the sense that the two legislative provisions cannot coexist. Arrow Club, Inc. v. Nebraska Liquor Control Commission ---------- 686

16. A litigant, instead of resorting to an equitable remedy, is not obliged to take the risk of prosecution, fine, imprisonment, and loss of property in order to test the constitutionality of a city ordinance. Midwest Employers Council, Inc. v. City of Omaha ---------- 877

17. A home rule charter is a grant of power to a city and not a limitation of general power. The grant of power is to be construed strictly against the public

officials of a home rule charter city. Midwest Employers Council, Inc. v. City of Omaha ---------- 877
18. Nature of powers possessed by a municipal corporation stated. Midwest Employers Council, Inc. v. City of Omaha ---------- 877
19. The state is vested with the power and has entered the field of labor, and has not delegated to the city of Omaha any power to enact by its city council ordinances relating to labor relations and practices, and civil rights. Midwest Employers Council, Inc. v. City of Omaha ---------- 877
20. When the Legislature has enacted a law affecting municipal affairs, which are also of statewide concern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield. Midwest Employers Council, Inc. v. City of Omaha ---------- 877

Negligence.
1. An "invitee" is defined as a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage. Von Dollen v. Stulgies ------- 5
2. The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition, but licensees take the premises as they find them, the only duty of the owner being to give notice of traps or concealed dangers. Von Dollen v. Stulgies ---------- 5
3. Generally, a licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent, whether given by invitation or permission. Von Dollen v. Stulgies ---------- 5
4. A license may be given by any words, either written or spoken, which manifest consent. Von Dollen v. Stulgies ---------- 5
5. Difference between an invitee and licensee outlined. Von Dollen v. Stulgies ---------- 5
6. Mere knowledge or acquiescence on the part of the owner that persons are using or will use his premises does not amount to an invitation so as to impose upon the owner the obligation which he owes to an invited guest. Von Dollen v. Stulgies ------ 5
7. Generally, there is no authority on the part of an invitee to extend the scope of the invitation to

another person accompanying the invitee upon the premises. Von Dollen v. Stulgies ---------- 5

8. A business inviter owes the duty to exercise ordinary care to keep the approaches to his place of business, maintained by him for the use of patrons and customers properly on the premises, in a reasonably safe condition. Nance v. Ames Plaza, Inc. 88

9. In an action by an invitee against an inviter based on negligence, the burden is on the plaintiff to prove negligence. There is no presumption of negligence and the doctrine of res ipsa loquitur has no application. Nance v. Ames Plaza, Inc. ---------- 88

10. An inviter has the duty to exercise ordinary care, in the light of what he knows or reasonably should know, to protect an invitee from danger or to notify him of such danger while he is rightfully on the premises and engaged in the proper performance of the purpose of his presence. Nance v. Ames Plaza, Inc. ---------- 88

11. If conditions and circumstances are such that an invitee has knowledge of a condition in advance or should have knowledge comparable to that of the inviter, the inviter is not guilty of actionable negligence. Nance v. Ames Plaza, Inc. ---------- 88

12. An inviter with relation to common outside areas may not be charged with negligence by reason of natural accumulations of ice or snow which are open and obvious. Nance v. Ames Plaza, Inc. ---- 88

13. A natural gas company transmitting gas to its customers owes a duty to the public to exercise a degree of care commensurate with the danger involved in the transaction of its business. Whittington v. Nebraska Nat. Gas Co. ---------- 264

14. One under a duty to use care for which knowledge is necessary cannot avoid liability because of voluntary ignorance. Whittington v. Nebraska Nat. Gas Co. ---------- 264

15. The duty to exercise proper care to maintain a gas distributing system is a continuing one. Whittington v. Nebraska Nat. Gas. Co. ---------- 264

16. Constructive notice under these circumstances is just as effective as actual notice. Whittington v. Nebraska Nat. Gas Co. ---------- 264

17. A gas company owes the duty to the general public to so operate its business and maintain its pipes as to prevent the escape of gas therefrom in such quantities as to become dangerous to life or prop-

erty. Whittington v. Nebraska Nat. Gas Co. ----- 264

18. Public utility distributing natural gas for public use must exercice every reasonable precaution to avoid injury or death by escape of gas while it is being carried through its pipes to the consumer, and the care required must be commensurate with danger which it is the utility's duty to avoid. Whittington v. Nebraska Nat. Gas Co. ---------- 264

19. Public utility distributing natural gas for public use must not only install pipes and fittings of good material and workmanship but must see that equipment when installed and laid is maintained in a reasonably safe condition. Whittington v. Nebraska Nat. Gas Co. ---------- 264

20. The foundation of liability for negligence is knowledge, but in law an opportunity by exercise of reasonable diligence to acquire knowledge is equivalent to knowledge. Whittington v. Nebraska Nat. Gas Co. ---------- 264

21. If there is evidence sufficient to support a theory set out in the allegations of the defendant's answer that the proximate cause of the injuries to the plaintiffs' property was in no way attributable to any negligence of the defendant, that theory should be submitted under a proper instruction to the jury. Whittington v. Nebraska Nat. Gas Co. ---------- 264

22. A lessor is bound to exercise reasonable care in keeping premises used in connection with but not demised to the lessee reasonably safe for those having lawful occasion to use them for the purpose for which they were intended. Schwab v. Allou Corp. 342

23. Rule as to liability of landlord to tenant for removal of ice or snow stated. Schwab v. Allou Corp. ---- 342

24. Assumption of risk is predicated upon an implied consent to be treated negligently. If the person against whom the doctrine is applied is deprived of a choice in the matter, the risk is not assumed, although it may be encountered. Schwab v. Allou Corp. ---------- 342

25. One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. Fritchley v. Love-Courson Drilling Co., Inc. ------ 455

26. One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes

himself to the danger assumes the risk of injury from it. Fritchley v. Love-Courson Drilling Co., Inc. 455

27. An issue concerning gross negligence under our guest statute must be decided on the particular facts and circumstances of each case. Thorpe v. Zwonechek ---------- 504

28. Test of existence of gross negligence as a question for the court or for a jury stated. Thorpe v. Zwonechek ---------- 504

29. If there is evidence of imminent danger apparent to the driver of an automobile, and if he is timely warned by the passenger but persists in negligent driving, heedless of the consequences of his negligent driving, there is sufficient evidence to submit the case to a jury. Thorpe v. Zwonechek ---------- 504

30. Gross negligence does not necessarily extend to wanton or willful or intentional disregard for the guest's safety. It may arise from a series of acts or omissions, or both, none of which standing alone would constitute more than ordinary negligence. Thorpe v. Zwonechek ---------- 504

31. Conditions affecting the visibility of a motorist impose upon a driver the duty to exercise a degree of care commensurate with the existing circumstances. Thompsen v. Miller ---------- 530

32. An owner or occupant of land is liable for a failure to use due care toward a licensee whose presence is known, or should have been known, and who is injured by the active conduct of the owner or occupant. Boardman v. McNeff ---------- 534

33. Provisions of motor vehicle guest statute recited. O'Brien v. Anderson ---------- 635

34. 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. O'Brien v. Anderson ---------- 635

35. Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. O'Brien v. Anderson ---------- 635

36. 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. O'Brien v. Anderson ---------- 635
37. Meaning of the maxim "volenti non fit injuria" stated. O'Brien v. Anderson ---------- 635
38. Within the limits of its terms the maxim of "volenti non fit injuria" is applicable to negligence actions in this jurisdiction. O'Brien v. Anderson ---------- 635
39. In actions based on negligence the defense of assumption of risk under the maxim "volenti non fit injuria" is not inconsistent with the defense of contributory negligence. O'Brien v. Anderson ---------- 635
40. In a negligence action the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury, or a cause which proximately contributed to it. Odoms v. Willms ---------- 699
41. Duty of driver of automobile with respect to children near his line of travel stated. Odom v. Willms 699
42. When the evidence shows that defects in the mechanism of an automobile did not contribute to an accident and that the accident would have occurred irrespective of such defects, such defects cannot be said to be the proximate cause of the accident or a cause which proximately contributed to it. Odom v. Willms ---------- 699
43. While circumstances may exist that would warrant a jury in finding a duty to warn a child of obvious dangers, that question is not material where there is no evidence of a failure to warn sufficient to take that question to the jury. Odom v. Willms ---------- 699
44. When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury. Beck v. Trustin ---------- 788
45. Negligence, to be actionable, must be the proximate cause of the injury. Beck v. Trustin ---------- 788
46. The failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger or to misjudge its speed does not ordinarily constitute contributory negligence as a matter of law. Beck v. Trustin ---------- 788
47. Whether a party failed to look or looked and failed to see a motor vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching motor vehicle was within the limit of

danger that reasonable minds could not differ thereon. Beck v. Trustin ---------- 788
48. Rule requiring motorist to be able to stop or turn aside within the range of his vision stated. Pool v. Romatzke ---------- 870
49. Issues of negligence and contributory negligence must be submitted to a jury when different conclusions may be reasonably drawn from the evidence adduced. Pool v. Romatzke ---------- 870
50. Where specific acts of negligence are charged and supported by the evidence, the trial court should instruct as to specific acts so alleged and supported. The failure to do so, whether or not requested, is error. Pool v. Romatske ---------- 870
51. Generally it is negligence as a matter of law for a motorist to drive a motor vehicle on a highway in such manner that he cannot stop in time to avoid a collision with an object within the range of his vision. Brazier v. English ---------- 889
52. The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it. Brazier v. English ---------- 889
53. 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 ------ 894
54. The questions of negligence and contributory negligence are for the jury where reasonable minds may differ as to whether the operator of a motor vehicle exercised the care and caution of a reasonably prudent person. Robins v. Sandoz ---------- 894

New Trial.

1. In a case where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, it is error for the trial court to set aside the verdict and grant a new trial. Odoms v. Willms ---------- 699
2. Procedure outlined on appeal from order granting a new trial. Balog v. State ---------- 826

Officers.

1. The discretion of a public officer cannot be con-

trolled by mandamus, but when a specific duty is made plain by statute, and the officer is not given any discretion in the matter, one for whose benefit the duty is performed may compel its performance by mandamus. State ex rel. McIlvain v. City of Falls City ---------- 677

2. An election to retire from active service occurs, under the provisions of the Firemen's Pension Act when the employee quits work, resigns, or in any manner indicates a severance of the relationship of employer and employee. State ex rel. McIlvain v. City of Falls City ---------- 677

3. A resident taxpayer, as such, and without proof of peculiar interest or injury to himself, may enjoin the illegal expenditure of money by a public board or officer. Midwest Employers Council, Inc. v. City of Omaha ---------- 877

Parent and Child.

1. When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child, with due regard to the superior rights of a fit, proper, and suitable parent. State ex rel. Cochrane v. Blanco ---------- 149

2. The courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. State ex rel. Cochrane v. Blanco ---------- 149

3. The indifference of a parent for a child's welfare over a long period of time, and the willingness that others should assume the obligations of parents in his stead is a material element in determining whether a parent has forfeited or abandoned his natural right to the custody of the child. State ex rel. Cochrane v. Blanco ---------- 149

Penalties.

1. A liability imposed as a consequence of the doing or omission to do an act which is not measured by any injury flowing from the act or omission is a penalty. Kometscher v. Wade ---------- 299

2. A statute which imposes such a liability in effect inflicts a penalty and is of a penal character. Kometscher v. Wade ---------- 299

3. In case of a change of law providing for civil pen-

alties the Supreme Court, if the law so provides, will apply it to a case pending on appeal rather than apply the law in effect when the judgment was rendered. Kometscher v. Wade ---------- 299

Pensions.

1. Mandamus is a proper remedy to require a city of the first class having a paid fire department to place a fireman on the retired list after he has served 21 years and elects to retire from active service. State ex rel. McIlvain v. City of Falls City 677
2. An election to retire from active service occurs, under the provisions of the Firemen's Pension Act when the employee quits work, resigns, or in any manner indicates a severance of the relationship of employer and employee. State ex rel. McIlvain v. City of Falls City ---------- 677
3. An action brought to enforce the provisions of Firemen's Pension Act is an action upon a liability created by statute and, in the absence of a limitation in the act itself, is barred in 4 years from the time a suit may be maintained thereon. State ex rel. McIlvain v. City of Falls City ---------- 677

Physicians and Surgeons.

1. Malpractice may be defined as the treatment of a case by a surgeon or physician in a manner contrary to the accepted rules and with injurious results to the patient. Stacey v. Pantano ---------- 694
2. Mutual confidence and trust are essentials of the relationship between physician and patient. Stacey v. Pantano ---------- 694
3. Postoperative treatment and advice by the physician to the patient are an interwoven and essential part of the physician-patient relationship. Stacey v. Pantano ---------- 694
4. Generally, fraudulent representations by a physician as to previous negligence or as to the patient's condition do not alter or change the cause of action from one of malpractice to one of fraud or deceit. Stacey v. Pantano ---------- 694

Pleading.

1. An allegation in a pleading upon which an action is tried is a judicial admission and a limitation of the issues which is binding upon the party making the allegation. City of Omaha v. Rubin -------- 314

2. 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. Christopherson v. Christopherson ---------- 414
3. The Nebraska Code of Civil Procedure covers the proper pleading procedures in this jurisdiction. To avoid unnecessary costs and delays, litigants should confine themselves to those pleadings and procedures approved in this jurisdiction. Christopherson v. Christopherson ---------- 414
4. When an adverse party files a reply to an unverified answer, thus pleading over, he waives any objection as to the verification thereto. Woods v. Woods ---------- 542
5. A material allegation in a pleading is one essential to the claim or defense which could not be stricken from the pleading without leaving it insufficient. Baylor v. Tyrrell ---------- 812
6. Loss of earnings is an item of special damage and must be specifically pleaded and proved. Baylor v. Tyrrell ---------- 812
7. Proof of impairment of earning capacity may be had under general allegations of injury and damage. Baylor v. Tyrrell ---------- 812

Public Lands.

1. A statute provides the procedure for the appraisement of improvements on school land when a lease has been terminated by expiration or forfeiture. The procedure prescribed therein is an exclusive remedy that is binding upon all lessees of school lands. Kidder v. Wright ---------- 222
2. By statute, an assignment of a school land lease is not valid until it has been recorded in the office of the Board of Educational Lands and Funds. Kidder v. Wright ---------- 222
3. An assignment of a school land lease made pursuant to a property settlement in a divorce action is not effective as against the State of Nebraska and subsequent lessees if the assignment is not recorded in the office of the Board of Educational Lands and Funds. Kidder v. Wright ---------- 222
4. An assignee of a school land lease who is in possession of the land is not a "former lessee" within the meaning of statute and entitled to the notice required if the assignment has not been recorded in

the office of the Board of Educational Lands and Funds. Kidder v. Wright ---------- 222

Public Service Commissions.

1. By statute, the railway commission is authorized to permit a telephone company to extend its service into the certificated area of another telephone company only on the application for and the grant of a certificate of convenience and necessity to the invading company. Buhr v. Glenwood Tel. Membership Corp. ---------- 164
2. The railway commission has no authority to grant a certificate of convenience and necessity to a telephone company on the application of a user of telephone service. Buhr v. Glenwood Tel. Membership Corp. ---------- 164
3. The railway commission is without power to require or permit a telephone company which is a common carrier to extend its service beyond its certificated service area where it has not previously extended its service, except in the manner provided by statute. Buhr v. Glenwood Tel. Membership Corp. ---------- 164
4. The general powers of the railway commission are the regulation of rates, service, and general control of common carriers. Village of Louisville v. Chicago, B. & Q. R.R. Co. ---------- 491
5. Statutory jurisdiction of railway commission over railroad crossings outlined. Village of Louisville v. Chicago, B. & Q. R.R. Co. ---------- 491
6. The judicial powers lodged in the railway commission are only such that are remedial of its regulatory powers. Village of Louisville v. Chicago, B. & Q. R.R. Co. ---------- 491
7. The hearing and determination as to whether or not an easement by prescription exists across the right-of-way of a railroad company is not regulatory and not within the jurisdiction of the railway commission. Village of Louisville v. Chicago, B. & Q. R.R. Co. ---------- 491
8. The mere fact that a purported easement by prescription crosses the right-of-way and tracks of a railroad company does not have the effect of lodging jurisdiction in the railway commission. The rights of a village in having such an issue determined are no different than those of any other person or entity. Village of Louisville v. Chicago, B. & Q. R.R. Co. ---------- 491

9. The railway commission is required to fix classifications of rates for transportation of freight and passengers, and to give notice of hearing thereon. United Mineral Products Co. v. Nebraska Railroads 802
10. An attack upon a rate of a carrier is required to come after its establishment and notice, and not prior thereto. United Mineral Products Co. v. Nebraska Railroads ---------- 802
11. As to joint rates it is the duty of railway companies and common carriers doing business in this state to establish reasonable joint line rates. United Mineral Products Co. v. Nebraska Railroads -------- 802
12. If common carriers fail to establish reasonable joint line rates it becomes the duty of the railway commission, on its own motion or on the application of some one interested, to establish reasonable joint line rates by original fixation or by change and revision. United Mineral Products Co. v. Nebraska Railroads ---------- 802
13. The establishment or fixation of rates on motion of the commission or on behalf of interested parties requires 10 days' notice to the carriers involved and a hearing, and notice and a grant of hearing to interested parties making complaint. United Mineral Products Co. v. Nebraska Railrods ------- 802
14. The validity of rates which common carriers may exact depends upon whether or not there has been a compliance with the statutory procedures. United Mineral Products Co. v. Nebraska Railroads ------- 802
15. A rate once established continues to be the legal rate until legally canceled, and subsequent tariffs naming new rates cannot carry the new rate into lawful effect. United Mineral Products Co. v. Nebraska Railroads ---------- 802
16. Joint rates may not be canceled or modified except upon hearing and with notice to all parties affected thereby. United Mineral Products Co. v. Nebraska Railroads ---------- 802
17. Where there is a failure of the railway commission to comply with the statutory procedures in the establishment of a joint line rate, its findings are void and of no effect. United Mineral Products Co. v. Nebraska Railroads ---------- 802
18. The railway commission has the power to regulate the rates and services of, and to exercise a general control over, all railroads engaged in the transpor-

tation of freight or passengers within the state. United Mineral Products Co. v. Nebraska Railroads 898

19. Rates and charges duly established by the railway commission, until altered or set aside, have the effect of a legislative enactment. United Mineral Products Co. v. Nebraska Railroads ---------- 898

20. In determining the reasonableness of a freight charge, the season of the year during which the rates are in force may be considered. United Mineral Products Co. v. Nebraska Railroads ---------- 898

21. Manner of consideration of appeal from order of railway commission, administrative or legislative in character, to Supreme Court stated. United Mineral Products Co. v. Nebraska Railroads ---------- 898

22. An appeal divests the railway commission of jurisdiction only as to matters under review and does not preclude it from proceeding as to collateral and independent matters. United Mineral Products Co. v. Nebraska Railroads ---------- 898

Quieting Title.

An action to quiet title to real estate and to enforce a contract and agreement is an equitable action and is tried de novo in the Supreme Court. Neylon v. Parker ---------- 187

Railroads.

1. A railroad company is primarily liable as the initial carrier for a wrongful delivery of goods. Elgin Mills, Inc. v. Chicago & N. W. Ry. Co. ---------- 110

2. A railroad company is liable in conversion for the delivery of goods without the surrender of an order bill of lading properly endorsed, except where the delivery was justified as provided by the Uniform Bill of Lading Act. Elgin Mills, Inc. v. Chicago & N. W. Ry. Co. ---------- 110

3. Under the Uniform Bill of Lading Act, a railroad company is justified in delivering goods to a person lawfully entitled to the possession of the goods. Elgin Mills, Inc. v. Chicago & N. W. Ry. Co. ------ 110

4. Where a shipper consigns goods on a shipper's order bill of lading and retains the order bill of lading in his possession, the delivery of the goods without obtaining the bill of lading properly endorsed is a delivery to a person entitled to possession, where it is shown that such delivery was in conformity with an agreement between the shipper and the

consignee for a specified purpose contrary thereto. Elgin Mills, Inc. v. Chicago & N. W. Ry. Co. ---- 110

5. Where it is shown that a loss occurred because of a breach of contract between the shipper and consignee, and not because of a misdelivery by the railroad company, the railroad company is exonerated from liability for a misdelivery of the goods. Elgin Mills, Inc. v. Chicago & N. W. Ry. Co. ---------- 110

6. Statutory jurisdiction of railway commission over railway crossings outlined. Village of Louisville v. Chicago, B. & Q. R.R. Co. ---------- 491

7. Statutes requiring railroads to fence right-of-way are still constitutional notwithstanding changed conditions in transportation. Linenbrink v. Chicago & N. W. Ry. Co. ---------- 838

8. Legislature is authorized to treat railroads as a separate class with respect to police power regulations such as fencing right-of-way. Linenbrink v. Chicago & N. W. Ry. Co. ---------- 838

9. The railway commission has the power to regulate the rates and services of, and to exercise a general control over, all railroads engaged in the transportation of freight or passengers within the state. United Mineral Products Co. v. Nebraska Railroads 898

10. Rates and charges duly established by the railway commission, until altered or set aside, have the effect of a legislative enactment. United Mineral Products Co. v. Nebraska Railroads ---------- 898

11. In determining the reasonableness of a freight charge, the season of the year during which the rates are in force may be considered. United Mineral Products Co. v. Nebraska Railroads -------- 898

Retirement Benefits.

1. The benefits of a retirement act awarded to a member thereof who renders services under the act creating the system after its enactment are not a grant of extra compensation after the services are rendered and in violation of Article III, section 19, of the Constitution of Nebraska. Gossman v. State Employees Retirement System ---------- 326

2. When the state deducts from salary an amount to create a pension or retirement fund without the direction or consent of a salaried official or employee, the amount withheld is not a tax within the provisions of Article VIII, section 1, of the Constitution

of Nebraska. Gossman v. State Employees Retirement System ---------- 326

3. A retirement act is not invalid because it does not require that there be any particular length of qualifying service as long as it requires that a member be an employee on the effective date of the act. Gossman v. State Employees Retirement System ------- 326

4. The benefits granted under a retirement act, no matter how short the duration of service, must be construed as compensation currently earned, with its payment being postponed to a future date under the conditions and requirements of the act. Gossman v. State Employees Retirement System------- 326

5. Deductions for the purpose of funding a retirement plan are not property taken away from the employee but remain public funds. The withholding amounts to the fixing of an employee's present and net compensation and the payment of benefits fixed by law are a part of his voluntary contract of employment with the state. Gossman v. State Employees Retirement System ---------- 326

6. Benefits conferred under the provisions of a retirement act need not be proportionate to the deductions from the employee's salary fixed by law as a condition of his employment. Gossman v. State Employees Retirement System ---------- 326

7. Wide discretion is vested in the Legislature as to the conditions of public employment and as to the requirements, classifications, contributions to, and benefits conferred by a retirement act. Gossman v. State Employees Retirement System ---------- 326

8. In reviewing the reasonableness of a retirement act, all of the provisions of the act must be construed together and if the total plan provides a comprehensive and reasonable scheme for the retirement of public employees and sets up reasonable requirements as a condition of their employment, it may not be declared invalid. Gossman v. State Employees Retirement System ---------- 326

Robbery.

Robbery is a crime of violence within the meaning of the indeterminate sentence statute. Draper v. Sigler 726

Schools and School Districts.

1. The powers of a board of education are statutory,

and in the absence of statutory authority it is without power to act. Galstan v. School Dist. of Omaha 319

2. The furnishing of free transportation to school children at public expense by a school district is authorized only in the manner and to the extent permitted by statute. Galstan v. School Dist. of Omaha 319

3. In a case where a county superintendent exercises the power to attach territory to a school district the district is without power to maintain action to question the action of the county superintendent. Board of Education v. Winne ---------- 431

4. A school district in the State of Nebraska has no territorial integrity but is subject to the reserve power of the state exercised through its administrative authority to make changes according to educational needs and principles. Board of Education v. Winne ---------- 431

5. The state may change or repeal all powers of a school district, take its property without compensation, expand or restrict its territorial area, unite the whole or a part thereof with another subdivision or agency of the state, or destroy the district with or without the consent of the citizens. Board of Education v. Winne ---------- 431

6. 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. Board of Education v. Winne ---------- 431

7. 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. Board of Education v. Winne ---------- 431

8. Interested parties have the right of appeal from the action of the county superintendents in dissolving school districts and attaching the area to another or other districts. Board of Education v. Winne ---------- 431

9. A valid order of a county superintendent, made in accordance with statutory terms, is final as to all matters properly determined by it, unless a review thereof is sought, and as to such matters it is not subject to collateral attack. Board of Education v. Winne ---------- 431

Setoff and Counterclaim.

In an appeal from the county court the district court is without jurisdiction to try a counterclaim for an amount in excess of the jurisdiction of the county court. KBR Rural Public Power Dist. v. Kidder ---- 228

Specific Performance.

Courts will specifically perform testamentary agreements not embraced within the provisions of our statutes only when the equities are substantial and the evidence is clear, satisfactory, and unequivocal. Neylon v. Parker ---------- 187

Statutes.

1. Courts should give to statutory language its plain and ordinary meaning. State ex rel. Finigan v. Norfolk Live Stock Sales Co., Inc. ---------- 31
2. Legislation affecting the merits of a controversy adopted subsequent to a trial in district court dealing with a subject matter with which the Legislature has the power to act retroactively is an exception to the requirement that only assignments of error assigned in the trial court may be inquired into in the Supreme Court. Kometscher v. Wade ---------- 299
3. Legislative Bill 17, Seventy-fourth (Extraordinary) Session of the Legislature of Nebraska, 1963, found not to be applicable to judgments entered on the merits in the trial court and pending herein on appeal. Kometscher v. Wade ---------- 299
4. Where a statute enumerates the things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned, unless the Legislature has plainly indicated a contrary purpose or intention. Galstan v. School Dist. of Omaha ---------- 319
5. Classification in legislation is proper if the special class has some reasonable distinction from other subjects of a like general character which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. Gossman v. State Employees Retirement System ---------- 326
6. Classifications or distinctions that are arbitrary or unreasonable for some purpose may be reasonable and proper when considered with reference to different subject matters and different purposes. Gossman v. State Employees Retirement System ---- 326
7. The question in classification generally is whether

the things or persons classified by the act itself form by themselves a proper and legitimate class with reference to the purposes of the act. Gossman v. State Employees Retirement System -------- 326

8. Wide discretion is vested in the Legislature as to the conditions of public employment and as to the requirements, classifications, contributions to, and benefits conferred by a retirement act. Gossman v. State Employees Retirement System---------- 326

9. In construing an act of the Legislature, all reasonable doubt must be resolved in favor of constitutionality. If a statute is subject to more than one construction, the court will adopt the one which will make the act constitutional. Terry Carpenter, Inc. v. Wood ---------- 515

10. While it is competent for the Legislature to classify, the classification to be valid must rest on some reason of public policy, some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. Terry Carpenter, Inc. v. Wood ---------- 515

11. Exact conformity or absolute harmony and symmetry between groups, while desirable, are not always obtainable. Constitutional provisions are met if a legislature responds to the practical everyday facts with which it deals. Terry Carpenter, Inc. v. Wood 515

12. In order to see whether the excluded classes or transactions in a legislative act are on a different basis than those included, a court must look to the purpose of the act. The objects and purposes of a law present the touchstone for determining proper and improper classifications. Terry Carpenter, Inc. v. Wood ---------- 515

13. A declaration of severability in a legislative act is a declaration of the intent of the Legislature that it would have passed the act with the invalid parts omitted. Terry Carpenter, Inc. v. Wood ---------- 515

14. When a legislative enactment in which a severability declaration appears contains valid and void provisions, the valid provisions will be upheld if it is a complete law in itself, capable of enforcement, and is not dependent upon that which is invalid. Terry Carpenter, Inc. v. Wood ---------- 515

15. When the invalid portions of the act are so interwoven with the rest that the act may not be operative with the void portions eliminated or where it is

obvious from an inspection of the act that the invalid portion formed the inducement for the passage of the act, the whole act fails. Terry Carpenter, Inc v. Wood ---------- 515

16. The Legislature while in special session can transact no business except that for which it was called together. Arrow Club, Inc. v. Nebraska Liquor Control Commission ---------- 686

17. The proclamation calling a special session may state the purpose for which the Legislature is convened in broad, general terms or it may limit the consideration to a specified phase of a general subject. The Legislature is free to determine in what manner the purpose shall be accomplished, but it must confine itself to the matters submitted to it by the proclamation. Arrow Club, Inc. v. Nebraska Liquor Control Commission ---------- 686

18. The Legislature while in special session may enact legislation relating to, germane to, and having a natural connection with the purpose for which it was convened. Arrow Club, Inc. v. Nebraska Liquor Control Commission ---------- 686

19. The purpose or subject as stated in the proclamation is to be determined by an analysis and construction of the proclamation as in the case of any written instrument. Arrow Club, Inc. v. Nebraska Liquor Control Commission ---------- 686

20. The presumption is always in favor of the constitutionality of legislation. An act should be held to be within the call for a special session if it can be done by any reasonable construction. Arrow Club, Inc. v. Nebraska Liquor Control Commission ------- 686

21. Where there is a direct conflict between a city ordinance and a state statute, the statute is the superior law. Arrow Club, Inc. v. Nebraska Liquor Control Commission ---------- 686

22. A city ordinance is inconsistent with a statute if it is contradictory in the sense that the two legislative provisions cannot coexist. Arrow Club, Inc. v. Nebraska Liquor Control Commission ---------- 686

23. The repeal of a statute affects in no manner a pending action founded thereon nor a cause of action that accrued prior to any such repeal, except as may be provided for in the repealing statute. United Mineral Products Co. v. Nebraska Railroads ------ 802

24. A statute valid when enacted may become invalid

by a change in conditions to which it is applied. Linenbrink v. Chicago & N. W. Ry. Co. ---------- 838

25. The determination of questions of classification is primarily for the Legislature, and courts will not interfere unless classification is clearly arbitrary and unreasonable. Linenbrink v. Chicago & N. W. Ry. Co. 838

26. The purpose of fencing statutes is to protect lives and property. The changes in condition which require a statute once held valid to be declared invalid ordinarily apply to conditions which remove or reduce the need for and the purposes of the act. Linenbrink v. Chicago & N. W. Ry. Co. ---------- 838

27. Where the Legislature determines a public policy of the state by a proper exercise of the police power, changing conditions which tend to make the result inequitable and unjust are ordinarily for the Legislature and not the courts. Linenbrink v. Chicago & N.W. Ry. Co. ---------- 838

Streets.

1. The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances. Balog v. State ----- 826

2. The owner of property abutting on a street is not entitled as against the public to access to his land at all points on the boundary between it and a street. The measure of the right of the property owner is reasonable ingress and egress under all the circumstances. Painter v. State ---------- 905

3. Incidental damages sustained by an owner of real property because a street was changed from a two-way street to a one-way street adjacent to condemnee's property are the result of the exercise of the police power, and are not ordinarily compensable in eminent domain proceedings. Painter v. State 905

Sunday.

A prohibition of activities on Sunday for the promotion of health, peace, and good order of society by requiring a periodic day of rest is sustainable on the ground that it is within the domain of the police power. Terry Carpenter, Inc. v. Wood ---------- 515

Taxation.

1. By the terms of Article VIII, section 2, of the Constitution of Nebraska, the Legislature is empowered

to exempt from taxation by general law property which is owned and used exclusively for educational, religious, or charitable purposes, when such property is not owned or used for financial gain or profit to the owner or user. Young Women's Christian Assn. v. City of Lincoln ---------- 136

2. By statute, the Legislature implemented Article VIII, section 2, of the Constitution of Nebraska, so as to exempt from taxation property owned and used exclusively for educational, religious, or charitable purposes, when such property is not owned or used for financial gain or profit to either the owner or user. Young Women's Christian Assn. v. City of Lincoln 136

3. Whether or not a use of property is charitable must in each instance be determined by its own facts. Young Women's Christian Assn. v. City of Lincoln 136

4. A building owned and used by Young Women's Christian Association for low rental housing was exempt from taxation. Young Women's Christian Assn. v. City of Lincoln ---------- 136

5. Denial to banks of deduction for tax purposes of actual value of shares of stock of other Nebraska corporations was a violation of Article VIII, section 1, of the Constitution of Nebraska. First Nat. Bank & Trust Co. v. County of Lancaster ---------- 390

6. The establishment of two methods of valuation of property in the same class for taxation purposes results in a want of uniformity prohibited by Article VIII, section 1, of the Constitution of Nebraska. First Nat. Bank & Trust Co. v. County of Lancaster 390

7. The purpose of section 77-706, R. R. S. 1943, is to allow corporations a deduction of the value of domestic corporation stock in order to prevent double taxation of property. First Nat. Bank & Trust Co. v. County of Lancaster ---------- 390

8. There is no reasonable difference between banks and other corporations with respect to the purpose of the deduction allowed in section 77-706, R. R. S. 1943, which justifies a double tax effect on the stockholders of a bank and not on the stockholders of other business corporations. First Nat. Bank & Trust Co. v. County of Lancaster ---------- 390

Telecommunications.

1. By statute, the railway commission is authorized to permit a telephone company to extend its service into the certificated area of another telephone

company only on the application for and the grant of a certificate of convenience and necessity to the invading company. Buhr v. Glenwood Tel. Membership Corp. ---------- 164

2. The railway commission has no authority to grant a certificate of convenience and necessity to a telephone company on the application of a user of telephone service. Buhr v. Glenwood Tel. Membership Corp. ---------- 164

3. The railway commission is without power to require or permit a telephone company which is a common carrier to extend its service beyond its certificated service area where it has not previously extended its service, except in the manner provided by statute. Buhr v. Glenwood Tel. Membership Corp. 164

Trespass.

1. The owner of real estate has the legal right to use and operate his land free from repeated acts of trespass. An injunction will issue to restrain such acts, especially where committed under a claim which indicates that the trespass will be continued. Van Donselaar v. Conkey ---------- 169

2. Equity will afford relief by the process of injunction against repeated acts of trespass, especially where committed under a claim which indicates a continuance and constant repetition of it. Van Donselaar v. Conkey ---------- 169

Trial.

1. Where the trial court permitted the case to be tried on the theory that the answer and cross-petition were denied, it was not error for the trial court to deny a motion for judgment on the pleadings, even though the trial court did not specifically grant plaintiff's request for leave to file instanter a general denial as a reply. Murphy Finance Co. v. Fredericks ---------- 1

2. The district court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. Zwink v. Ahlman ---------- 15

3. Where the owner of lands included in a proposed sanitary and improvement district seeks to have such lands excluded on the ground that they will

not be benefited, the burden is on the landowner to satisfy the court that they will not be benefited. Zwink v. Ahlman ---------- 15

4. An opening statement is to advise the jurors concerning the questions of fact involved, so as to prepare their minds for the evidence to be heard. Facts should not be stated which cannot be proved. Lybarger v. State ---------- 35

5. In all cases considerable latitude must be allowed in the opening statement of what the party "expects" to prove. The fact that he may fail to establish the facts which he may have expected to prove does not necessarily establish the fact that the statement was intentionally false. Lybarger v. State ---- 35

6. Counsel in referring to matters which he subsequently does not attempt to prove may be guilty of inexcusable misconduct prejudicial to the opposing side, justifying, in the case of proper objection, a new trial or a reversal. Lybarger v. State -------- 35

7. Rule stated as to when an opening statement of counsel may be ground for a mistrial. Lybarger v. State 35

8. In stating the issues of fact in its charge to the jury, the court should submit to the jury only such issues as are presented by the pleadings and are in controversy, and which find some support in the evidence. Reorganized Church of Jesus Christ v. Universal Surety Co. ---------- 60

9. The admission or rejection of photographs in evidence is largely within the discretion of the trial court. Error may not be predicated thereon in the absence of a showing of an abuse of discretion. Reorganized Church of Jesus Christ v. Universal Surety Co. ---------- 60

10. Rule for consideration of motion for a directed verdict stated. Nance v. Ames Plaza, Inc. ---------- 88
Beck v. Trustin ---------- 788

11. The amount of damages sustained by a landowner for the taking of land by eminent domain 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. Lansman v. State ---------- 119

12. Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony. Lansman v. State 119

13. Everything which affects the market value is to be taken into consideration. The burden of additional

fencing, and like matters, are to be included, not by being added together item by item, but to the extent that, taken as a whole they detract from the market value of the property. Lansman v. State 119

14. Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. Lansman v. State ---- 119

15. In an action at law wherein a jury has been waived the findings of fact by the court have the same force and effect as the verdict of a jury, and if they are supported by competent evidence they will not be disturbed on appeal. Lincoln Welding Supply Co. v. Western Contracting Corp. ---------- 160

16. Where opinion evidence is based on direct or positive evidence, as distinguished from circumstantial evidence, it will be considered by the jury in the same manner as other direct or positive evidence, and a request for a cautionary instruction may be denied without prejudicing the rights of the defendant. State v. Lewis ---------- 173

17. Where a requested instruction is substantially covered by another instruction it is not error to refuse the request. State v. Lewis ---------- 173

18. A motion for summary judgment is properly sustained where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Kidder v. Wright ------ 222

19. Rule for consideration of sufficiency of evidence to support verdict stated. Whittington v. Nebraska Nat. Gas Co. ---------- 264

20. If there is evidence sufficient to support a theory set out in the allegations of the defendant's answer that the proximate cause of the injuries to the plaintiffs' property was in no way attributable to any negligence of the defendant, that theory should be submitted under a proper instruction to the jury. Whittington v. Nebraska Nat. Gas Co. -- 264

21. In determining the sufficiency of the evidence to sustain the judgment, the evidence must be considered most favorably to the successful party and every controverted fact must be resolved in his favor. Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co. ---------- 287

Thompson v. Miller ---------- 530

Boardman v. McNeff ---------- 534

22. Instructions to the jury should be considered as a whole and if they fairly submit the case, they are not erroneous. Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co. ---------- 287
O'Brien v. Anderson ---------- 635
Baylor v. Tyrrell ---------- 812
23. A motion for a directed verdict at the close of all of the evidence must be treated as an admission of the truth of all of the material and relevant evidence admitted and all proper inferences to be drawn therefrom. Andersen v. Andersen -------- 374
24. The party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence. Fritchley v. Love-Courson Drilling Co., Inc. ---------- 455
25. Functions of trial and appellate courts with respect to a view of the premises stated. Wiese v. Klassen 496
26. Test of existence of gross negligence as a question for the court or for a jury stated. Thorpe v. Zwonechek ---------- 504
27. Instructions must be considered and construed together. A party cannot complain that a correct instruction is not sufficiently specific when no request is made for more explicit instructions. Thorpe v. Zwonechek ---------- 504
28. An instruction which informs the jury of the nature of present worth, without fixing any rate of interest or rigid formula, and requires it to reduce future damages to their present worth, is proper. An example is not essential. Thorpe v. Zwonechek ---------- 504
29. A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with the trial and introduces evidence, waives any error in the ruling upon his motion. The sufficiency of the evidence to sustain a judgment for the plaintiff is then determined upon the basis of the entire record. Boardman v. McNeff ---------- 534
30. Where different minds may draw different inferences or conclusions from facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined. Boardman v. McNeff ---------- 534
Beck v. Trustin ---------- 788

31. It is the duty of the trial court to instruct the jury upon issues presented by the pleadings and supported by the evidence. There is no duty to instruct in reference to a matter that is not an issue in the case. Boardman v. McNeff ---------- 534
32. An instruction which assumes an undisputed fact is not erroneous. Boardman v. McNeff ---------- 534
33. In considering a motion for summary judgment the courts should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom. Bishop Cafeteria Co. v. Ford ---------- 600
34. It is not the purpose of the summary judgment procedure to require a plaintiff to reveal in detail the evidence he expects to produce to prove the allegations of his petition. Bishop Cafeteria Co. v. Ford ---------- 600
35. A motion for summary judgment is not a substitute for a demurrer, a motion to dismiss, or a motion for judgment on the pleadings. Bishop Cafeteria Co. v. Ford ---------- 600
36. The evidence offered on a motion for summary judgment is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, and affidavits which constitute only a part of the evidence available on a trial on the merits. Bishop Cafeteria Co. v. Ford ---------- 600
37. In order for the movant to obtain a summary judgment it must be shown: First, that there is no genuine issue as to any material fact in the case and, second, that movant is entitled to judgment as a matter of law. Bishop Cafeteria Co. v. Ford -- 600
38. When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment. Bishop Cafeteria Co. v. Ford ---------- 600
39. When the provisions of a contract together with the facts and circumstances that aid in ascertaining the intent of the parties thereto are not in dispute, the proper construction of such contract is a question of law. Bishop Cafeteria Co v. Ford ---------- 600
40. When a trial by jury has been had, judgment must be rendered by the court and entered by the clerk in conformity to the verdict, unless it is special, or the court order the case to be reserved for future

argument or consideration. Northwestern Public Service Co. v. Juhl ---------- 625

41. 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. O'Brien v. Anderson ---------- 635

42. 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 that is done, the judgment will not ordinarily be reversed for such defects. O'Brien v. Anderson ---------- 635

43. The burden of proving a cause of action or defense is not sustained by evidence from which the jury can arrive at its conclusion only by mere guess or conjecture. Odom v. Willms ---------- 699

44. When the alleged measure of damages is challenged by objections to the pleading or evidence, by a motion for a directed verdict, or by a tender of an instruction, the correct measure of damages must be given to the jury and there must be evidence in the record to support it. Beveridge v. Miller-Binder, Inc. ---------- 734

45. Where there is a material variance in the measure of damages and the evidence, and objection thereto is timely made, a judgment obtained thereon cannot stand. Beveridge v. Miller-Binder, Inc. ---------- 734

46. Rule for consideration of preliminary question for court to decide as to sufficiency of evidence to take case to the jury stated. Beck v. Trustin ---------- 788

47. It is the duty of the trial court to fully instruct the jury upon the theory of a party to an action if that theory finds support in the evidence. Beck v. Trustin ---------- 788

48. It is not error for counsel in final argument to the jury to suggest flat amounts of recovery for different periods of pain, suffering, and disability, if such different periods of pain and suffering bear some real relation to differences demonstrated in the evidence. Baylor v. Tyrrell ---------- 812

49. The verdict of a jury in a personal injury case will not be set aside unless it is so clearly exorbitant as to indicate passion and prejudice, or disregard of

the evidence, or controlling rules of law. Baylor v. Tyrrell 812
50. If an instruction is not sufficiently specific in some respect, it is the duty of the party to offer a request to supply an omission, and unless this is done, the judgment will not be reversed for such defect. Baylor v. Tyrrell 812
51. Proof of an actual loss of wages or earnings is not essential to recovery for loss of earning capacity. Baylor v. Tyrrell 812
52. Conflicting instructions are erroneous and prejudicial unless it is apparent from the record that the jury was not misled thereby. Balog v. State 826
53. It is the duty of the trial court to instruct the jury as to the proper basis upon which damages are to be assessed. Balog v. State 826
54. Issues of negligence and contributory negligence must be submitted to a jury when different conclusions may be reasonably drawn from the evidence adduced. Pool v. Romatzke 870
55. It is the duty of the trial court without request to submit to and properly instruct the jury upon all material issues presented by the pleadings and the evidence. Pool v. Romatzke 870
56. Where specific acts of negligence are charged and supported by the evidence, the trial court should instruct as to specific acts so alleged and supported. The failure to do so, whether or not requested, is error. Pool v. Romatzke 870
57. It is only when the evidence is undisputed, or but one reasonable inference or conclusion could be drawn from the evidence, that the question is one of law for the court. Brazier v. English 889
58. Where from the testimony before the jury different minds may draw different conclusions or inferences, or where there is conflict in the evidence, the matter must be submitted to the jury. Brazier v. English 889
59. Instructions which are more favorable to an appellant than that to which he is entitled are not ordinarily subject to a claim of error. Painter v. State 905

Usury.

1. The burden of proving usury as a defense to an action on a promissory note rests upon the party alleging it, unless usury is apparent on the face of the note. Murphy Finance Co. v. Fredericks 1
2. To constitute usury it is essential that an excess

of the maximum legal rate of interest be exacted. Pattavina v. Pignotti ---------- 217
Moffitt-Harrison Builders, Inc. v. Sandman ---------- 425
3. When the sum named in a promissory note, which was given for a loan of money, exceeds the sum actually loaned by the lender to the borrower, and if such excess when added to the interest charged aggregates more than the rate lawfully allowed for the period of the loan, the note is usurious. If such aggregate be equal to or less than the maximum legal rate permitted to be charged, the note is not tainted with usury. Pattavina v. Pignotti ---------- 217
4. A loan of money by a nonlicensee under the provisions of the Installment Loan Act, which does not exact interest and charges in excess of 9 percent per annum, is not within the inhibitory provisions of such act. Pattavina v. Pignotti ---------- 217
Moffitt-Harrison Builders, Inc. v. Sandman ---------- 425
5. Legislative Bill 11, adopted by the Seventy-fourth (Extraordinary) Session of the Legislature of Nebraska, 1963, and becoming operative December 16, 1963, is a bill for the regulation of interest on money. State Securities Co. v. Ley ---------- 251
6. When the sum named in a promissory note, which was given for the loan of money, exceeds the sum actually loaned by the lender to the borrower, and if such excess when added to the interest charged aggregates more than the rate lawfully allowed for the period of the loan, the note is usurious. Moffitt-Harrison Builders, Inc. v. Sandman ---------- 425

Vendor and Purchaser.
1. Articles which may or may not become attached to the freehold, according to circumstances, will retain their character of personalty by virtue of a contract between vendor and vendee to that effect, when the rights of innocent purchasers relying upon their apparent character are not involved. Stibor v. Farrell ---------- 437
2. The recording act is intended to protect the security holder, not to give a mortgagor an opportunity to take advantage of those to whom he sells. Stibor v. Farrell ---------- 437
3. Buildings, such as corn cribs, situated upon a farm, are of a general class which a prospective buyer inspecting the farm would have a right to assume are a part of the freehold. They are not such as to

put him upon inquiry in reference thereto, even though he may know that the farm is occupied by a tenant. Stibor v. Farrell ---------- 437

4. As between the vendor and purchaser of real estate, the rule for determining what is a fixture is strongly construed against the vendor. Whatever is essential for the purposes for which the realty is used, and which has actually or constructively been annexed is a fixture, and passes to the grantee unless it is excepted from the operation of the deed. Stibor v. Farrell ---------- 437

Waters.

1. Where the waters of a stream are accustomed to spill over beyond its banks in times of high water, and flow over adjacent lands in its flood plain and to return to the stream at points farther downstream, such waters are floodwaters, and not diffused surface waters. Wiese v. Klassen -------- 496
2. A riparian owner of land may not dam or dike against floodwaters to the injury of adjacent owners of land. Wiese v. Klassen ---------- 496
3. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water. Reliction is the gradual withdrawal of the water from the land by the lowering of its surface level from any cause. Krumwiede v. Rose ---------- 570
4. Where by the process of accretion and reliction, or either, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. Krumwiede v. Rose ---------- 570
5. Subject to the easement of navigation, riparian owners are entitled to the possession and ownership of the soil formerly under the waters of the stream as far as the thread of the stream. Krumwiede v. Rose ---------- 570
6. An owner of land on shore, in the absence of restrictions on his grant, owns to the thread of the stream and his riparian rights extend to existing and subsequently formed islands. Krumwiede v. Rose 570
7. The rule as to the ownership of accretion land remains the same, even though the processes of accre-

tion are caused or accelerated by the construction work of third parties. Krumwiede v. Rose 570

Wills.

1. An instrument, although in form a deed, which by its terms is to operate only after the death of the maker or grantor, is testamentary in its character, and passes no present estate in the premises therein described. Neylon v. Parker 187
2. Courts will specifically perform testamentary agreements not embraced within the provisions of our statutes only when the equities are substantial and the evidence is clear, satisfactory, and unequivocal. Neylon v. Parker 187
3. Where a will is attacked on the ground that it was procured by undue influence, the burden is upon the party so alleging so to prove. Andersen v. Andersen 374
4. The mental and physical capacity of a deceased is to be considered in determining what degree of influence will vitiate his will. Andersen v. Andersen 374
5. In a will contest on the ground of undue influence, the burden is on the contestant to prove by a preponderance of the evidence: First, that the testator was a person who would be subject to such influence; second, that there was an opportunity to exercise such influence; third, that there was a disposition to exercise such influence for an improper purpose; and fourth, that the result was the effect of such influence. Andersen v. Andersen 374
6. Rule for evaluating the testimony and proper inferences to be drawn on the issue of undue influence stated. Andersen v. Andersen 374
7. Undue influence is usually surrounded by all possible secrecy. It is almost always difficult to prove by direct and positive proof. It is largely a matter of inference from facts and circumstances surrounding the testator, his life, character, and mental condition, as shown by the evidence. Andersen v. Andersen 374
8. Mere suspicion, surmise, or conjecture is not enough to warrant a finding of undue influence. There must be a solid foundation of established facts upon which to rest an inference of its existence. This rule applies with peculiar force to the execution of a will. Andersen v. Andersen 374
9. Undue influence sufficient to defeat a will must be

of such character as to destroy the free agency of the testator and substitute another person's will for his own. Andersen v. Andersen ---------- 374

10. The mere opportunity of the wife, when living happily with the husband, to influence the execution of a will favorable to herself is not alone sufficient to warrant submission to the jury of the question of undue influence. Andersen v. Andersen -- 374

Witnesses.

1. In condemnation proceedings, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation. Lansman v. State ---------- 119
2. In condemnation proceedings, the owner of real estate taken can testify as to its value. Lansman v. State ---------- 119
3. Either lay or expert witnesses may be allowed to testify as to the value of land taken in eminent domain proceedings, the weight and credibility of their testimony being for the jury. Lansman v. State 119
4. In a condemnation proceeding the weight and credibility of testimony of either lay or expert witnesses regarding value of land taken or value of the remainder immediately before and immediately after taking is for the jury. Lansman v. State -------- 119
5. Failure to make proper objection to the testimony of a witness known to be disqualified under the dead man's statute waives the right to exclude testimony. Ryan v. Nelson ---------- 130
6. Testimony tending to prove that a person is under the influence of intoxicating liquor may come from a nonexpert witness and, after detailing the facts upon which his opinion is based, he may give his opinion as to whether or not such person is under the influence of intoxicating liquor. State v. Lewis 173
7. Whether a witness' qualification to state his opinion is sufficiently established rests largely in the discretion of the trial court, and its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse of discretion. Whittington v. Nebraska Nat. Gas Co. ---------- 264
8. The observations on the part of a witness are an essential part of his opinion on intoxication. Ordinarily such facts must be provided as a foundation

for the reception of a lay witness' opinion testimony as to intoxication. State ex rel. City of St. Paul v. Rutten ---------- 633

9. Actual observations by a lay witness of a defendant charged wtih intoxication must be made within a time period reasonably related to the time it is charged he was intoxicated. State ex rel. City of St. Paul v. Rutten ---------- 633

Workmen's Compensation.

1. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo upon the record. To entitle the plaintiff to a recovery he must sustain the burden of proof by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment. Runyons v. Mavis & Sons, Inc. ------ 179
Oline v. Nebraska Nat. Gas Co. ---------- 851
2. 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. Runyons v. Mavis & Sons, Inc. 179
3. Rule for consideration of workmen's compensation case de novo in Supreme Court stated. Runyons v. Mavis & Sons, Inc. ---------- 179
4. In a workmen's compensation case disability is determinable by a consideration of employability and earning capacity. Spangler v. Terry Carpenter, Inc. 740
5. The burden is on a plaintiff in a workmen's compensation case to prove a right of recovery. Spangler v. Terry Carpenter, Inc. ---------- 740
6. The rule of liberal construction of the Workmen's Compensation Act does not apply to the evidence to support a claim. Spangler v. Terry Carpenter, Inc. ---------- 740
7. In a rehearing in the Nebraska Workmen's Compensation Court a de novo consideration is required. Spangler v. Terry Carpenter, Inc. ---------- 740
8. On appeal to the district court in a workmen's compensation case the hearing is by review of the transcript of the proceedings from the Nebraska Workmen's Compensation Court. Spangler v. Terry Carpenter, Inc. ---------- 740
9. On appeal to the Supreme Court in a workmen's compensation case the consideration is de novo on

the record from the district court. Spangler v. Terry Carpenter, Inc. ---------- 740

10. In order to recover under the Workmen's Compensation Act the plaintiff must prove that the death or disability of the workman was the result of an accident arising out of and in the course of the employment. Uzendoski v. City of Fullerton ------- 779
Oline v. Nebraska Nat. Gas Co. ---------- 851

11. Meaning of the term "arising out of" the employment in Workmen's Compensation Act stated. Uzendoski v. City of Fullerton ---------- 779

12. Temporary disability within the meaning of the Workmen's Compensation Act is the period the injured employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident. Uzendoski v. City of Fullerton ---------- 779

13. The extent of the permanent disability is not finally determinable within the meaning of the Workmen's Compensation Act until the employee is restored insofar as the nature of his injuries will permit. An injured employee is entitled to temporary disability compensation until this determination can be made. Uzendoski v. City of Fullerton ---------- 779

14. Where the evidence shows that an employee is under medical treatment, is convalescing, is suffering from the injury, and is unable to work, with a reasonable expectation of substantial improvement, the extent of permanent disability is not finally determinable, and an award of benefits for permanent disability is not sustained by the evidence. Uzendoski v. City of Fullerton ---------- 779

15. The words "arising out of" refer to the origin or cause of the accident and are descriptive of its character, while the words "in the course of" refer to the time, place, and circumstances of the accident. Oline v. Nebraska Nat. Gas Co. ---------- 851

16. Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. Oline v. Nebraska Nat. Gas Co. ---------- 851

17. The rule of liberal construction of the Workmen's Compensation Act is related to determination of the scope of the act and does not apply to evidence produced to establish a claim for compensation. Oline v. Nebraska Nat. Gas Co. ---------- 851

18. In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard. Oline v. Nebraska Nat. Gas Co. -- 851
19. If an employee is injured while absent from the employment for lunch, the injury does not arise out of nor in the course of the employment. Oline v. Nebraska Nat. Gas Co. ---------- 851
20. An award under the Workmen's Compensation Act may not be based upon possibilities, probabilities, or conjectural evidence. Oline v. Nebraska Nat. Gas Co. 851
21. A workman is entitled to recover compensation for neurosis if it is a proximate result of his injury and results in disability. Haskett v. National Biscuit Co. ---------- 915
22. Where an accident combines with a preexisting condition to produce disability, the injured workman may recover compensation. Haskett v. National Biscuit Co. ---------- 915

Zoning.

1. Power of the city of Omaha to zone the city and restrictions thereon stated. Wolf v. City of Omaha 545
2. What is the public good as it relates to zoning ordinances is, primarily, a matter lying within the discretion of the municipal body to which the power and function of zoning is committed. Unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere. Wolf v. City of Omaha ---------- 545
3. In passing upon the validity of zoning ordinances, an appellate court should give great weight to the determination of local authorities and local courts especially familiar with local conditions. Wolf v. City of Omaha ---------- 545
4. Every zoning ordinance effects some impairment of vested rights either by restricting prospective uses or by prohibiting continuation of existing uses, because it affects property already owned by individuals at the time of its enactment. Wolf v. City of Omaha ---------- 545
5. Whether a zoning ordinance is unreasonable, arbitrary, and discriminatory is related to its appli-

cation to the particular property involved. Each case must be determined on its own facts. Wolf v. City of Omaha ---------- 545

6. A zoning ordinance may be amended from time to time as new and changing conditions warrant revision. Wolf v. City of Omaha ---------- 545

7. Public welfare must be considered from the standpoint of the objective of zoning and of all property within any particular use district, and it is not contemplated that preexisting nonconforming uses are to be perpetual. Wolf v. City of Omaha ------ 545