BERNARD C. POPPE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

52 N. W. 2d 422

Filed March 21, 1952. No. 33062.

1. **Appeal and Error: Criminal Law.** This court will not interfere with a verdict of guilty in a criminal case which is based upon conflicting evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. **Courts: Criminal Law.** The rule of practice and procedure in criminal cases promulgated under the authority of Article V, section 25, of the Constitution of Nebraska set forth in Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462, is adhered to.
3. **Constitutional Law: Automobiles.** Section 39-727, R. S. Supp., 1949, held not violative of Article I, sections 6, 11, and 12, of the Constitution of Nebraska, and Article III, section 2, and amendments V, VI, and XIV, of the Constitution of the United States.
4. **Criminal Law.** When a proper record of a previous conviction has been produced, it becomes a matter of law for the court to determine whether or not that record establishes a previous conviction for the violation of a statute.
5. **Criminal Law: Automobiles.** Evidence as to the identification of the defendant as the same person charged with two previous offenses under section 39-727, R. S. Supp., 1949, and convicted, examined and held to be sufficient to identify the defendant as the same person.

ERROR to the district court for Sarpy County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

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

Clarence S. Beck, Attorney General, and *Dean G. Kratz,* for appellee.

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

MESSMORE, J.

Plaintiff in error Bernard C. Poppe, defendant in the district court for Sarpy County, brings this error proceeding seeking reversal of his conviction of unlawfully operating a motor vehicle upon the public highways of

this state while under the influence of alcoholic liquor. The information also contained charges of two previous convictions of a like offense. His motion for new trial having been overruled, the defendant was sentenced to serve not less than 1 year nor more than 18 months in the State Reformatory for men. The trial court also ordered the defendant not to drive any motor vehicle for a period of 1 year from the date of his final discharge from the State Reformatory for men.

We will refer to the plaintiff in error as the defendant.

The defendant assigns as error that the verdict of the jury is not sustained by sufficient evidence.

The evidence adduced by the State, briefly summarized, is as follows: About 9:15 p. m., on February 13, 1951, patrolman Whitney of the Nebraska Safety Patrol was patrolling Federal Highway No. 6 from Lincoln to Gretna. The night was clear and cold, and the pavement was dry. While he was in the cruiser car a little east of Linoma Beach the defendant's car passed him at a speed of 50 miles an hour. The defendant's car was weaving back and forth across the pavement. The patrolman fell in behind the defendant's car at a distance of about two blocks and continued northeast on highway No. 6 at a speed of 65 miles an hour. The defendant's car continued to weave back and forth and sometimes would be completely across the center line of the pavement. After following the defendant for a mile, the patrolman attempted to speed up and stop him, at which time the defendant speeded up his car and started to pull away from the patrolman. The two cars continued on northeast to a hill which is between two and three miles east of Linoma Beach, and started up the hill. They met a truck, and defendant slowed his vehicle down to approximately 35 miles an hour, and was at that time on his own side of the road. After being clear of the truck, the defendant speeded up and reached the top of the hill traveling very fast. The patrolman was unable to stop him.

They proceeded on, and passed the junction of highways No. 85 and No. 6, and proceeded straight north. Defendant was traveling at a rate of speed of from 85 to 90 miles an hour. At that time the defendant's car was swerving on the highway. It would swerve completely across the highway and then sharply back to its right side of the highway. This occurred several times between that point and the southwest corner of Gretna, at which time the defendant came up behind three cars which were traveling northeast in the curve proceeding to Gretna. The defendant passed these cars at a high rate of speed. He was unable to see around this curve to tell if any traffic was coming. After defendant got clear around the curve, the patrolman could see the road ahead, and he speeded up the cruiser car. The defendant had slowed down, turned in at the east side of the Home Oil Company, and stopped. As he came to a stop the patrolman pulled up on the right side of the defendant's car and stopped. The patrolman opened the door of the defendant's car and smelled a strong odor of alcoholic liquor. The defendant stepped out of his car holding on to it. He was unsteady on his feet, his face was flushed, and his eyes were watery and bloodshot. He was not clear in his speech and stuttered considerably. His clothes were disheveled and his hair was mussed. As he walked to the patrol car his feet were spread far apart. He staggered and his body lurched forward. On the way to Papillion, the county seat of Sarpy County, the defendant would fall asleep, wake up, straighten up, then fall asleep again. Upon the arrival at Papillion they met another patrolman and the deputy sheriff of Sarpy County. These two officers testified to the defendant's condition substantially to the same effect as the arresting patrolman. All of these witnesses gave as their opinion that the defendant was under the influence of intoxicating liquor. On the inside of the defendant's car was found two six-pack

cartons of beer, and another carton with two cans of beer gone.

The defendant testified that he is 29 years old, unmarried, and lives with his parents. He was employed as an inside laborer with a railroad company. Since his return from military service he has been nervous and restless when not working, and he would go down town or drive his car. He further testified that he went to night school, attending a body and fender class. Prior to February 13, 1951, he had been on a vacation. He admitted the speed of his car to be 70 miles an hour on occasions, and that he slowed down for the truck as the headlights on the truck were set high. He further testified that his windows were not steamed up. One front wheel on his automobile was out of line which caused it to swerve to the left, and he was required to pull it back. He did not cross the center line of the pavement. He always slowed down for trucks and other cars. When he came to the curve he was traveling 75 miles an hour. He passed the cars on the curve, slowed down, and had stopped at Gretna to get something to eat when the patrolman came up. He was acquainted with the highway. His feet had been frozen on many occasions, and when he sat in the car for a long period of time his legs would go to sleep. When he stopped and got out of the car, the ground was rough and he turned his ankle a little bit. Two or three hours before the patrolman stopped him he had had a can of beer before he got to Ashland. He never wears a hat, and while he was out of the car near Linoma Beach his hair became mussed. He described the way he was dressed as the kind of clothes he usually wore to work.

The defendant's father testified that after the defendant went into the service the family moved from a farm to Lincoln, and defendant lived with them. Defendant was on vacation prior to February 13, 1951, and spent most of his time around the house. In the evening defendant attended a body and fender school.

Since his birth, defendant has had a defect of speech which retarded his schooling. When he got excited or nervous he stuttered very badly. He had trouble with his feet; they had been frozen. Damp weather caused him to have rheumatism, and when he would get up from a sitting position, he would stagger. This witness never saw the defendant drink too much beer.

In a prosecution against defendant for intoxication and for driving a motor vehicle while intoxicated, evidence of odor of alcoholic liquor on his breath, of staggering, of impaired control of mental faculties, and of disregard of danger resulting in accidents, and opinions by witnesses testifying from observation that he was intoxicated at the time and place charged, may be sufficient to sustain a conviction. See Rhodes v. State, 124 Neb. 147, 245 N. W. 402. See, also, Smith v. State, 124 Neb. 587, 247 N. W. 421.

"This court will not interfere with a verdict of guilty in a criminal case which is based upon conflicting evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt." Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462.

Before taking up other assignments of error contended for by the defendant, we make reference to Haffke v. State, *supra,* wherein section 39-727, R. S. 1943, was involved. This statute was amended in 1947 and 1949, and for the purposes of this case is section 39-727, R. S. Supp., 1949. The amendments, however, do not affect the subject matter contained in the act to the extent of making any material difference in determining the proceedings in error in the instant case as will subsequently appear from an analysis of Haffke v. State, *supra.* The statute provides in part as follows: "It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug. Any person who shall operate or be in actual physical

control of any motor vehicle while under the influence of alcoholic liquor or of any drug shall be deemed guilty of a crime and, upon conviction thereof, shall be punished as follows: * * *." Following this language the statute specifies the penalties to be assessed for a first, a second, and a third or subsequent offense. The penalties increase in severity in each instance. It is noted that the statute defines one crime. It provides different penalties within limits upon conviction depending upon whether the person found guilty had previously been convicted of one or more offenses under the statute. Nowhere in the statute is the jury given any function to perform with reference to the penalty. The penalties are in effect habitual criminal penalties limited to the one crime defined in the statute. See Jones v. State, 147 Neb. 219, 22 N. W. 2d 710.

The defendant in the cited case contended, as the defendant here, that the jury should have been allowed to decide whether or not the defendant was guilty of a lesser crime. The obvious answer is that the statute defines but one crime, that of operating a motor vehicle while under the influence of alcoholic liquor or of any drug.

This court, in Haffke v. State, *supra,* recognized a diversity of opinion respecting the province of court and jury where a charge is made of a second or subsequent offense, citing authorities, then went on to say: "In the absence of a statute placing upon the jury a duty with reference to the penalty (such as section 28-401, R. S. 1943), the penalty to be imposed after conviction of a criminal offense is not for the jury but for the court to determine within the limits fixed by the statute. * * * 'Except as to crimes having an element of motive, criminal intent, or guilty knowledge, evidence of separate and distinct offenses committed by accused is not admissible.' Swogger v. State, 116 Neb. 563, 218 N. W. 416; Henry v. State, 136 Neb. 454, 286 N. W. 338." The reason for these rules and the rules themselves are

in conflict with the conclusions announced in Wozniak v. State, 103 Neb. 749, 174 N. W. 298; Osborne v. State, 115 Neb. 65, 211 N. W. 179; Burnham v. State, 127 Neb. 370, 255 N. W. 48; Wiese v. State, 138 Neb. 685, 294 N. W. 482. This court then accepted as sound the reasoning of other courts, citing Sammons v. State, 210 Ind. 40, 199 N. E. 555; Levell v. Simpson, 142 Kan. 892, 52 P. 2d 372; Hill v. Hudspeth, 161 Kan. 376, 168 P. 2d 922; People v. Gowasky, 244 N. Y. 451, 155 N. E. 737, 58 A. L. R. 9; Graham v. West Virginia, 224 U. S. 616, 32 S. Ct. 583, 56 L. Ed. 917. We deem it unnecessary to again set out the holdings in the afore-cited cases upon which this court relied in Haffke v. State, *supra*. To discern the applicability of such decisions we make reference to the Haffke case.

In Haffke v. State, *supra*, we said: "Accordingly, under section 25, article V, of the Constitution, we promulgate the following rule of practice and procedure in criminal cases hereafter tried in all courts. In the absence of a provision placing upon the jury a duty with reference to the penalty, where punishment is sought under any statute defining one crime and providing for an enhanced penalty upon conviction of a second or subsequent offense: (1) The facts with reference thereto must be alleged in the complaint, indictment or information upon which the accused is prosecuted; (2) the fact that the accused is charged with having committed a second or subsequent offense should not be an issue upon the trial and should not in any manner be disclosed to the jury; (3) if the accused is convicted, before sentence is imposed a hearing should be had before the court without a jury as to whether or not there have been any prior convictions of the accused under the same statute; (4) the accused should be given notice of the time of hearing at least three days prior thereto; and (5) at the hearing, if the court finds from the evidence submitted that the accused has been convicted prior thereto under the same statute,

the court should sentence the accused according to the enhanced penalty applicable to the facts found. This rule, of course, does not in any manner limit the application in a proper case of the provisions of section 25-1214, R. S. 1943."

The defendant predicates error on part 2 of the rule of practice and procedure in criminal cases as above stated, for the reason that such a rule deprives defendant of having a jury trial on all issues involved in the felony charge, which is guaranteed to him under the Constitution of Nebraska and the Constitution of the United States. Also, the defendant predicates error on part 3 of the practice and procedure in criminal cases as above stated, for the same reason, and on part 5 as previously stated, for the reason that under such rule defendant received the enhanced sentence for a felony rather than a misdemeanor, without having a trial by jury on the previous convictions. The defendant then relies on the cases of Wiese v. State, *supra;* Burnham v. State, *supra;* Osborne v. State, *supra;* and Wosniak v. State, *supra.* These cases are discussed in Haffke v. State, *supra,* and overruled insofar as the same were in conflict with the practice and procedure in criminal cases adopted in Haffke v. State, *supra.* We find no occasion to discuss the holdings in such cases again.

The defendant, in contending that he was deprived of and denied his constitutional rights cites the following: Article I, section 6, of the Constitution of Nebraska, to the effect that the right of trial by jury shall remain inviolate; Article III, section 2, of the Constitution of the United States, as follows: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; * * *"; amendment V of the Constitution of the United States, "* * * nor shall any person be subject for the same offense to be twice put in jeopardy * * * nor be deprived of life, liberty, or property, without due process of law; * * *"; amendment VI of the Constitution of the United States to the effect that the defendant shall be entitled

to a speedy and public trial by an impartial jury of the state; amendment XIV of the Constitution of the United States, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"; Article I, section 11, of the Constitution of Nebraska with reference to the right of the defendant to have a speedy, public trial by an impartial jury of the county or district in which the offense is alleged to have been committed; and Article I, section 12, of the Constitution of Nebraska, "No person shall be compelled, in any criminal case, to give evidence against himself, or be twice put in jeopardy for the same offense."

The practice and procedure in criminal cases adopted in Haffke v. State, *supra,* is analogous to that now in effect in the habitual criminal act. This practice and procedure was adopted as a matter of sound public policy, and applies to any statute which imposes the duty upon a court to inflict a greater punishment on the repetition of an offense.

Under statutes providing for a higher penalty or more severe punishment to be imposed for a second or subsequent offense under the liquor laws than for a first offense, see Cisson v. United States, 37 F. 2d 330; Massey v. United States, 281 F. 293; and cases subsequently cited.

All questions here raised by the defendant against the constitutional validity of section 39-727, R. S. Supp., 1949, have been settled adversely to his contentions insofar as the Constitution of the United States is concerned. See, Graham v. West Virginia, *supra:* McDonald v. Massachusetts, 180 U. S. 311, 21 S. Ct. 389, 45 L. Ed. 542; State v. Findling, 123 Minn. 413, 144 N. W. 142, 49 L. R. A. N. S. 449; 16 C. J., Criminal Law, § 3151, p. 1339; 24 C. J. S., Criminal Law, § 1959, p. 1145; 8 R. C. L., Criminal Law, §§ 284, 285, 286, 287, pp. 271, 272, 273;

Moore v. Missouri, 159 U. S. 673, 16 S. Ct. 179, 40 L. Ed. 301; and as to state constitutions by decisions in numerous state courts. The reasoning supporting these decisions is equally applicable to the provisions found in the Constitution of Nebraska. See, a very complete note to State v. LePitre, 54 Wash. 166, 103 P. 27, 18 Ann. Cas. 922; In re Miller, 110 Mich. 676, 68 N. W. 990, 34 L. R. A. 398, 64 Am. S. R. 378; Note to Commonwealth v. McDermott, 224 Pa. 363, 73 A. 427, 24 L. R. A. N. S. 431; 1 Bishop on Criminal Law, 9 Ed., § 947 (7), p. 700, § 993a, p. 736; Jones v. State, 9 Okl. Cr. 646, 133 P. 249, 48 L. R. A. N. S. 204; Cross v. State, 96 Fla. 768, 119 So. 380; State v. Vandetta, 108 W. Va. 277, 150 S. E. 736; Rand v. Commonwealth (Va.) 9 Gratt. 738; People v. McCarthy, 45 How. Pr. 97; State v. Flynn, 16 R. I. 10, 11 A. 170; State v. Zywicki, 175 Minn. 508, 221 N. W. 900; Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82; Rains v. State, 142 Neb. 284, 5 N. W. 2d 887.

To set out the reasoning in the above-cited cases holding that habitual criminal acts, or an act such as involved in this case, are constitutional would unnecessarily lengthen this opinion and serve no useful purpose. We make reference to the same in answer to defendant's assignments of error attacking the constitutionality of the act here involved.

The question arises as to the identity of the accused, and whether he is the same person who was convicted of two previous offenses of like nature as provided for in the act. This hearing was had before the court. The defendant objected to the hearing before the court for the reason that he was denied his guaranteed constitutional rights. This objection was overruled. We have previously determined in the opinion the subject matter of the objection, and proceed to the evidence on this phase of the case.

The record discloses that the sheriff of Gage County arrested the defendant on November 26, 1949, when he found him driving a motor vehicle upon the public

highways of this state in said county, while under the influence of alcoholic liquor. He was taken by the sheriff before a justice of the peace. His constitutional rights were explained to him. The sheriff testified against him. Defendant voluntarily entered his plea of guilty. He paid a fine and his license to drive a motor vehicle was suspended, as provided for under the statute in question for the first offense. The transcript of proceedings in the justice court was admitted in evidence.

A member of the Nebraska Safety Patrol testified to arresting the defendant while he was driving a motor vehicle when he was under the influence of alcoholic liquor upon the public highways of this state, near Lincoln, Nebraska, on May 30, 1950. The defendant was taken before the municipal court at Lincoln, Nebraska, on May 31, 1950. The patrolman testified against the defendant. The transcript of the proceedings had in municipal court was admitted in evidence, showing that the defendant's motion to dismiss the case against him was overruled. He was fined $100 and costs, his driver's license suspended for one year, and his car impounded, as provided for the second offense under section 39-727, R. S. Supp., 1949. He appealed to the district court. The case was settled on December 1, 1950. Defendant paid his fine of $100 and costs, and his driver's license was suspended. Certified copy of these proceedings appears in the record.

Patrolman Whitney, the arresting officer, testified in the instant case and also in the hearing before the trial court which was held for the purpose of fixing the penalty, and identified the defendant as the same person charged in the information in the instant case.

All of the witnesses testifying at this hearing identified the defendant as the same person involved in the previous convictions, who was tried before a jury in the instant case. Such evidence is held to be sufficient on identification of the accused as the person convicted

of two previous offenses of the same nature. See, Sammons v. State, *supra;* Massachusetts Bonding & Ins. Co. v. State ex rel. Gary, 191 Ind. 595, 131 N. E. 398; Davis v. Commonwealth, 230 Ky. 732, 20 S. W. 2d 731; Belcher v. Commonwealth, 216 Ky. 126, 287 S. W. 550; Graham v. West Virginia, *supra;* State v. Dale, 115 Wash. 466, 197 P. 645.

We conclude, in the light of the evidence and the foregoing authorities, that the defendant was properly identified as the person who committed two previous offenses, as provided for in section 39-727, R. S. Supp., 1949, and was convicted of two previous offenses; also that he was the person identified and convicted of the offense charged in the information in the instant case.

Other assignments of error are without merit and need not be discussed.

We adhere to the principles of law announced in Haffke v. State, *supra.*

There appearing to be no prejudicial error in the record, we conclude that the verdict of the jury and the sentence of the trial court should be, and are hereby, affirmed.

AFFIRMED.

WALLACE G. QUEST, APPELLANT, V. EAST OMAHA DRAINAGE DISTRICT, A CORPORATION, APPELLEE.
52 N. W. 2d 417

Filed March 21, 1952. No. 33087.

1. **Constitutional Law.** Constitutional guarantees are of little avail unless carried out in the spirit in which they were framed, and no plea of public benefits should be permitted to impoverish the owner of private property, or override a plain constitutional inhibition.
2. **Eminent Domain.** The purchase of property by a public corporation, where it could have been acquired by the power of eminent domain, carries with it all the incidents of taking or damaging

by eminent domain insofar as the question of damages by reason of the taking or damaging is concerned.

3. **Constitutional Law: Eminent Domain.** One of the incidents of taking property by eminent domain is that not only is the condemnor liable to compensate for the taking but also is liable, by virtue of Article I, section 21, of the Constitution of Nebraska, for consequential damage to other property in excess of the damage sustained by the public at large.
4. ———: ———. The words, "or damaged," in Article I, section 21, of the Constitution of Nebraska, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property.
5. ———: ———. In a suit to recover damages under the constitutional provision for damage to property for public use, it is immaterial whether the petition states a cause of action ex delicto or ex contractu. If the fact is established that property has been damaged for public use, the owner is entitled to compensation.
6. **Eminent Domain.** Where land is not taken, the measure of damages is the difference in market value before and after the damaging, taking into consideration the uses to which the land was put and for which it was reasonably suitable.
7. ———. Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to which the property owner is entitled.
8. ———. The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property.
9. **Constitutional Law: Eminent Domain.** In a case based on the constitutional provision, proof of negligence or the commission of a wrongful act is not necessary to a recovery.
10. ———: ———. In an action for damages based upon Article I, section 21, of the Constitution of Nebraska and against a drainage district organized under the provisions of Chapter 31, article 4, R. S. 1943, for the damaging of private property for a public use, it is not necessary for plaintiff to plead or prove that he filed a notice as provided by section 31-451, R. S. 1943.

APPEAL from the district court for Douglas County: HENRY J. BEAL, JUDGE. *Reversed and remanded.*

William H. Thomas, for appellant.

Fraser, Connolly, Crofoot & Wenstrand, for appellee.

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

SIMMONS, C. J.

This is an action for damages, allegedly caused to plaintiff's real estate, by reason of an excavation made by defendant on its land adjoining that of the plaintiff. Issues were made and trial was had. At the close of all the evidence, on motion of defendant, the trial court discharged the jury and dismissed the action. Plaintiff appeals. We reverse the judgment of the trial court and remand the cause.

It was stipulated that the defendant was a corporation organized and existing under the provisions of Chapter 31, article 4, R. S. 1943. As such it had the power of eminent domain. § 31-415, R. S. 1943.

So far as is necessary for the requirements of this opinion, we summarize the evidence in accord with the rule that "A motion to dismiss or for directed verdict admits the truth of all material and relevant evidence adduced by the party against whom the motion is made, and such party is entitled to have such evidence considered in the light most favorable to him and to have the benefit of all inferences reasonably deducible therefrom in testing validity of the court's action in disposing of the motion." Weisenmiller v. Nestor, 153 Neb. 153, 43 N. W. 2d 568.

The two tracts of land involved are situated in an irregular tract in an area classed as the 5th Residence District in the City of Omaha. Defendant's land is (roughly) a triangular piece bounded by Twenty-fifth Street on the west, Sharon Drive on the north, and Pershing Drive on the northeast. Plaintiff's land is contiguous to defendant's land on the south and borders on Twenty-fifth Street.

Plaintiff purchased his land in August 1945. At that time it was and still is generally on the same level as

Twenty-fifth Street. To the north the land which defendant now owns was also of that same height for some distance and gradually sloped down to Sharon Drive. There were residences constructed along the west side of Twenty-fifth Street. The land to the north of plaintiff's, then a cornfield, was suitable for residence construction, facing Twenty-fifth Street to Sharon Drive. Pershing Drive, running northwest to southeast, is at a level appreciably lower than Twenty-fifth Street. Defendant's land had been excavated along Pershing Drive to the approximate level of the Drive and back for some distance into that land, leaving a cliff, as viewed from the Drive. The closest this cliff came to plaintiff's land was 50 feet at the northeast corner or to the north and rear of plaintiff's land. It then angled to the northwest and away from plaintiff's land.

Plaintiff's family consisted of himself, his wife, and three minor children. He began the construction of a house on his property in March 1946. He moved into the incompleted house in May 1946, and thereafter he and his family occupied it as a home, both before and after its completion as a modern home. His house was set back from Twenty-fifth Street and at its closest point was 28 feet from his north or common boundary line with defendant's property.

Defendant purchased its land for the specific purpose of excavating dirt therefrom for use on its levee. In September 1946 it began its excavation. Defendant allowed a strip of land 8 to 10 feet in width to remain undisturbed along its south line and its west line on Twenty-fifth Street. It cut a bank at a slope of one-quarter to one along that line and excavated the balance of its land to a grade below that of Sharon Drive and Pershing Drive. The result was that a cliff 40 feet high was made along the south side of its land contiguous to plaintiff's property and 38 feet from plaintiff's house, and a cliff from 40 down to 15 feet high at Sharon Drive along the west side of its property. In

so doing it destroyed the use of its property for residential purposes, so far as Twenty-fifth Street was concerned. It built a high wire fence on the boundary line around the property above the cliff on both the south and west sides of its property. Children could and did get under the fence and play on the land above the cliff with the resulting danger that the cliff presented. Fires were started in that area.

Dirt sloughed off from the face of the cliff and in times of high wind, dust blew up the cliff and into plaintiff's house, and dust and litter blew into his yard. Wind coming up the face of the cliff blew roofing and shingles from the north side of the house. It was necessary to double-insulate the north side of the house and expend extra amounts for heat because of it. The dust problem did not exist prior to the excavation work.

There was a railroad line some 500 or 600 feet east of these properties. When trains passed, the noise was excessive and the house and articles in it vibrated. These vibrations caused cracks in the walls and ceilings on the north side. Annoying noise and vibrations were not experienced prior to the excavation.

Pools of stagnant water were in the excavated area. Mosquitoes became quite bothersome in the summertime after the excavation, but were not experienced prior thereto.

Hundreds of cliff swallows nested in the cliff made by the excavation. They flew over the property of plaintiff with resultant noise and filth in the yard and on person and property. That condition was not a noticeable one prior to the excavation, although there were swallows in the cliff to the northeast prior to the excavation. These swallows and their nests were attractive to children and caused them to try to get to the nests and to shoot the birds.

The existence of the excavated area and the cliff, and the other matters resulting from it, have materially depreciated the market value of plaintiff's property and re-

stricted its use. Plaintiff's expert witness estimated the depreciation at $6,000. Defendant's expert witness estimated the adverse effect of the existence of the excavation and the cliff on the market price at $1,000 to $2,000.

Defendant offered evidence that controverted most, if not all, of these contentions. However, it is not material to a determination of the question here presented.

Plaintiff contends that it was error to refuse to submit the case to the jury. Plaintiff rests his contentions here upon either or both of two propositions: First, upon the constitutional provision that "The property of no person shall be taken or damaged for public use without just compensation therefor." Art. I, § 21, Constitution of Nebraska. Second, plaintiff contends that the use made of its property by the defendant constitutes a nuisance for which damages may be recovered.

Defendant here challenges those two contentions and advances a third which is that plaintiff failed to serve the notice provided for in section 31-451, R. S. 1943.

There is no contention here of negligence in defendant's acts. There is no contention of a removal of lateral support.

We have heretofore stated the rules of law that determine the questions here presented.

As above stated, defendant is a public corporation organized under the laws of this state and has the power of eminent domain. There is no question here that the excavation was made for a public use. Defendant pleads that this property was the only available property from which earth could be taken without substantially increasing the cost. In that connection we call attention to our statement that "Constitutional guarantees are of little avail unless carried out in the spirit in which they were framed, and no plea of public benefits should be permitted to impoverish the owner of private property, or override a plain constitutional inhibition." City of

Omaha v. Kramer, 25 Neb. 489, 41 N. W. 295, 13 Am. S. R. 504.

The following rules are stated in Snyder v. Platte Valley Public Power and Irrigation Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154:

The purchase of property by a public corporation, where it could have been acquired by the power of eminent domain, carries with it all the incidents of taking or damaging by eminent domain insofar as the question of damages by reason of the taking or damaging is concerned.

One of the incidents of taking property by eminent domain is that not only is the condemnor liable to compensate for the taking but also is liable, by virtue of Article I, section 21, of the Constitution of Nebraska, for consequential damage to other property in excess of the damage sustained by the public at large.

The words, "or damaged," in Article I, section 21, of the Constitution of Nebraska, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property.

In a suit to recover damages under the constitutional provision for damage to property for public use, it is immaterial whether the petition states a cause of action ex delicto or ex contractu. If the fact is established that property has been damaged for public use, the owner is entitled to compensation.

Where land is not taken, the measure of damages is the difference in market value before and after the damaging, taking into consideration the uses to which the land was put and for which it was reasonably suitable.

" 'Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to which the property owner is entitled.' " Luchsinger v. Loup River Public Power Dist., 140 Neb. 179, 299 N. W. 549.

" 'The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property.' " Asche v. Loup River Public Power Dist., 136 Neb. 601, 287 N. W. 64.

In a case based on the constitutional provision, proof of negligence or the commission of a wrongful act is not necessary to a recovery. Wagner v. Loup River Public Power Dist., 150 Neb. 7, 33 N. W. 2d 300.

Tested by these rules it is patent that plaintiff, under the constitutional provision, was entitled to have the issue of his damages submitted to the jury for determination. The trial court erred in sustaining the motion of defendant. This makes a consideration of the nuisance theory unnecessary.

This brings us to the defendant's contention that plaintiff's action is barred because of failure to plead and prove the giving of the notice required by section 31-451, R. S. 1943. That statute is in part as follows: "No drainage district organized under the laws of Nebraska shall be liable for damages arising out of the construction or maintenance of any of the work of the said district unless actual notice in writing, describing fully the accident and the nature of the injury complained of, describing the defects causing the injury, and stating the time when and with particularity the place where the accident occurred, shall be proved to have been filed with the secretary of the board of directors of the district within thirty days after the occurrence of such accident or injury, except in cases involving minors or incompetents, or where the person injured is incapacitated to the extent that he is unable to give such notice or to employ an agent or attorney to do so in his behalf."

The transcript shows that on the opening day of the

trial plaintiff amended his petition, with court permission, and alleged that he had notified the defendant in writing of the damage to his property. There was evidence of letters that passed between the parties. We need not determine their sufficiency as to compliance with the statute.

Defendant relies upon Bartels v. Drainage District, 122 Neb. 340, 240 N. W. 434. That case was one based on negligent construction and maintenance.

Plaintiff relies upon Bridge v. City of Lincoln, 138 Neb. 461, 293 N. W. 375. There a similar claim involved a charter provision comparable to the statute here involved. That decision answers the defendant's contention here. Accordingly we hold that in an action for damages based upon Article I, section 21, of the Constitution of Nebraska and against a drainage district organized under the provisions of Chapter 31, article 4, R. S. 1943, for the damaging of private property for a public use, it is not necessary for plaintiff to plead or prove that he filed a notice as provided by section 31-451, R. S. 1943.

For the reasons given herein, the judgment of the trial court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

GRAND ISLAND FINANCE COMPANY, A CO-PARTNERSHIP CONSISTING OF EDGAR REYNOLDS AND FRANCES REYNOLDS, APPELLANT, V. EDDIE EACKER, APPELLEE.
52 N. W. 2d 805

Filed April 4, 1952. No. 33110.

1. **Appeal and Error.** A finding of fact by the court in a law action, where the finding by a jury is waived by the parties, will not be disturbed on appeal unless clearly wrong.
2. **Usury.** A loan made at a place of business in violation of the

provisions of section 45-123, R. S. 1943, is void and uncollectible under the provisions of section 45-155, R. S. 1943.

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

Johnson & DesJardien, for appellant.

E. F. Myers, for appellee.

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

SIMMONS, C. J.

This case started as an action in replevin based on a promissory note secured by chattel mortgage. The security was not taken under the writ. The action proceeded as one for damages. Defendant pleaded by way of answer that the debt was void and uncollectible and that it had been paid. A jury was waived and trial had to the court, resulting in finding generally against the plaintiff and for the defendant, and that the debt had been satisfied in full. The trial court entered judgment for the defendant and dismissed plaintiff's petition. Plaintiff appeals. We affirm the judgment of the trial court.

Treating the judgment as one against it on both issues, plaintiff challenges its correctness as to both issues.

We review the evidence subject to the rule that "A finding of fact by the court in a law action, where the finding by a jury is waived by the parties, will not be disturbed on appeal unless clearly wrong." Witthauer v. Employers Mutual Casualty Co., 149 Neb. 728, 32 N. W. 2d 413.

Plaintiff is a copartnership. License was issued to it to carry on the business of making loans at Broken Bow, Nebraska, under the provisions of what are now sections 45-114 to 45-155, R. S. 1943. In the application for this license plaintiff designated Geo. F. Dudley as the manager who was to have charge of the business under the license. The license has been renewed annually.

Under date of March 28, 1942, the Department of Banking granted plaintiff permission "to conduct your direct loan business in the same office in which Mr. Dudley, your manager, conducts an insurance business and a real estate loan business."

We take up first the issue as to whether or not the indebtedness was void and uncollectible.

The evidence is that from 1946 to 1949, Mr. Dudley conducted in his office not only the loan business of the plaintiff, but also wrote life insurance, accident insurance, car insurance, and fire - dwelling-house insurance; bought and sold new and used cars, trucks, combines, and farm machinery; wrote bonds; and collected rents on business houses—the evidence not being clear as to whether he owned these business houses or handled them on an agent basis. He also managed a ranch from his office.

The note here involved was one given November 22, 1948, to refinance the balance due on a note originally given by the defendant for the purchase of a combine from Dudley in August 1947. The note given for that purchase was endorsed payable to plaintiff on a printed form.

The evidence is that defendant had sold cars for Dudley. About the middle of July 1947, defendant, at Dudley's request, went to Dudley's office to look at a used car. Dudley then proposed to defendant that he buy a combine, which defendant did.

Defendant's first defense is based on sections 45-123 and 45-155, R. S. 1943.

Section 45-123, R. S. 1943, so far as important here, provides: "No licensee shall conduct the business of making loans under sections 45-114 to 45-155 within any office, room or place of business in which any other business is solicited or engaged in, or in association or conjunction therewith, except as may be authorized in writing by the Director of Banking for the Department of Banking upon his finding that the character of

such other business is such that the granting of such authority would not facilitate evasions of said sections, or of the rules and regulations lawfully made thereunder; * * *."

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

The evidence is ample, in fact undisputed, to sustain a finding that at all times involved here, plaintiff's business of making loans was conducted in an office and at a place of business in which other business was solicited and engaged in which was outside of and beyond the authority in writing of the Director of Banking.

The question then comes, is the indebtedness sued on void and uncollectible? Obviously it is if the plain language of the statute is to be followed.

Our decisions point directly to the answer.

In Motors Acceptance Corp. v. McLain, 154 Neb. 354, 47 N. W. 2d 919, we said: "The small loan business is one which is subject to regulation because of the abuses which seem to be inherently linked with it."

In Mack Investment Co. v. Dominy, 140 Neb. 709, 1 N. W. 2d 295, we had an action in replevin based on a loan made under the act then in force. The defense was usury. The statute there involved provided that if interest or charges in excess of those prescribed shall be received, the licensee shall "lose all his right to collect or receive any sum whatever on said indebtedness." We held that the licensee, because of brokerage charges, lost his right to collect any sum whatever on this indebtedness and "The letter of the statute admits of no other interpretation by any construction." In the course of the opinion we said: "The purpose and intent of the legislature in passing this act were to protect the borrower against excessive and usurious rates of interest on small loans, and other charges, made under

one subterfuge or another, and to control and regulate, rather than protect, the lender."

In Nitzel and Co. v. Nelson, 144 Neb. 662, 14 N. W. 2d 197, we had an action in equity to foreclose securities given for the payment of promissory notes. The defense was usury under the small loan law based on the prior act, sections 45-143 and 45-144, C. S. Supp., 1941. There the statute provided that if interest or charges in excess of the prescribed amount were contracted for, collected, or received, the licensee "shall thereupon lose all of his right to collect or receive any sum whatsoever on said indebtedness." We held that because of usury and excess charges the notes were "void and uncollectible." In the course of the opinion we said: "The duty of the court in the premises is clear and distinct."

In Union Loan Assn. v. Woodie, 13 N. J. Misc. 214, 177 A. 438, the Supreme Court of New Jersey had before it a case that involved a statute which provided that no corporation or association licensed under their act "shall transact or solicit business under any other name or at any other office or place of business than that named in the license." The statute further provided that "every loan in connection with which such violation shall have occurred shall be absolutely null and void * * *." One of the defenses was that the loan had been made under the name of Union Loan Company, rather than Union Loan Association, which was the corporate title. The court held that the use of the word "company" was a clear violation of the act. The court said: "It is a harsh rule, but clearly intended to be such. The abuses growing up under this class of loans no doubt operated to induce the passage of this stringent legislation, and the purpose of the act is obviously to hold loan companies incorporated under the act to the strictest accountability, * * *." The above decision was cited with approval in Ryan v. Motor Credit Co., Inc., 130 N. J. Eq. 531, 23 A. 2d 607, a decision of the Court of Chan-

cery. That case was affirmed by the Court of Errors and Appeals in 132 N. J. Eq. 398, 28 A. 2d 181, 142 A. L. R. 640.

We hold that a loan made at a place of business in violation of the provisions of section 45-123, R. S. 1943, is void and uncollectible under the provisions of section 45-155, R. S. 1943.

We consider briefly the plea of payment.

The evidence is that at the time the note and chattel mortgage here involved were executed defendant gave Dudley positive directions to sell the combine and liquidate the debt, the new papers being executed to permit a reasonable opportunity to do that to advantage. Dudley sold the combine in February 1949, and advised defendant of the sale, but said he had not then received the money. On April 14, 1949, Dudley told defendant he had received the payment for the combine; that it was not sufficient to pay the debt; and that there was still due a balance of $58 which defendant paid and received a receipt for balance of loan in full, calculated from the records in Dudley's office of plaintiff's loans. There was some effort made to show that this receipt was antedated to avoid the date of termination of Dudley's authority as manager. There is ample evidence to show that the final payment of $58 and the receipt antedated the termination date. It is a fact question determined by the trial court.

Without further reciting the evidence we hold it ample to sustain the judgment of payment.

The judgment of the trial court is affirmed.

AFFIRMED.

IN RE ESTATE OF MARY E. DRYDEN, DECEASED. PATRICIA JEAN JOHNSON ET AL., APPELLANTS, V. E. O. RICHARDS, EXECUTOR OF THE ESTATE OF MARY E. DRYDEN, DECEASED, ET AL., APPELLEES.
52 N. W. 2d 737

Filed April 4, 1952. No. 33118.

1. **Process.** The requirement of publication of a notice in a newspaper three weeks successively is complied with by publication on one day of each of three weeks, that is, three successive weekly publications.
2. ———. In such an instance the notice is complete upon the distribution of the last issue of the paper containing the notice though three full weeks did not elapse after the first publication.
3. **Time: Process.** The construction of the statute providing for notice of the time and place of proving a will, as made by this court, was not changed or affected by section 25-2228, R. R. S. 1943.
4. ———: ———. Section 25-2228, R. R. S. 1943, does not refer to the period during which a notice or legal publication must be published but it was intended to and does limit the number of issues in which the notice must appear when the medium of publication has more than one regular issue each week.
5. **Constitutional Law: Appeal and Error.** This court will not in an appeal consider or determine the constitutionality of a statute unless it has been made an issue in the case in the trial court.
6. **Appeal and Error.** Generally a case in this court on appeal will be limited to errors assigned and discussed and an assignment of error not discussed will be considered waived.
7. **Executors and Administrators.** The authority of an executor, in this state, is principally but not solely derived from the will in which he is nominated and it is not complete until the court has approved his nomination, he has qualified, and he has been granted letters testamentary by the court.
8. **Fraud.** Though one is under no duty to speak, if he does so, he must tell the truth and not suppress or materially qualify facts within his knowledge affecting the subject of his disclosure. Fraudulent representations may consist of half-truths calculated to deceive and a representation literally true is fraudulent if used to create an impression substantially false. A slight imposition may terminate the privilege of silence.
9. ———. Extrinsic or collateral fraud is that practiced in the act of obtaining an adjudication in the course of litigation. It consists of something done by the successful party that prevents

the unsuccessful party, because of the fraud or deception practiced on him, from presenting his case or defense so that there was not a real contest in or actual litigation of the issue of the case.

10. **Executors and Administrators.** The personal representative of an estate and his attorney are both fiduciaries in their relation to the estate of the deceased and the persons interested therein.
11. **Trusts.** It is the duty of a trustee to fully inform the cestui que trust of all facts relating to the subject matter of the trust which come to the knowledge of the trustee and which are material to the cestui que trust to know for the protection of his interests.
12. ———. Every violation by a trustee of a duty required of him by law, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.
13. **Fraud: Judgments.** The equity powers are ample, independently of statute, to set aside a probate procured by fraud.

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

Dallas A. Clouse, and *Beatty, Clarke, Murphy & Morgan,* for appellants.

Baskins & Baskins, Edward E. Carr, Richard D. Dittemore, and *Greydon L. Nichols,* for appellees.

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

BOSLAUGH, J.

This is an action in equity commenced in the county court by appellants against appellees to set aside a decree admitting to probate the will of Mary E. Dryden, deceased, on the ground that the probate thereof was obtained by fraud and that appellants have valid legal objections to its probate. Appellants were the grandniece and grandnephew respectively of the deceased, and are her only relatives. They and appellees are the beneficiaries named in the will, and E. O. Richards is the executor of the will and the estate of the deceased.

The will was without contest admitted to probate and about four months thereafter the petition was filed by appellants to vacate the order of probate and to be permitted to contest the will. The county court sustained demurrers of appellees to the petition and an appeal was taken to the district court. That court sustained the general demurrers filed therein by appellees to the petition and rendered a judgment of dismissal.

Appellants challenge the validity of the judgment of the district court because they claim that lawful notice of the hearing of the petition for the probate of the will of the deceased was not given. The defect alleged by them is that the order of the county court designated November 3, 1950, as the date of hearing of the petition for the probate of the will and required notice to be published as provided by law in the Chappell Register, a weekly newspaper. The notice was published in the issues of the paper of October 19, October 26, and November 2, 1950. The hearing was had and the decree of probate of the will was rendered on November 3, 1950, 15 days after the first publication of the notice. The notice was not published for three weeks successively covering a period of 21 days as appellants assert the law requires.

The statute requires that notice of the time and place of proving a will shall be given by publication in a newspaper designated by the judge of the county court "three weeks successively, and no will shall be proved until notice shall be given as herein provided * * *." § 30-217, R. R. S. 1943. Publication of notice sufficient to satisfy the demands of this statute was determined many years ago. The requirement of publication of a notice in a newspaper "three weeks" is complied with by the publication thereof in a weekly paper on one day of each of three weeks, that is, three successive weekly publications. The notice is complete upon distribution of the last issue of the paper containing the notice though three full weeks have not elapsed since the first

publication. Alexander v. Alexander, 26 Neb. 68, 41 N. W. 1065; State v. Hanson, 80 Neb. 724, 115 N. W. 294; Claypool v. Robb, 90 Neb. 193, 133 N. W. 178; In re Estate of Johnson, 99 Neb. 275, 155 N. W. 1100; Pohlenz v. Panko, 106 Neb. 156, 182 N. W. 972.

The act of 1915 defining the word "week" as used in certain statutes providing for publication of notices did not change or affect the construction of the statute providing for notice of the time and place of proving a will. Laws 1915, c. 222, p. 491; § 25-2227, R. R. S. 1943; In re Estate of Johnson, *supra*. It is conceded in this case that this is also true as to the act of 1917 on the subject of the publication of notices and other legal publications. Laws 1917, c. 202, p. 481. Likewise it is obvious that the act of 1923 by its terms applied only to the publication of notices and other legal publications required by law to be published "a certain number of days" when published in a daily, semiweekly, or triweekly paper. Laws 1923, c. 100, p. 255.

In Claypool v. Robb, *supra*, it was decided that a provision of the code that publication must be made four consecutive weeks was satisfied by publication in a weekly newspaper once each week for four consecutive weeks "But, where the notice is published in a paper having more than one issue during the week, insertion of the notice in each of the regular issues during the week is necessary to a complete publication of the notice for that particular week." It was because of the holding of the court in reference to the publication of legal notices in newspapers having more than one regular issue in each week that the Legislature passed Laws 1927, c. 63, p. 225. The amendment thereof in 1943 made no material change. It added a sentence defining a daily newspaper. Laws 1943, c. 47, p. 197; § 25-2228, R. R. S. 1943. The parts thereof pertinent to the problem now being considered are: "All legal publications and notices * * * that may by law be required to be published a certain number of days or a certain num-

ber of weeks shall be legally published when they have been published in one issue in each week in a daily, semiweekly or triweekly newspaper, such publication * * * to be made upon any one day of the week upon which such paper is published, except Sunday * * *. Nothing in this act contained shall be construed as preventing the publication of such legal notices and publications in weekly newspapers. * * * All legal publications and all notices of whatever kind or character that may be required by law to be published a certain number of days or a certain number of weeks, shall be and hereby are declared to be legally published when they shall have been published once a week in a weekly, semiweekly, triweekly or daily newspaper for the number of weeks, covering the period of publication."

The Legislature, by any of the acts above referred to, did not intend to enact that in no case would a publication be complete until the full number of weeks mentioned had elapsed after the first publication. This result if desired by the Legislature could easily have been accomplished by simple and clear language. Its objective was not to destroy the rule that where the time mentioned by the statute indicates only the number of times the notice is required to be published, it is satisfied if the notice is published the number of times mentioned. The purpose and intention of the Legislature were to eliminate the requirements of Claypool v. Robb, *supra*, and to provide that the insertion of the matter required to be published in one regular issue of a legal paper in any week should be a legal and sufficient publication for that period without regard to whether the paper had one or more than one regular issue during that period. The act of 1943 does not refer to the duration or period during which a notice or other legal publication must be published but it was intended to and does limit the number of issues in which the notice must appear when the medium of publication has more than one regular issue each week. The object of the act was

to put weekly newspapers and newspapers with more than one regular issue each week in the same situation in reference to the publication of notices and other publications. The time mentioned in the last part of the act that all legal publications and notices required by law to be published a certain number of weeks shall be legally published "when they shall have been published once a week in a weekly, semiweekly, triweekly or daily newspaper for the number of weeks, covering the period of publication" indicates only the number of times the notice is required to be published and does not refer to the duration of the notice. See, In re Estate of Johnson, *supra;* Davies v. American Investment & Trust Co., 94 Neb. 427, 143 N. W. 464; Claypool v. Robb, *supra;* State v. Hanson, *supra;* Davis v. Huston, 15 Neb. 28, 16 N. W. 820.

Appellants assail the legal sufficiency of the notice given of the time and place of the hearing of the petition for the probate of the will of the deceased. They say that service of notice upon them by publication was a denial of due process of law in violation of Article XIV, section 1, of the Constitution of the United States and Article I, section 3, of the Constitution of Nebraska, because the residence and location of each of them were known to the executor and proponent and that anything less than personal service of notice on them failed to satisfy the demands of due process. This in short is a declaration that section 30-217, R. R. S. 1943, fails to meet constitutional requirements.

The record does not show that this issue was presented in any manner in the district court. It made its initial appearance in the brief of appellants in this court. In order for this court to consider the constitutionality of a statute, except in an original action, it must be raised and placed in issue in the trial court. Weekes v. Rumbaugh, 144 Neb. 103, 12 N. W. 2d 636, 150 A. L. R. 129; Madison County v. Crippen, 143 Neb. 474, 10 N. W. 2d 260.

The notice of the hearing for the probate of the will was legally published, the service was complete on November 2, 1950, and it was permissible to have a hearing on the next day.

Appellants requested I. J. Nisley, one of the judges of the Thirteenth Judicial District, to declare himself disqualified to act in the case in any of the proceedings had and they objected to his doing so on the grounds that he was prejudiced against appellants; that he was related to one of the beneficiaries named in the will of the deceased; that he had discussed matters involved in the case with and had advised some of the parties adverse to appellants; and that he was a material witness for appellants in reference to matters involved in the case. The request and objections were denied by Judge Nisley and demurrers to the petition of appellants to vacate the order of probate of the will of the deceased were heard by him and sustained. The denial of the request and objections is assigned as an error by appellants but the assignment is not discussed by them. Generally a case in this court will be limited to errors assigned and discussed and an assignment of error not discussed will be considered waived. Rules of Supreme Court, 8 a 2 (4); Little v. Loup River Public Power Dist., 150 Neb. 864, 36 N. W. 2d 261, 7 A. L. R. 2d 355; Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588; Daugherty v. State, 154 Neb. 376, 48 N. W. 2d 76.

The correctness or invalidity of the action of the trial court in sustaining the demurrers to the petition and adjudging a dismissal must be decided from a consideration of the facts well pleaded in the petition. It alleges that: Mary E. Dryden died on the 9th day of October 1950, a resident of Deuel County, and left an instrument purporting to be her will. It and a petition for the probate thereof were filed in the county court of that county and November 3, 1950, was designated as the date of hearing. A hearing was held at the time indicated. The instrument was admitted to probate as the will of the

deceased, and E. O. Richards was confirmed and qualified as executor of the will. The property of the deceased consisted of real and personal property estimated by the petition for probate to be worth $90,000. She left surviving her appellants, the grandchildren of a deceased sister of the testatrix, as her only heirs at law. The appellants, as was well known to the proponent of the will, Leta Ellen Koier, and Richards, resided and had resided for many years at 209 West 46th Street in Seattle, Washington. Richards wrote the petition for the probate of the alleged will of the deceased and stated therein the correct address of appellants. Neither of them knew of the death of Mary E. Dryden, the existence of a will made by her, the filing in court for probate of an instrument claimed to be her will, nor the institution of any proceedings in regard thereto or with reference to her estate until they received on October 30, 1950, a letter from Richards dated October 27, 1950, stating the fact of the death of Mary E. Dryden, enclosing an alleged copy of the instrument said to be the will of the deceased, and advising appellants that the "will was in the process of being probated." Appellants had no knowledge of the date of hearing for the probate of the will of the deceased or of any date fixed for any hearing or proceedings in regard to the estate of the deceased until shortly before the filing of their petition in this case. The letter of Richards was silent as to all of such matters. Appellants immediately upon receipt of his letter wrote and mailed him a request for information as to the date of hearing on the probate of the will. He did not answer the request but remained silent and gave appellants no further information.

The instrument probated as the will of the deceased was prepared by Richards, a member of the Bar of Nebraska, and for many years prior thereto attorney for the testatrix and there was and had been between them a close fiduciary relationship. The preparation and execution of the will were under the personal and direct

supervision, management, and direction of Richards. He is principal beneficiary of the will and is named and designated therein as executor. He, as a part of a plan to secure for himself the property of the deceased, by the use of arts, devices, contrivances, and deception and by making use of the implicit confidence and trust which the deceased had for him, advised, persuaded, and induced her to make during a considerable period of time several wills and other instruments, each suggested and prepared by him, changing the disposition of her property, and each change made in these resulted in the gift of a greater part of her property to him. These instruments or any of them were not the product of the free and voluntary act of the deceased but each was the product of the fraud and undue influence of Richards, of such a nature and to such an extent, that they and each of them, including the one probated as the will of the deceased, were his instruments.

Richards during several years preceding the death of Mary E. Dryden induced and caused his wife to and she did make frequent visits to and spent much of her time at the home of the deceased, did errands for her, cooked her meals, complied with her every wish, and performed for her a vast number of personal favors and courtesies. Richards during this time frequently called at the home of the deceased and visited with her. These things were done as a part of a plan of ingratiating Richards in the trust and confidence of the deceased and enabled him to influence and control her in the disposition of her property to his advantage and profit. It was by virtue of these facts that he became the principal beneficiary and executor of the instrument probated as the will of the deceased.

The will was made on the 9th day of January 1950. The testatrix was an elderly woman, feeble in body and mind, physically and mentally weak and ill. She was and had been under the care of physicians. Richards was at that time and for several years prior thereto had

been the personal adviser and legal counselor of the testatrix in all of her personal and business matters. He was her close friend and confidant, and had gained and had her friendship, trust, and complete confidence to the extent that he was able to and did dominate and control her. She accepted, believed, and acted upon advice, counsel, or directions given her by him. The instrument signed by her on January 9, 1950, purporting to be her will was the result of the fraud and undue influence of Richards and was not and is not the will of the testatrix. He was not related to her, was not a natural object of her bounty, and had no relationship to her except as he had become acquainted with her as her counselor and adviser and thereafter ingratiated himself in her friendship, confidence, and trust.

He prepared, had executed, and filed the petition of the proponent for the probate of the will. He knew the date of the hearing to be had thereon, deliberately and fraudulently refrained from informing appellants of the facts in reference thereto except as above stated, and did not at any time advise them of the date of the hearing. He deliberately planned to deceive and did deceive appellants concerning the true facts of the making of the alleged will, its validity and force, and the time when it would be before the court for examination and probate. He knew at all of the times referred to that appellants were the only heirs at law of the deceased. He was the attorney for her estate, acted as such from the time of her death, and was present and conducted the proceedings on behalf of her estate and himself at the hearing for the probate of the will.

The objections of appellants to the probate of the alleged will of the deceased filed at the time of the filing of the petition to set aside the decree of probate are absence of due execution, mental incapacity of the deceased, and undue influence.

Appellants argue that a person designated in a will

as executor becomes such at the time of the death of the testator; that he is from that time vested with all the rights, powers, and duties and is subject to all the obligations, responsibilities, and liabilities of an executor; and that he then has without further act, proceedings, or adjudication the status of a fiduciary towards the estate, the beneficiaries, and the heirs of the deceased.

At common law the executor derived his power and authority solely from the will by which he was appointed, and not from the probate, which was held to be only evidence of his right. In this state and many of the other states the authority of an executor, while derived primarily from the will is not derived solely therefrom, is not complete until the court has approved his nomination, the executor has qualified by complying with certain statutory requirements, and has been granted letters testamentary by the court. In re Estate of Blochowitz, 124 Neb. 110, 245 N. W. 440; In re Estate of Haeffele, 145 Neb. 809, 18 N. W. 2d 228; State ex rel. Huber v. Tazwell, 132 Or. 122, 283 P. 745; In re Birkholz's Estate (Iowa), 197 N. W. 896; Davenport v. Sandeman, 204 Iowa 927, 216 N. W. 55; In re Estate of Swanson, 239 Iowa 294, 31 N. W. 2d 385; Estate of Svacina, 239 Wis. 436, 1 N. W. 2d 780; Annotation, 95 A. L. R. 828; 33 C. J. S., Executors and Administrators, § 22, p. 903. Richards became executor of the will of Mary E. Dryden when he was appointed and qualified on the 3d day of November 1950.

The date of the hearing for the probate of the will was November 3, 1950. The second publication of the notice of the hearing was October 26, 1950. The appellants, the heirs at law of the deceased, had no information of the death of Mary E. Dryden, that she left an alleged will, or of the pendency of the proceedings affecting it or her estate. They resided, as the proponent and Richards knew, in Seattle, Washington. The appellants received on October 30, 1950, a letter from Rich-

ards dated October 27, 1950, that stated the fact of the death of Mary E. Dryden, contained a copy of her will, and advised them that it "was in the process of being probated." The appellants upon receipt of the letter immediately wrote to Richards and requested him to inform them "the date of a hearing upon the probate of the will." He wholly disregarded the request of their letter to him.

It is unnecessary in this case to consider what the duty of Richards was, if any, in reference to appellants before he volunteered to give partial information to them by his letter of October 27, 1950. But when he broke his silence he became obligated to truthfully and completely state the facts within the limits of his information and knowledge in regard to the subjects referred to by his letter and enclosure transmitted with it, and not to withhold or distort anything that would tend to cause appellants to remain inactive.

Though one may be under no duty to speak, if he undertakes to do so, he must tell the truth and not suppress facts within his knowledge or materially qualify them. Fraudulent representations may consist of half-truths calculated to deceive, and a representation literally true is fraudulent if used to create an impression substantially false. In Long v. Krause, 105 Neb. 538, 181 N. W. 372, the court said: "A stranger, having secret knowledge of valuable mineral deposits in the waters of a private lake on land, may purchase the land without disclosing his superior knowledge, but a slight imposition on his part may terminate his privilege of silence; and, if he speaks falsely on matters relating to his secret knowledge and to the purpose of his purchase and thus deceives the owner into making a sale, he may be held liable for resulting damages." The opinion in that case states that this principle more than a century before was expressed in Turner v. Harvey, 1 Jac. (Eng.) 169, in this language: "* * * if an estate is offered for sale, and I treat for it, knowing that there

is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it; he acts for himself, and exercises his own sense and knowledge. But a very little is sufficient to affect the application of that principle. If a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate." See, also, Ash Grove Lime & Portland Cement Co. v. White, 361 Mo. 1111, 238 S. W. 2d 368; Boas v. Bank of America, 51 Cal. App. 2d 592, 125 P. 2d 620; Blackstock Oil Co. v. Caston, 184 Okl. 489, 87 P. 2d 1087; Associated Indemnity Corp. v. Del Guzzo, 195 Wash. 486, 81 P. 2d 516; Dennis v. Thomson, 240 Ky. 727, 43 S. W. 2d 18; Van Houten v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. S. R. 373; Restatement, Torts, Vol. 3, §§ 529, 550, pp. 67, 116; 37 C. J. S., Fraud, § 16, p. 246; 23 Am. Jur., Fraud and Deceit, § 83, p. 861.

The conclusion is reasonable that the motive that prompted Richards to give appellants the information he did was either to be of assistance to them in timely asserting any rights they claimed or had as heirs at law of the deceased that conflicted with the provisions of the will or that his purpose was to mislead them until an order of probate had been entered and the adjudication foreclosed a contest. It is difficult to develop any other reasonable alternative from the facts alleged in the petition and admitted by the demurrers.

If the motive was to be helpful, then it taxes credulity to believe that Richards would have delayed his letter until after the second publication of the notice with the date of hearing only a few days away and would also have neglected and omitted to have told appellants the most important fact that the date of the hearing on the probate of the will was November 3, 1950. He knew, as a lawyer, that prompt action by them could have secured a postponement of the hearing to a reasonable date in the future. The matters alleged by appellants are convincing that Richards desired and intended to

have appellants understand and believe that he was solicitous in good faith for their interests and rights, and that prejudice to them would not be permitted by him to intervene until they could secure from him the date of the hearing and arrange to appear and be represented. The substance of the petition in this regard is that appellants moved promptly as to this upon receipt of his letter. His silence to the request of their letter for information, and his failure to supply it or to delay the hearing, strengthens the conclusion that his letter to them was intended to cause inaction on their part until he could and did secure the probate of the will. The incomplete information given and the omissions of Richards are the "very little" mentioned in the Krause case that is sufficient to affect and make inapplicable the principle that he was under no obligation to appellants, and are the things that misled them and resulted in their failure to present their case at the time of the hearing of the petition for the probate of the will or to seek and obtain a postponement of the hearing until they could reasonably prepare and present their contentions at a later time. These constituted extrinsic fraud. United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, defines extrinsic fraud as follows: "But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court * * * or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff * * * these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing." See,

also, Purinton v. Dyson, 8 Cal. 2d 322, 65 P. 2d 777, 113 A. L. R. 1230; Laun v. Kipp, 155 Wis. 347, 145 N. W. 183, 5 A. L. R. 655; Larrabee v. Tracy, 21 Cal. 2d 645, 134 P. 2d 265; Keane v. Allen, 69 Idaho 53, 202 P. 2d 411; Jones v. Arnold, 359 Mo. 161, 221 S. W. 2d 187; Hewitt v. Hewitt, 17 F. 2d 716; State v. Vincent, 152 Or. 205, 52 P. 2d 203; Annotation, 88 A. L. R. 1201.

Richards become executor of the will and estate of the deceased on November 3, 1950. He was then executor, attorney for the estate, and the principal legatee and devisee of the deceased. There was then a fiduciary relationship between him and the estate of the deceased, her heirs and beneficiaries, and all persons interested therein. The statute of this state providing for the appointment of an executor recognizes that an executor is a trustee to execute a trust by this language: "* * * the county court shall issue letters testamentary thereon (a probated will) to the person named executor therein, if he is legally competent, and he shall accept the trust * * *." § 30-302, R. R. S. 1943. The personal representative of an estate and his attorney are officers of the court and both are fiduciaries in their relation to persons entitled to share in the estate of the deceased. In re Estate of Blochowitz, *supra;* Meade v. Vande Voorde, 139 Neb. 827, 299 N. W. 175, 137 A. L. R. 554; In re Estate of Rhea, 126 Neb. 571, 253 N. W. 876. See, also, Fidelity & Deposit Co. v. Lindholm, 66 F. 2d 56, 89 A. L. R. 279; In re Estate of Willenbrock, 228 Iowa 234, 290 N. W. 502; Reconstruction Finance Corp. v. Lee, 290 Mich. 328, 287 N. W. 757; 33 C. J. S., Executors and Administrators, § 142, p. 1099.

The status of Richards as a trustee required him to make a full disclosure of all facts within his knowledge which were material for appellants to know for the protection of their interest, if they desired to contest the will of the deceased and acted timely after receipt of the information from the trustee. In Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393, it is said: "It is the

duty of a trustee to fully inform the cestui que trust of all facts relating to the subject matter of the trust which come to the knowledge of the trustee and which are material to the cestui que trust to know for the protection of his interests."

This obligated Richards when he became executor and was the attorney for the estate to advise appellants, at least, of the fact and the date of the probate of the will of the deceased; the time allowed for and the manner of taking an appeal to the district court from the decree of probate of the county court; that a new and complete trial in reference to the validity of the will of the deceased could be had in the district court; and that he had prepared the will and the facts concerning the making and execution thereof as he claimed them to be. He was also duty bound to correctly give any information he had concerning the will and the estate of the deceased on request of appellants. His default in these respects constituted a breach of his trust and a fraud on appellants. The court said in Rettinger v. Pierpont, *supra:* "Every violation by a trustee of a duty required of it by law, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust." See, also, Larrabee v. Tracy, *supra;* Jones v. Arnold, *supra;* 23 Am. Jur., Fraud and Deceit, § 81, p. 858.

The equity powers are ample, independently of statute, to set aside a probate procured by fraud. In In re Estate of Jensen, 135 Neb. 602, 283 N. W. 196, this court said: "* * * the statute enumerating grounds upon which a judgment may be vacated after term does not provide an exclusive remedy, but such grounds are concurrent with independent equity jurisdiction. * * * since the county court has exclusive original jurisdiction in probate matters, it has ample power to set aside probate decrees procured by fraud, independent of statute * * *." The Supreme Court of the United States in

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238, 64 S. Ct. 997, 88 L. Ed. 1250, said on this subject: "From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. * * * This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule."

Appellees rely strongly on Miller v. Estate of Miller, 69 Neb. 441, 95 N. W. 1010; In re Estate of House, 129 Neb. 838, 263 N. W. 389; and In re Estate of Reikofski, 144 Neb. 735, 14 N. W. 2d 379. The facts of each of those cases make them unimportant in the consideration and decision of this case. The facts alleged in the petition exempt appellants from a conclusion of negligence and an absence of diligence contributing to the entry of the decree of probate of the will from which they now seek relief.

The judgment sustaining the demurrers of appellees to the petition of appellants and dismissing the petition should be and it is reversed. This cause should be and it is remanded with directions to the district court of Deuel County to overrule the demurrers of appellees to the petition and to proceed further as provided by law.

REVERSED AND REMANDED WITH DIRECTIONS.

GEORGIANA G. MASTERS, APPELLANT, V. CLARENCE E. MASTERS, APPELLEE.
52 N. W. 2d 802

Filed April 4, 1952. No. 33138.

1. **Divorce.** The right to receive alimony, payable in monthly installments, and the corresponding duty to pay it, being personal, are generally considered as terminating on the death of either of the parties, where no statute to the contrary exists and the judgment or decree is silent on the subject.
2. ———. A judgment for alimony in general terms requiring payments of $50 a month, until further order of the court, terminates on the death of the husband, where there are no directions or circumstances indicating an intent to provide for payments after his death.

APPEAL from the district court for Dawes County: EARL L. MEYER, JUDGE. *Affirmed.*

Edwin D. Crites and *Albert W. Crites,* for appellant.

Greydon L. Nichols, for appellee.

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

MESSMORE, J.

The plaintiff filed an application in the district court for Dawes County to revive a judgment entered in her favor in a divorce action. The second wife of the defendant Clarence E. Masters, deceased, as executrix of his estate, appeared specially, objecting to the jurisdiction of the court over the subject matter of the action. Two claims were filed by the plaintiff in the estate matter, one for monthly installments in arrears to the date of death of Clarence E. Masters, which payments were made by the executrix and the claim settled. The second claim is a contingent claim for alimony payments in monthly installments to be paid out of the deceased's estate for and during the natural life of the plaintiff. The trial court, after hearing had, sustained the special appearance of the executrix. The plaintiff filed a mo-

tion for new trial which was overruled. From the order overruling the motion for new trial, the plaintiff appeals.

It appears from the record that the plaintiff Georgiana G. Masters and Clarence E. Masters were married on July 1, 1901. The children of the parties have reached their majority and are self supporting, so no minor children are here involved. The plaintiff obtained an absolute divorce from the defendant on October 12, 1933. In the decree the following is stated: "And it is forther (further) ordered, adjudged, considered and decreed by the Court that under the property settlement heretofore made between plaintiff and defendant, which is hereby confirmed by the Court, there is hereby set over to the plaintiff as her sole and absolute property, the homestead, (which is described) * * * (subject to existing encumbrances), and all the household furniture * * * and * * * effects, and that defendant pay to the plaintiff as alimony, the sum of fifty dollars ($50.00) per month on or before the 15th day of each month, beginning on the 15th day of October, 1933, and until the further order of Court, * * *."

When the plaintiff and defendant were married, he was engaged in the watch-repair business, having a space in his uncle's drug store at Crawford, Nebraska. The plaintiff taught music in the public schools. Through the plaintiff's efforts and with some money that she had, they expanded the business to include jewelry. Subsequently the defendant took a course in optometry, returning to Crawford to practice his profession, where he remained for a while. He thereafter believed that Chadron, being without an optometrist, would afford him many more advantages. He went to Chadron and opened an office there, leaving the plaintiff to believe that the family would move to Chadron. Instead, he desired her to get a divorce, which she did on October 12, 1933. The record does disclose that through her efforts she was of great help and benefit to the defendant in his business and in getting a start in his profession.

In July of 1934, the defendant married Bernice E. Masters. At that time she was living with her mother, and working. She and the defendant lived in the mother's home until the mother passed away. At that time defendant's wife bought out the other heirs and became the sole owner of the real estate. She had previously, by inheritance, received a farm from her father. She loaned her husband money on occasions to help him build a new office and procure an automobile after his car had been taken from him by his first wife. In addition, a friend of hers loaned the defendant some money for the purpose of procuring a new office. Through their joint efforts they created an estate, the exact amount of which is not reflected in the record, but of a modest sum. At the time of defendant's marriage to his second wife he had no property other than the income received from his earnings from which he was obligated to pay the monthly alimony installments to the plaintiff. Defendant died on October 3, 1948.

The question presented in the instant case may be summarized as follows: Does the judgment of the district court, as a part of a decree of divorce obtained by a wife against her husband, which provides for the payment of a fixed monthly sum, as alimony, until further order of the court, automatically abate upon the death of the husband so as to release his estate from any further obligation to make the payments, even though the court has never entered a further order with respect to them? This precise question has not been previously before this court.

The plaintiff assigns as error that the order of the trial court was contrary to the evidence and to the law.

The following authorities are pertinent to a determination of this appeal.

In Metschke v. Metschke, 146 Neb. 461, 20 N. W. 2d 238, the wife was awarded $8,000 alimony payable $300 semiannually, requiring more than 13 years to complete the payments. It developed that in order to complete

the payments the husband would have to live out his life expectancy. The court said: "In considering small payments of alimony extending over many years, there are cases in which this may be a proper solution for the payment of alimony, but 'Generally, we do not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time.' Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51. See, also, Martin v. Martin, 145 Neb. 655, 17 N. W. 2d 625." This court disapproved the decree providing for payments of alimony long past the natural expectancy of life of one who is to provide such payments.

In the case of DeWaal v. DeWaal, 148 Neb. 756, 29 N. W. 2d 371, the court said: Great latitude is allowed the trial court under section 42-318, R. S. 1943, not alone in fixing the amount of alimony, but also in determining the manner of its payment. The court may provide that, in case of the death of the wife, the husband's estate shall only be liable for a definite amount. The wife was granted alimony of $6,500, payable at the rate of $60 a month, requiring a little over 9 years to complete the payments, but in case of the prior death of the wife, payment of installments not due should terminate, and in case of the prior death of the husband then his estate should be liable for a maximum of $5,039.74 as alimony. It will be observed that the decree specifically provided how the payments should be made and the liability of the husband for such payments determined therein. This court has taken the position that the trial court should be free to fix the amount of alimony and how it should be paid. The decree may provide that upon the death of the husband his estate may be held liable for a less amount, as in the case at bar; it being understood that any monthly payments of alimony which might be in default upon the date of death of the wife must be paid in full. See, also, Met-

schke v. Metschke, *supra;* Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51.

The foregoing-cited authorities of this state clearly indicate that in a decree of divorce where the parties contract or stipulate, or the court so determines, installment payments of alimony may be incorporated therein to be paid out of the estate of the husband, but not otherwise.

"The right to receive alimony and the duty to pay it are generally considered as terminating on the death of either of the parties where no statute to the contrary exists and the decree is silent on the subject, although the courts generally have the power to provide for the continuance of alimony after the husband's death." 27 C. J. S., Divorce, § 240, p. 999.

There are a number of cases which take the view that, in absolute divorce, a provision for regular, periodical payments to the wife for her maintenance and support should not relate to periods after the death of the husband; or, at least, that the presumption is that such a provision will not embrace such periods unless they are specifically included. See annotations to 18 A. L. R. 1040 and 101 A. L. R. 323. The court considers that in the absence of disclosing intention, alimony does not survive the former husband's death.

In Lennahan v. O'Keefe, 107 Ill. 620, the decree with reference to annual payments provided the husband was required to pay his wife $400 per annum, payable semi-annually, as alimony, until the further order of the court. It was held that under the reservation in the decree giving alimony, as well as under the statute, the court was authorized to declare the alimony terminated, that is, it abated upon the death of the husband. See, also, Stahl v. Stahl, 114 Ill. 375, 2 N. E. 160.

Alimony decreed upon the dissolution of a marriage, if payable in installments, is, unless otherwise specially provided, an allowance for the support of the beneficiary during the joint lives of herself and her

divorced husband. See, Craig v. Craig, 163 Ill. 176, 45 N. E. 153; Maxwell v. Sawyer, 90 Wis. 352, 63 N. W. 283; Wallingsford v. Wallingsford, 6 Harr. & J. (Md.) 485.

Other cases take the view that whether a provision for periodical payments to the wife in absolute divorce, for support and maintenance, abates on the husband's death or not, depends upon circumstances. This is referred to as the broader view. We see no necessity to separately cite cases adopting the broader view as some of them appear in the following cited cases.

In Murphy v. Shelton, 183 Wash. 180, 48 P. 2d 247, the court held: "A judgment for alimony in general terms requiring payments of $50 a month, without specifying the period of the payments, terminates on the death of the husband, where there are no directions or circumstances indicating an intent to provide for payments after his death." See, also, Roberts v. Higgins, 122 Cal. App. 170, 9 P. 2d 517; Miller v. Superior Court, 9 Cal. 2d 733, 72 P. 2d 868; Borton v. Borton, 230 Ala. 630, 162 So. 529, 101 A. L. R. 320; Storey v. Storey, 125 Ill. 608, 18 N. E. 329, 1 L. R. A. 320, 8 Am. S. R. 417.

In the instant case the property settlement of the parties was agreed upon by them. The trial court, after considering the circumstances, confirmed this agreement and decreed judgment accordingly. It is obvious that the intention of the plaintiff and defendant, at the time they negotiated the property settlement in the divorce action, was that the installments of $50 a month were to be paid out of the income derived by the defendant from his profession. He had no other property. The trial court apparently understood and recognized the fact as evidenced by the decree.

The plaintiff claims, in an affidavit appearing in the record, that the defendant was to pay her $50 a month alimony which would be increased to $100 a month when his income and business had progressed to the extent that it was warranted, and that such amounts would

be paid during the natural life of the plaintiff. However, she made no effort, from the date of the rendition of the decree in her divorce action in October 1933, to attempt to have the decree modified to include what she claimed. The defendant died on October 3, 1948, and at that time the alimony payments were in arrears $1,243.37, which clearly indicates that the plaintiff, for a period of at least two years prior to defendant's death, was not interested in securing a modification of the decree.

Under either view, whether the same be called a restricted view as some of the cases indicate or the broader view, the plaintiff, under the circumstances of this case, would not be entitled to the relief she seeks.

We conclude the trial court did not err in sustaining the special appearance of the executrix of the estate of Clarence E. Masters, deceased, and the judgment of the trial court should be and is hereby affirmed.

AFFIRMED.

JOSEPH J. ROSSBACH, APPELLANT, V. JOHN L. BILBY, APPELLEE.
52 N. W. 2d 747

Filed April 4, 1952. No. 33143.

1. **Appeal and Error.** This being an equitable action it will be tried de novo in this court pursuant to section 25-1925, R. R. S. 1943, and we will reach an independent conclusion without referring to the findings of the district court; subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. **Joint Adventures.** To constitute joint adventure, there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control over

the agencies used therein, though one may entrust performance to the other.

3. ———. More convincing evidence is required to prove existence of a joint adventure where alleged joint adventurers are the only litigants than where the controversy is between a third party and the joint adventurers.

4. ———. Evidence examined and found insufficient to establish a joint adventure.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Paul I. Manhart and *Henry C. Winters,* for appellant.

Fred N. Hellner, for appellee.

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

MESSMORE, J.

Joseph J. Rossbach, plaintiff, brought this action against John L. Bilby, defendant, in the district court for Douglas County to establish an oral agreement of a joint adventure between the plaintiff and defendant for the purpose of dealing in and supplying stone to purchasers who might require such product, for an accounting and determination of the rights of the parties, and for damages. Trial was had to the court. The court rendered judgment, finding generally in favor of the defendant and against the plaintiff. The plaintiff did not file a motion for new trial. Plaintiff appeals.

For convenience we will refer to the parties as they appear in the district court, and in some instances by their last names as a matter of clarity.

The principal assignment of error contended for by the plaintiff is that the trial court erred in holding the plaintiff had not proved his oral contract to establish a joint adventure as pleaded in his petition, and in dismissing the plaintiff's cause of action at plaintiff's costs.

This action being equitable in nature comes under the provisions of section 25-1925, R. R. S. 1943, and is

here for review de novo. Byram v. Thompson, 154 Neb. 756, 49 N. W. 2d 628.

The evidence on many material questions of fact is conflicting. This is particularly true with regard to the testimony of the plaintiff and defendant. The record presents a factual situation to which the following is applicable: "This being an equitable action it will be tried de novo in this court pursuant to section 20-1925, Comp. St. 1929, and we will reach an independent conclusion without referring to the findings of the district court. Subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite." Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393. See, also, Byram v. Thompson, *supra.*

The plaintiff not having filed a motion for new trial, this court has jurisdiction and authority to try the case de novo on its merits in the manner provided by section 25-1925, R. R. S. 1943, but in the absence of a motion for new trial timely filed, it cannot review, consider, or pass upon errors of law which occurred during the trial. See Molczyk v. Molczyk, 154 Neb. 163, 47 N. W. 2d 405.

"A joint adventure is a legal relation of recent origin created by the American courts and is generally described as an association of persons to carry out a single business enterprise for profit." 48 C. J. S., Joint Adventures, § 1, p. 801.

"Although it has been held that a joint adventure and a partnership are separate legal relationships, it has also been held that they are governed by the same rules of law. The principal difference is that a joint adventure is usually, but not necessarily, limited to a single transaction." 48 C. J. S., Joint Adventures, § 1, p. 806. It is in the nature of a limited partnership.

See, Bank of Cedar Bluffs v. LeGrand, 127 Neb. 183, 254 N. W. 892; Soulek v. City of Omaha, 140 Neb. 151, 299 N. W. 368. It can only exist by the voluntary agreement of the parties to it; nor can it arise by mere operation of law. It is said to exist where persons embark on an undertaking without entering on the prosecution of a business as partners strictly, but engage in a common enterprise for their mutual benefit. Bosteder v. Duling, 117 Neb. 154, 219 N. W. 896; Soulek v. City of Omaha, *supra.*

The existence of a joint adventure is a question of fact under the evidence, and further, more convincing evidence is required to prove existence of a joint adventure where alleged joint adventure parties are the only litigants than where the controversy is between a third party and the joint adventurers. The burden of establishing the joint adventure is on the plaintiff. See, Baum v. McBride, 143 Neb. 629, 10 N. W. 2d 477; Soulek v. City of Omaha, *supra.*

To constitute joint adventure there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other. See Soulek v. City of Omaha, *supra.*

The question presented in this appeal is whether or not a joint adventure existed.

With the legal principles set forth in the foregoing authorities in mind, we proceed to a review of the evidence.

The record shows that Rossbach, the plaintiff, a resident of Omaha since 1906, operated the Nebraska Stone Company, a corporation, for 30 years. Rossbach testified that sometime in April 1948, he was in the office of one Harry Stitt, a brother-in-law of the defendant Bilby, when the defendant came in and inquired of him

what he was doing, to which he replied: "Not much of anything, I am selling building material." The defendant then said: "Why don't we go into the stone business?" The plaintiff replied: "That is an idea." On May 4, 1948, the plaintiff was in the same office when the defendant came in. The defendant said to Stitt: "Harry how much do you want for this office?" Stitt had a vacant room in the building. Stitt said: "Who wants to know?" The defendant said: "* * * Rossbach and I want to go into the stone business, and we want an office." Stitt replied: "* * * I wouldn't rent it to anybody, but as a favor I will rent it for $25.00." Nothing further happened until June 12, 1948, and the plaintiff called the defendant to find out if he had given up the idea. The defendant said he would see him Sunday, so the plaintiff went to see the defendant on Sunday, June 13, 1948. Rossbach testified further that they had a conversation with reference to going into business. Bilby told the plaintiff to come to his store yard the next day at 9 a. m., which plaintiff did. Bilby was not there but telephoned to tell plaintiff that he was busy and would call later, which he did not do. On June 20, 1948, plaintiff went to Bilby's house. Bilby was favorable to making further arrangements. He said he would put up $5,000, and he wanted 5 percent return on his money, plaintiff was to take the rest. Plaintiff said that was a fair proposition. Plaintiff was to manage the stone business and, in addition, undertake the bookkeeping for such business and defendant's contracting business. Plaintiff told the defendant he would draw $50 a week for doing the bookkeeping, which was aside from the management of the stone business. They agreed to go into the stone business at that time. Defendant insisted on 5 percent return on his money. Rossbach said that going in on a fifty-fifty basis would be better, and instead of plaintiff operating the business alone defendant should protect his interest and see what was going on, and what the money was spent for.

Defendant asked Rossbach what assurance he had that plaintiff would remain with the business. Plaintiff told him that it was understood that he was going into the stone business as a permanent venture. They agreed to go into the business for a year and at the end of that time if it was successful they would incorporate. On June 21, 1948, plaintiff went to the defendant's construction yard. There was no building for an office and defendant asked plaintiff to inquire of the Reed Ice Cream Company to see if one of their vacant buildings could be procured. Nothing further was said or done. On July 8, 1948, defendant called plaintiff about the Reed building. Plaintiff told him that they could not procure space there. Plaintiff also told defendant he had another chance to go into business and he wanted to know if they were going ahead with the stone business. Defendant said they were. Nothing further occurred during the summer. On September 14, 1948, the parties went to a place where an office was being built by the defendant. Plaintiff told the defendant it was not large enough, but defendant said it was. Defendant then wanted to know what name should be used in the business. Rossbach told defendant they would take the name "Nebraska Stone Supply Company," not the Nebraska Stone Company. They agreed on that. Rossbach's name was synonymous with the Nebraska Stone Company. The matter continued along until the defendant called plaintiff on October 13, 1948. He informed plaintiff that he knew where some stone could be sold, and asked plaintiff to contact the party which he did and made the sale. The office was completed, and Rossbach started to work. They concluded they needed some furniture which plaintiff furnished and put in the office. They then started operation. Stationery was prepared, and they advertised "thirty years of experience in every phase of the stone industry" in letters signed by J. J. Rossbach which were sent out to the trade in which they explained their

line and business under the name of Nebraska Stone Supply Company.

About June 20, 1949, Bilby called in Mrs. Futcher to take over the bookkeeping, and told plaintiff to go out and sell stone. Then, during the morning of August 12, 1949, Bilby called Rossbach into the office and said: "I don't want you any more," and told him they were through.

On cross-examination the plaintiff testified that he was an employee of the defendant only to the extent of the bookkeeping arrangement. He was noted on the payroll of the company as an employee; likewise, he was noted on the social security records as an employee, and paid the social security premium required of him. On August 2, 1949, he signed a statement prepared by Mrs. Futcher wherein he was reimbursed for two trips made in behalf of the company, for a desk which was purchased from him, and his salary to date based on $50 a week. When he left the office he made no statement to defendant that he was a partner or engaged in a joint adventure, and that he was not subject to have his services terminated. Further, when Mrs. Futcher took over the bookkeeping in June, he continued to draw his weekly salary of $50 until such time as he signed the release. At that time he was engaged in teaching the men how to handle the saw to cut stone, and other matters which were not incident to management of the business.

Bilby testified that he was acquainted with the plaintiff for a number of years, and met him on the dates as testified to by him, as near as he could remember. Prior to meeting the plaintiff he had engaged to some extent in the stone business, and was jobbing stone as well as being engaged in the construction business. His business had increased to the extent that he and his wife were required to work on the books at night, to enable him to make his estimates and do work incident to his business in the daytime. He owned a lot and yard at 3730 Lake

Street, which is now a stoneyard. He testified that he was down there working one day when the plaintiff came over to the yard. The plaintiff had been endeavoring to get some office space from Stitt who had divided the space in his building. The plaintiff at that time had an architect with him. He told the defendant that the architect wanted him to sell stone on commission, but he did not want to. Bilby further testified that Rossbach asked him why he did not go into the stone business instead of jobbing stone. He told plaintiff the only reason he would go into that business in a large way, or build an office, was to make an arrangement so that his books could be taken care of and he could carry on the work of the construction company in the daytime. Rossbach said he would certify to the public as a bookkeeper and that he could take care of the defendant's books, with the amount of business he transacted, in 15 minutes a day. They dropped the subject. Rossbach called at Bilby's home on different occasions in the morning, evening, and on Sunday, urging him to go ahead and build an office and go into the stone business instead of jobbing stone, which he finally did.

With reference to the employment of Rossbach, Bilby testified that Rossbach said he was selling some kind of special line that took him out on the road once in a while and he was getting pretty old for that sort of work. His car was practically worn out, and he wanted to get something to do in town. He agreed to go to work for Bilby for $50 a week. He was to take care of the books of the construction company, manage and operate the stoneyard, and go out and sell stone. It was to be Bilby's stone business. The defendant denied entering into any partnership arrangement or joint adventure with the plaintiff, or that he would take the plaintiff into the business and share the profits. He testified that they were to try out the arrangement for a year. There was no mention of incorporating. Rossbach sold some stone before reporting to work, and sold some after he

took the job. Bilby further testified that he was unable to get Rossbach to go out and sell stone, and that he would not call on the list of prospects they had. On August 1, 1949, Bilby gave Rossbach a list of people to call on, and he did not call on them. About 10 o'clock the morning of August 2, 1949, Rossbach was not at the office. Bilby called him in and asked him for his keys, and told him "* * * you are through; you are fired." He replied "You have not heard the last of it." He then signed a statement prepared by Mrs. Futcher in full for his salary through August 2, and other items, although Rossbach testified that he was discharged on August 12, 1949.

Bilby further testified that he had met Rossbach in Stitt's office many times. He had no conversation with Rossbach in Stitt's office about going into the stone business. Stitt and an architect were considering going into the business and wanted Rossbach to work for them on a commission. Bilby also testified that he did not agree to put in any certain amount of capital; that he did borrow $4,000 at one time, $2,000 of which was used in the construction business and $2,000 in the stone business; and that the stone company paid the interest on its loan to the bank. He had as high as $15,000 in the stone business at one time. He denied suggesting the use of the name Nebraska Stone Company or Nebraska Stone Supply Company. He testified that when he asked Rossbach "How are we doing?" he used the term "we" without any particular significance. He did talk to Rossbach about purchasing a saw that could be used in the business. It was impossible for him to tell by Rossbach's books the status of the business, and he noticed that the entries by the plaintiff were not kept up, but appeared up to February 1, 1949. As a result he obtained the services of Mrs. Futcher to keep the books.

The defendant's wife testified that on several occasions Rossbach came to their home to see the defendant. She was under the impression that he was seeking

employment. It was a task for her to keep the books and tend to her family obligations. She kept the social security records until Mrs. Futcher took over the bookkeeping. She still did some book work at the office, and it was apparent to her that Rossbach resented her coming to the office.

Harry W. Stitt testified that he believed Rossbach worked for Bilby doing book work either in 1948 or 1949; that no conversation was had in his presence with reference to Rossbach and Bilby going into the stone business at any time; and that he remembered that they wanted to rent a building and he told them they could have the space in his office for $25 a month.

From an analysis of the evidence, and in the light of the authorities heretofore cited, we conclude that the evidence is insufficient to establish a joint adventure. Other assignments of error need not be discussed. The decree of the trial court should be, and is hereby, affirmed.

AFFIRMED.

EUGENE RAMSEY, APPELLANT, V. KRAMER MOTORS, INC., A CORPORATION, ET AL., APPELLEES.
52 N. W. 2d 799

Filed April 4, 1952. No. 33153.

1. **Workmen's Compensation.** In a workmen's compensation case the insurance carrier is bound by a judgment against the insured whether the carrier is a party to the action or not.
2. ———. The provision of the workmen's compensation law which makes the contract of an insurance carrier a direct promise enforceable in the name of one entitled to compensation benefits effectually makes of the carrier a proper party defendant in an action to recover benefits.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Hans J. Holtorf and *Robert M. Harris,* for appellant.

Lovell & Wiles, and *Mothersead, Wright & Simmons,* for appellees.

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

YEAGER, J.

This is an action by Eugene Ramsey, plaintiff and appellant, against Kramer Motors, Inc., a corporation, Fireman's Fund Indemnity Company, incorporated, and Western Casualty and Surety Company, incorporated, defendants and appellees. The action is for the recovery of benefits which plaintiff claims are due him from the defendant Kramer Motors, Inc., his employer, under the workmen's compensation law. The date of the alleged accident which is the basis of the action is uncertain. The evidence indicates an occurrence at some time between July 25, 1950, and a date near November 6, 1950. The defendant Western Casualty and Surety Company was the workmen's compensation insurance carrier for Kramer Motors, Inc., to October 23, 1950, at 12:01 a. m. The defendant Fireman's Fund Indemnity Company was the compensation insurance carrier thereafter. Because of the uncertainty of the date of the alleged accident the two carriers were made parties defendant in the action. Hereinafter when the defendants are not mentioned together Kramer Motors, Inc., will be referred to as the defendant, Western Casualty and Surety Company as Western, and Fireman's Fund Indemnity Company as Fireman's.

The action was first tried before a single judge of the workmen's compensation court. An award was there made in favor of plaintiff. An appeal was taken from this award to the district court. The action was tried in the district court de novo. Following the trial the award of the workmen's compensation court was set aside and a judgment rendered dismissing plaintiff's petition with prejudice. From this judgment the plaintiff

has appealed. This judgment was dated September 10, 1951, and filed September 11, 1951.

The journal entry contained no findings except a general one in favor of defendants.

On motion of Western, which motion was filed November 13, 1951, the district court on November 13, 1951, by order made a nunc pro tunc finding as of September 10, 1951, that the alleged accident which is the basis of the action occurred on or about November 6, 1950.

Western and Fireman's were not parties to the action in the workmen's compensation court. They were made parties by order of the district court filed July 16, 1951, pursuant to request of the defendant. No objection to the application for and no exception to this order was taken at the time. The first exception thereto appears in the motion for new trial.

The plaintiff seeks a reversal on four grounds. He says (1) that the court erred in causing Western and Fireman's to be made parties defendant; (2) that the court erred in failing to find that plaintiff's disabilities were the proximate result of an accident arising out of and in the course of his employment; (3) that the court erred in not making findings to support the judgment; and (4) that the court erred in excluding testimony as to the nature and extent of plaintiff's injuries.

As to the first, plaintiff contends that he was required to meet three defendants instead of one and was thereby prejudiced. We pass over the question of the timeliness of the objection and limit our consideration to its merits. He points to no authority the effect of which is to say that these two companies were not, as to his alleged cause of action and his evidence in support thereof, proper parties defendant.

His theory appears to be that they were not necessary parties, therefore they were not proper parties.

It is true that neither of them was a necessary party. The workmen's compensation law clearly so indicates.

The workmen's compensation insurance carrier is bound by a judgment against the insured whether the carrier is a party to the action or not. In this connection section 48-146, R. S. Supp., 1951, contains the following: "* * * jurisdiction of the insured for the purpose of this act shall be jurisdiction of the insurer, and * * * that the insurer shall in all things be bound by the awards, judgments, or decrees rendered against such insured."

Another provision of this same section of the statute makes a workmen's compensation insurer directly liable to an accidentally injured employee of the insured. In reference to the insurance contract the statute provides: "Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name."

The promise contemplated is of course to respond to liability proved to exist under the terms of the contract in an action by an employee against the insurance carrier of the employer. The statute makes of the insuring agreement a primary obligation of the insurer to the employee of the insured.

It ought not therefore to be said that where one who has by law been made to primarily assume an obligation with another such one is not a proper party to defend against enforcement of the obligation. We hold that Western and Fireman's were properly made parties defendant and that the first assignment is without merit.

The determination upon the second assignment requires an examination of the evidence.

As to what occurred as the basis of this action there is no substantial dispute. As to when it happened there is not dispute but uncertainty. The matters of major importance are the conditions which followed the occurrence and their cause or causes.

On some day between July 25, 1950, and about November 6, 1950, the plaintiff, an employee of the defendant, and another employee were engaged in unloading crated automobile motors from a truck. These

motors were estimated to weigh from 300 to 500 pounds. The height of the truck from which they were unloaded was about 3½ feet. The crated motors were between 3 and 3½ feet in length. No information as to the other dimensions appears. As the crates were unloaded it appears that their length was crosswise of the truck. The unloading was onto a truck placed below the point of unloading. This truck was about 6 inches in height. With plaintiff at one end and the other employee at the other the crates were removed from the motor truck and down to the other truck which was there to receive them. Whether they were lowered by being carried downward or not is not made clear. The record is that they were eased to the lower truck.

As a crate was being lowered plaintiff says that he felt pain in the middle of his back somewhat below his belt line. His description indicates that it was not severe pain. He and his fellow employee testified that at the time he called the attention of the fellow employee to the pain. There was no evidence that he was disabled at the time. Apparently one or more crates were thereafter unloaded. The incident was not mentioned again to anyone until much later. Whether or not he called the attention of anyone to the matter before November 27, 1950, is not certain. On November 27 he was hospitalized and at that time and thereafter his condition came under the attention of several doctors.

Two doctors on behalf of plaintiff described his condition as a herniated intervertebral disc between the fifth lumbar and the first sacral segments of the vertebrae with disability which need not be described here. One doctor on behalf of the defendants likewise described it, and also described an arthritic condition which he found in close proximity. He said however that there was no aggravation of the herniation by the arthritis.

Significantly while the evidence of these witnesses of plaintiff and defendants is in substantial accord that

plaintiff has a disability and as to its character, neither this evidence nor that of any other witness relates that disability, in the sense that it must be related to be subject to recompense under the workmen's compensation law, to the alleged accident of which plaintiff complains. None of these witnesses on the basis of a hypothesis or otherwise has testified directly or given it as his opinion that the herniation of this disc was produced or flowed from any accident occurring while plaintiff was in the employ of the defendant.

The court therefore could not properly do other than to fail to find that plaintiff's disabilities were the proximate result of an accident arising out of and in the course of his employment.

This conclusion renders unnecessary a consideration of the question of whether or not the occurrence complained of was an accident within the meaning of the workmen's compensation law.

The court found generally for the defendants and against the plaintiff. As is clear from what has already been said this was the only possible proper finding. It is true that there could have been elaboration but it is not pointed out how that could have been beneficial to plaintiff or failure in that respect could or did operate to his prejudice.

From an examination of the record in this case the findings of fact were the only ones which could have been properly made. They were consistent with and in support of the judgment. The third assignment is therefore without merit.

The fourth assignment challenges the propriety of the exclusion of the offered testimony of two doctors in explanation of the character and extent of plaintiff's injuries and disability on rebuttal.

Whether or not the rejection of the evidence thus offered on the basis of the objections made was error does not require consideration here. If it was error it was such without prejudice in view of the fact already

pointed out that there was an entire failure of proof of injury sustained by plaintiff in the course of his employment by the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

HAZEL M. ANDERSON, APPELLEE, V. THE BITUMINOUS CASUALTY COMPANY, APPELLANT, THE STATE OF NEBRASKA, APPELLEE.

52 N. W. 2d 814

Filed April 11, 1952. No. 33126.

1. **Sheriffs and Constables.** Section 23-1704, R. S. 1943, gives a sheriff authority to call a private citizen into the service of the county to aid him for the purposes therein provided.
2. **Sheriffs and Constables: Counties.** When a private citizen is impressed into service by the sheriff for any of those purposes a contract of employment with the county results and the county so employing a citizen becomes liable to him for the reasonable value of the services he renders at the direction of the sheriff.
3. **Workmen's Compensation.** Any citizen so called into service who receives an injury which arises out of and in the course of such employment is entitled to compensation under the provisions of our workmen's compensation law.
4. **Officers.** A citizen who is actually called into service by the sheriff under the authority of this statute and assists him as a deputy under color of an appointment is such officer de facto, although his appointment was not made with the formalities required by statute.
5. **Appeal and Error: Workmen's Compensation.** Under the provisions of section 48-125, R. S. 1943, where an employer appeals to the Supreme Court from an award of the district court and fails to obtain any reduction in the amount of such award, the Supreme Court shall allow the employee a reasonable sum for attorney's fee for the proceedings in the Supreme Court.

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

Kennedy, Holland, DeLacy & Svoboda, Edwin Cassem, Harry R. Henatsch, and *Ferneau & Kiechel,* for appellant.

Davis, Stubbs & Healey, Betty Jean Sharp, and *Clarence S. Beck,* Attorney General, and *Clarence A. H. Meyer,* for appellees.

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

WENKE, J.

This is a compensation claim instituted in the Nebraska Workmen's Compensation Court by Hazel M. Anderson, widow of William M. Anderson, deceased, against The Bituminous Casualty Company, a corporation, insurance carrier for workmen's compensation for the county of Nemaha, Nebraska, and the State of Nebraska. Claimant contends William M. Anderson, upon whom she alleges she was wholly dependent for support, died on May 14, 1949, as a result of injuries suffered on May 12, 1949, in the course of and arising out of his employment as a law enforcement officer of the county of Nemaha and the State of Nebraska. She asked that she be granted such relief as she was entitled to under the workmen's compensation law.

The district court for Nemaha County, on appeal thereto, found William M. Anderson died as a result of injuries suffered in the course of and arising out of his employment with Nemaha County as a deputy or assistant to the sheriff thereof; that claimant was the widow of decedent and wholly dependent upon him for her support; and that The Bituminous Casualty Company, being the insurance carrier of workmen's compensation for Nemaha County, was liable for such compensation as the county is obligated to pay. Based on such findings the court rendered a decree in favor of the claimant and against The Bituminous Casualty Company for payments in the sum of $22 per week for a period of 325 weeks starting on May 12, 1949, for medical and hospital expenses in the sum of $286, and for burial expenses in the sum of $250. Her claim against the State of Nebraska was dismissed.

The Bituminous Casualty Company, a corporation, filed a motion for new trial and, from the overruling thereof, took this appeal. Claimant has cross-appealed from that part of the decree dismissing her claim against the State of Nebraska.

While differently stated in the assignments of error, the question presented by this appeal is, was William M. Anderson at the time he was injured an employee of Nemaha County within the meaning of the Nebraska Workmen's Compensation Act?

For the purpose of determining this question we consider the record de novo. See Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212.

Admittedly, or without dispute in the evidence, the record discloses that William M. Anderson, who will hereinafter be referred to as decedent, and Hazel M. Anderson, claimant, were husband and wife and lived together in their home in Auburn, Nebraska; that claimant was wholly dependent upon decedent for her support; that they were respectively 53 and 52 years of age and had one son, Mac, Jr., age 27; that the decedent and his son, who will herein be referred to as the Andersons, operated a garage and machine shop in Auburn; that about a week before May 12, 1949, a Reverend Edward D. Byrd, who did not live in Auburn and was not known there, left a car in the Andersons' garage for the purpose of having some repairs made thereon; that for various reasons, not here material, the Andersons concluded that the car might have been stolen and therefore got in touch with Donald G. Grieb, a trooper of the Nebraska Safety Patrol, who was at that time stationed in Auburn and who will hereinafter be referred to as the patrolman; that the patrolman checked the car and discovered it had been stolen and requested the Andersons to get in touch with him whenever anyone came to get the car; that the Andersons called the patrolman on Wednesday, May 11, 1949, advising that the party was there to get the car; that the patrolman

and Harvey H. Kuenning, who was then sheriff of Nemaha County and who will hereinafter be referred to as the sheriff, proceeded to the Andersons' garage where they found a party of four who had come to get the car; that out of the group of four the officers arrested Reverend Byrd and he was turned over to the sheriff who placed him in the county jail in Auburn; that sometime before 8 a. m. the next morning, which was Thursday, May 12, 1949, by use of a dummy, Byrd tricked the sheriff and managed to escape from the jail; that the sheriff, upon being released by his wife, having been locked in a jail cell by the prisoner, called the patrolman; that the patrolman immediately reported to the jail; that after a brief discussion with the sheriff the patrolman called decedent; that in response to the call the Andersons reported to the jail and joined in the hunt for the escaped prisoner; that the Andersons continued in that search throughout the day and into the night; that in the evening decedent joined the patrolman and assisted him with a road block at a point on the highway about two miles north of Auburn; that sometime after 9:30 p. m. of that evening, while continuing to assist in conducting this road block, decedent was hit by a jeep and injured; and that, as a result of the injuries, he died on Saturday, May 14, 1949.

With reference to the sheriff having employed decedent to assist him in apprehending the escaped prisoner, we think the evidence, although somewhat in dispute, supports a finding as follows: That after the prisoner tricked the sheriff and managed to escape, the sheriff, upon being released from the cell by his wife, took immediate steps to retake the prisoner; that he called the patrolman, who responded; that after the patrolman arrived they discussed plans to get some help to search for the escaped prisoner; that the sheriff asked who the patrolman thought they could get; that the patrolman suggested the Andersons since they knew the prisoner, who was a stranger in Auburn; that the sheriff

suggested to the patrolman that he call the Andersons and have them come to the jail; that the patrolman called the Andersons, talking to decedent, telling him that Byrd had escaped and that they needed help in finding him; that decedent said they would be right up; that shortly thereafter the Andersons came to the jail; that the sheriff was present when they arrived; that they, including the sheriff, then discussed what they were going to do and the best way to do it; that all that day decedent joined in the search; that after supper, with the consent and approval of the sheriff, decedent joined the patrolman in maintaining a road block some two miles north of Auburn; and that while engaged in this work with one Elmer Chapp, who had replaced the patrolman when the latter was called into Auburn, decedent received the injuries which resulted in his death.

The evidence also shows that after his prisoner escaped the sheriff took full charge of trying to recapture him. That the sheriff thought it presented an emergency and that it was an urgent matter to retake the prisoner, which it was, is fully evidenced by what he did during the day. The sheriff not only called on the Nebraska Safety Patrol for help but put out a general alarm in the community, asked a National Guard unit, that was having a meeting, to join in the search, called on the police officers of Auburn for help, and formed a road block on the four highways out of Auburn, one in each direction, to prevent the escaped prisoner from getting out of the community by means of a car.

Section 48-115, R. S. 1943, of the Workmen's Compensation Act, insofar as here material, provides:

"The terms 'employee' and 'workman' are used interchangeably and have the same meaning throughout this act. The said terms include the plural and all ages and both sexes, and shall be construed to mean:

"(1) Every person in the service of the state or of any governmental agency created by it, under any appointment or contract of hire, expressed or implied, oral or

written, but shall not include any official of the state, or any governmental agency created by it, who shall have been elected or appointed for a regular term of office, or to complete the unexpired portion of any regular term; * * *."

Section 23-1704, R. S. 1943, relating to the authority of sheriffs, provides: "The sheriff and his deputies are conservators of the peace, and to keep the same, to prevent crime, to arrest any person liable thereto, or to execute process of law, they may call any person to their aid; and, when necessary, the sheriff may summon the power of the county."

Under circumstances such as here, where a person under arrest had escaped and the sheriff was in charge of and organizing the search to retake him, we think, under this statute, the sheriff had authority to and was justified in securing the services of the Andersons, who knew the escaped prisoner, a stranger in the community of Auburn, on sight. This, the evidence establishes, the sheriff did and we find decedent, at the time of his injuries, was, at the request of the sheriff, assisting him in his attempt to retake Byrd who had, at the time decedent was injured, not been recaptured.

This same result has been reached in other jurisdictions under similar fact situations and like or comparable statutes. In Gulbrandson v. Town of Midland, 72 S. D. 461, 36 N. W. 2d 655, the South Dakota court said:

"The statutes clothe either a sheriff or a town marshal with authority to call a private citizen into the service of the county or town respectively. By SDC 12.1001 it is provided 'The sheriff shall keep and preserve the peace within his county, for which purpose he is empowered to call to his aid such persons or power of his county as he may deem necessary. * * *' And by SDC 45.1112 it is provided '* * * and each town marshal shall possess, within the jurisdiction of the municipality,

all the powers conferred by law upon sheriffs to suppress disorder and keep the peace.'

"We are of the opinion that when a private citizen is so impressed into service by a peace officer (cf. SDC 34.1618) a contract of employment results, and the county or town so employing a citizen becomes liable to him for the reasonable value of the service he renders by direction of such officer and therefore one who receives an injury which arises out of and in the course of such an employment is entitled to compensation as provided in the South Dakota Workmen's Compensation Law. Such is the current of authority in other jurisdictions. County of Monterey v. Rader, 199 Cal. 221, 248 P. 912, 47 A. L. R. 359; Tomlinson v. Town of Norwood, 208 N. C. 716, 182 S. E. 659; Mitchell v. Industrial Commission of Ohio, 57 Ohio App. 319, 13 N. E. 2d 736; Millard County v. Industrial Commission, 62 Utah 46, 217 P. 974; Village of West Salem v. Industrial Commission of Wisconsin, 162 Wis. 57, 155 N. W. 929, L. R. A. 1918c, 1077; Vilas County v. Monk, 200 Wis. 451, 228 N. W. 591 and Balinovic v Evening Star Newspaper Co., 72 App. D. C. 176, 113 F. 2d 505.

"In writing of the cases we have cited supra, in Eaton v. Bernalillo County, 46 N. M. 318, 128 P. 2d 738, 742, 142 A. L. R. 647, Mr. Justice Sadler said, 'In each of the cases relied upon by appellee and cited, supra, the court was presented with facts affording jurisdiction (justification) to the sheriff, or his deputy, in impressing the service of a bystander in arresting, securing or conveying some dangerous character suspected of or charged with a violation of the criminal laws. Under such circumstances, it was logical to hold that the person injured while so assisting occupied the status of a deputy sheriff, and, hence, of an employee, thereby entitled him or his dependents, to compensation.' And again at a later point in that opinion in writing of the element of pay, it was said, 'It all comes back to the question whether the services of decedent

were commandeered. If so, then we may assume he would be entitled to the reasonable value of his services for the period employed, thus supplying the much discussed wage element.' "

As stated in Sexton v. County of Waseca, 211 Minn. 422, 1 N. W. 2d 394: "While there was no pressing emergency, yet under the general power of the sheriff to keep and preserve the peace of the county, to pursue and apprehend all felons, execute all process, etc. (Mason St. 1927, § 907), he had ample authority to engage a person to go with him in order that he might safely conduct his prisoner from Mobridge to Waseca."

And in County of Monterey v. Industrial Accident Commission, 199 Cal. 221, 248 P. 912, 47 A. L. R. 359: "Clearly the deceased was in the service of the county of Monterey by the appointment of its sheriff, who was vested with power to confer upon the deceased the authority of a deputy sheriff or peace officer of said county. (Pol. Code, sec. 4157, subd. 5; Pen. Code, secs. 150 and 723.) The sheriff may, without organizing a formal posse comitatus, orally summon to his assistance any person when he deems it necessary to effect an arrest. (2 R. C. L., p. 491.) The person thus summoned has all the authority of a formally deputized officer in such matter, and is in fact a de jure deputy sheriff. The deceased was at the time he was slain in the service of the county under appointment by a county officer, to wit, the sheriff." See, also, Shawano County v. Industrial Commission, 219 Wis. 513, 263 N. W. 590; Mitchell v. Industrial Commission of Ohio, 57 Ohio App. 319, 13 N. E. 2d 736.

Decedent was not formally deputized; that is, he was not appointed and confirmed nor did he take an oath or give bond. While this fact is not particularly raised and discussed by appellant it does appear in the evidence and is mentioned as a fact in the brief. But this fact would not defeat recovery. Under situations, such as

here, it is seldom practical to go through these formalities.

As stated in Millard County v. Industrial Commission, 62 Utah 46, 217 P. 974: "* * * it is generally held that one who is actually acting as a deputy sheriff under color of an appointment is such officer de facto, although his appointment was not made with the formalities required by statute (35 Cyc. 1522), * * *." See, also, Vilas County v. Industrial Commission, 200 Wis. 451, 228 N. W. 591; Gulbrandson v. Town of Midland, *supra;* County of Monterey v. Industrial Accident Commission, *supra;* Village of West Salem v. Industrial Commission, 162 Wis. 57, 155 N. W. 929, L. R. A. 1918C 1077.

The cross-petition raises the question of whether or not decedent was also an employee of the State of Nebraska. We think the patrolman, in calling the Andersons to assist, was acting at the request of and in behalf of the sheriff, who was in charge of organizing the search, and not as a patrolman of the Nebraska Safety Patrol. Consequently we do not think the evidence sufficient to establish the relationship of employer and employee between the State of Nebraska and decedent even if the patrolman had authority to create such a relationship. In view thereof we will not discuss the patrolman's authority in that regard. We find the dismissal of the claim as against the State of Nebraska to be correct.

The claimant asks that if the appellant fails to obtain any reduction by reason of its appeal that she be allowed an attorney's fee in this court. Section 48-125, R. S. 1943, provides: "* * * In the event the employer appeals to the district court from the award of the compensation court, or any judge thereof, and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer, and the Supreme Court shall in like manner allow the

employee a reasonable sum as attorney's fees for the proceedings in that court."

In Gilmore v. State, 146 Neb. 647, 20 N. W. 2d 918, we held: "Under the provisions of section 48-125, R. S. 1943, where an employer appeals to the Supreme Court from an award of the district court and fails to obtain any reduction in the amount of such award, the Supreme Court shall allow the employee a reasonable sum for attorney fees for the proceedings in the Supreme Court."

Considering the amount involved and the fact that the case is one of first impression in this court we think a reasonable attorney's fee to be the sum of $600 and the same is taxed as costs.

In view of what has hereinbefore been said we affirm the judgment of the district court and direct that all costs, including the attorney's fee allowed in this court, be taxed to appellant, The Bituminous Casualty Company, a corporation.

AFFIRMED.

ED H. SCHRODER, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
52 N. W. 2d 808.

Filed April 11, 1952. No. 33129.

1. **Municipal Corporations: Nuisances.** The streets of a municipality in this state belong to the public and an unauthorized obstruction or encumbrance of them by a structure or otherwise constitutes a public nuisance.
2. **Nuisances.** A private individual may not maintain an action to prevent or suppress a public nuisance unless he will or has sustained some special injury therefrom distinct and different in kind from that which he will or does suffer in common with the rest of the public.
3. ———. A public nuisance, if committed without authority, can be remedied by a public prosecution or other available proceedings instituted by the proper officer on behalf of the people.

4. **Judgments.** The requisite precedent conditions of obtaining declaratory relief are: That a controversy exists in which a claim is asserted against one who has an interest in contesting it; that the controversy is between persons whose interests are adverse; that the parties seeking declaratory relief must have a legally protectible interest or right in the controversy; and that the issue involved is capable of present judicial determination.

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

Flansburg & Flansburg, John E. Jacobson, and *C. Russell Mattson,* for appellants.

F. C. Radke, for appellee.

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

BOSLAUGH, J.

This is a suit for a declaratory judgment to determine the validity of a resolution of the council of the city of Lincoln.

The general demurrer of the National Bank of Commerce, and the separate general demurrer of the city of Lincoln, the mayor thereof, and members of the council to the amended petition of appellee were denied. They elected not to plead further and judgment was rendered as follows: That the action of the council of the city of Lincoln in adopting the resolution in question was ultra vires; that the resolution was void; and that the National Bank of Commerce obtained no rights, permission, or authority because of its adoption. The motion for a new trial of the city, its mayor, and members of the council and the separate motion of the bank were overruled. They appealed separately. There has been no brief filed by the city, the mayor, or council. The contending parties are Ed H. Schroder and the National Bank of Commerce. They will be designated as appellee and appellant respectively.

Appellee alleges that: He is a citizen of the United

States and of Nebraska; he is a resident of, owns property subject to taxation in, and is a taxpayer of Lincoln; he is an elector; and he owns and operates motor vehicles therein. As a citizen, elector, and taxpayer he is interested in keeping the streets and sidewalks free from public nuisances. He brings this action pursuant to the Uniform Declaratory Judgments Act in his own behalf and on behalf of all other persons similarly situated.

Lincoln is a city of the primary class, has a population of about 100,000 inhabitants, has a home rule charter, and the government thereof is vested in a council of seven members, one of whom is elected as mayor of the city. The National Bank of Commerce is a national banking corporation engaged in conducting a commercial banking business in a building owned by it at the northwest corner of the intersection of O Street with Thirteenth Street in the city of Lincoln. The building faces on O Street. Thirteenth Street was dedicated to the use of the public for travel and transportation at the time Lincoln was platted and incorporated.

Appellant requested permission of the city to erect, on the sidewalk north of O Street on the west side of Thirteenth Street near its west curb opposite the east side of the bank building, a curb teller machine for use of patrons in making deposits of money with the bank without entering its building, and also for a reserved area of three motor vehicle parking stalls adjacent to the curb on the west side of Thirteenth Street to enable persons riding in vehicles to approach, have access to, and the use of the machine without alighting from their conveyances.

The city council of Lincoln adopted, and appellant accepted and agreed to be bound by, a resolution permitting it to install and maintain, until otherwise ordered by the council, a curb teller machine described as about 1 foot 10 inches deep, 2 feet 1 inch in width, and 5 feet 8 inches in height in the sidewalk space above

indicated. The city did not grant the request of appellant for the use of reserved parking area in the street designated as three parking stalls near the location of the machine.

The city of Lincoln or its council had no power or authority to authorize anyone, natural or artificial, to use any part of any street or sidewalk for private business purposes or to erect, have, or maintain thereon or therein a curb teller machine or any other structure. The action of the council was ultra vires. The resolution conflicted with described ordinances of the city and is void, and the bank obtained no right or authority by it. The existence of the installation attempted to be permitted would be an illegal encroachment on and an obstruction of the public streets, and would constitute a public nuisance, purpresture, and an illegal invasion of the rights of the appellee and the public. It is the duty of the city to keep its streets and sidewalks free of all unlawful encroachments and obstructions. The rights, duties, and other legal relationships of the parties as affected by the resolution are involved herein, and the validity of the resolution is the subject of controversy between the parties to the case. The court was asked to adjudge the resolution invalid.

The objective of this litigation is an adjudication preventing the creation and continuance in Lincoln of an alleged public nuisance by the authority of and with the approval of the council of the city. The legal qualification and capacity of appellee to contest the action of the city officials in reference to this must be found, if at all, in the fact that he enjoys the status of a resident citizen, elector, taxpayer, and owner of property subject to taxation in Lincoln, including motor vehicles that he operates therein. The location of the property of appellee in the city is not given. Neither is it claimed that it, nor the use and enjoyment thereof, would be in any way interfered with, obstructed, injured, or damaged by the installation and operation of the machine by

the bank in accordance with the resolution adopted by the city. He relies for his legal capacity to litigate the legality of an official act of the city on the fact that he is a citizen, elector, and taxpayer and his interest in having the public ways of the city free from public nuisances. He does not allege any special interest, right in, or injury because of the subject of this cause different from that of any other member of the public. The allegation of his pleading that he brings this action on his own behalf and on behalf of all others similarly situated disputes and forecloses any claim of special injury of appellee peculiar to himself aside from and independent of the general injury to the public. Appellee cannot successfully oppose the resolution of the city council on the basis that the exercise of the permission given by it to the appellant will create and continue a public nuisance unless he pleads and demonstrates that the installation and maintenance of the machine in question will cause him some special injury different not only in degree but distinct, independent, and different as to kind than that suffered by the public.

The obstruction or encumbrance of a street in a city of this state by a structure or otherwise is a public nuisance unless it is authorized in a proper case by competent authority. Section 28-1016, R. R. S. 1943, contains this language: "* * * the obstructing or encumbering of (by) fences, buildings, structures or otherwise, any of the public highways or streets or alleys of any city or village, shall be deemed nuisances." In Bischof v. Merchants Nat. Bank, 75 Neb. 838, 106 N. W. 996, 5 L. R. A. N. S. 486, it is said: "Public highways belong, from side to side and from end to end, to the public, and any permanent structure or purpresture which materially encroaches on the public street and impedes travel is a nuisance per se; but in a proper case such obstructions may be authorized by competent authority." This language is used in the opinion: "That the stone and pillars of the new portico to the

bank building, as now remodeled, extend into the public street, is conceded; that such an obstruction constitutes a public nuisance is not only the doctrine of the common law, but falls within the statutory definition." See, also, City of Omaha v. Flood, 57 Neb. 124, 77 N. W. 379; World Realty Co. v. City of Omaha, 113 Neb. 396, 203 N. W. 574, 40 A. L. R. 1313.

One of the first reported decisions of this court concerned an attempt by a private individual to maintain an action to abate and prevent the continuance of a public nuisance. The doctrine was therein adopted, and has frequently since been approved and given full effect, that in cases of public nuisances a private individual has no right of action unless he suffers because thereof some peculiar or special injury not common to the general public. This rule is obviously applicable to proceedings for relief by a private person because of the obstruction of a street or highway. To qualify an individual in his private capacity to maintain an action of this character he must allege and establish some special or peculiar damage to himself because of the obstruction not common to the general public. In Kittle v. Fremont, 1 Neb. 329, this court said: "A common or public nuisance, if committed without lawful authority, can be remedied by a public prosecution instituted by the proper officer, on behalf of the people. * * * An individual who is specially injured by a common or public nuisance may maintain a suit to have the same abated. * * * But a private person cannot maintain an action to abate a public nuisance unless he can aver and prove some special injury to himself." It is stated in the opinion: "The plaintiffs sue on behalf of themselves and all others, the property holders of the town of Fremont. They do not pretend to have any interest in the subject matter of the suit, which is not common to all the other residents of the town, whether they be freeholders or not. * * * The pretended wrong of which the plaintiffs complain is the closing up of cer-

tain of the public streets and alleys, and the vacation of a portion of the public park. This is in the nature of a common or public nuisance, and if done without lawful authority, can be remedied by a public prosecution, instituted by the proper public officer, on behalf of the people. So, too, could a suit be maintained by any individual of the town in his own right who is specially injured thereby. * * * The plaintiffs are simply resident freeholders of the town of Fremont. They have no real estate bordering upon the park, or upon either of the streets affected by this change. They have sustained no special damage by reason thereof * * *. They present themselves before the court in the character of volunteer champions of the public interests * * *. Under these circumstances we are most clearly of the opinion that the plaintiffs show no such interest in the subject of this suit * * * as to enable them to maintain this action." In Hill v. Pierson, 45 Neb. 503, 63 N. W. 835, it is said: "It has been stated by this court that a public nuisance will be enjoined in a suit instituted by a private party for such purpose, but only when the plaintiff does or will sustain a special damage, a personal injury distinct from that which he suffers in common with the rest of the public * * *." In Powers v. Flansburg, 90 Neb. 467, 133 N. W. 844, the court said: "A private individual cannot maintain an action to suppress a public nuisance, unless he sustains some special injury caused thereby other than that sustained by the public at large." This appears in the opinion: "The petition does not allege any special interest of these plaintiffs in these proceedings, as distinguished from the interests of the general public. On the other hand, it is specifically alleged that this action was brought by these plaintiffs in their own behalf and in behalf of all the citizens of Trenton who, it is alleged, were similarly situated. Under these circumstances, it is clear that this action cannot be maintained." In Ayers v. Citizens Railway Co., 83 Neb. 26, 118 N. W. 1066, it

was said concerning the plaintiff: "It is a general rule that a public nuisance does not furnish grounds for an action in equity by an individual who merely suffers an injury which is common to the public. * * * The lines of street railway and poles and wires may inconvenience the plaintiff to a greater degree than the public generally; but the mere fact that plaintiff uses that street more frequently than others of the public and may suffer more from the alleged nuisance than others does not present a distinct injury. Her injury is the same in character as that which the public will suffer. The only difference is one of degree, and not of kind." See, also, Lee v. City of McCook, 82 Neb. 26, 116 N. W. 955; Gleason v. Loose-Wiles Cracker & Candy Co., 88 Neb. 83, 129 N. W. 173; Brown v. Easterday, 110 Neb. 729, 194 N. W. 798; Chizek v. City of Omaha, 126 Neb. 333, 253 N. W. 441; Kirby v. Omaha Bridge Commission, 127 Neb. 382, 255 N. W. 776; 66 C. J. S., Nuisances, § 78, p. 831; 39 Am. Jur., Nuisances, § 124, p. 378; 40 C. J. S., Highways, § 222, p. 219; 25 Am. Jur., Highways, § 315, p. 607.

The allegations of interest of appellee in this controversy are citizenship, being an elector, the owner of property, a taxpayer, and an operator of motor vehicles in the city of Lincoln. He does not show by his pleading wherein any of these interests are or could be injured by the construction authorized by the resolution. He has not shown that he has or can sustain a special damage or a personal injury distinct from that which he may suffer in common with the rest of the public.

Appellee lists many cases in support of his proposition of law that the rule that plaintiff, to be entitled to sue, must have sustained some injury to his personal or property rights does not prevent the bringing of an action which involves only the establishment of public rights. He, with entire disregard of the prohibition that no authority shall be cited under any proposition that is

not quoted from or otherwise discussed (Rule 8a 2(5), Rules of Supreme Court), notices only one in his argument. It is Zoercher v. Agler, 202 Ind. 214, 172 N. E. 2d 186, 70 A. L. R. 1232. It does not support to any extent his proposition. It is very definitely to the contrary. There were public rights in the case but the court said: "* * * at the same time, it is apparent that, as taxpayers of South Bend, their (the plaintiffs) personal and property rights are also involved and will be injured if a tax is illegally levied." There was an actual controversy relative to a property right of plaintiffs as taxpayers. The pertinent language in that case, when all of it is considered, amounts to a declaration that the fact that plaintiff must show injury to his personal or property rights to qualify him to litigate in reference to public rights, does not prevent him from maintaining an action because it involves public rights and also matters affecting adversely his individual property rights.

An action for a declaratory judgment must involve a justiciable controversy between persons whose interests are adverse. The plaintiff must have a protectible interest in the controversy and the issue involved must be appropriate for judicial determination. The statute provides: "Any person interested * * * whose rights * * * are affected by * * * municipal ordinance * * * may * * * obtain a declaration of rights." § 25-21,150, R. R. S. 1943. It grants the moving party an opportunity to have his own rights determined but not some other person's rights when his own are not invaded or disturbed. This court pointed out in Lynn v. Kearney County, 121 Neb. 122, 236 N. W. 192, that unless the act authorized a declaratory judgment in those cases only where litigable issues between proper parties were presented it would be unconstitutional as conferring nonjudicial functions on the court. It therein said: "Declaratory judgments act examined, and held to be applicable to actions wherein there is an actual controversy, and where only justiciable issues are presented

by proper parties. So construed, the act does not confer on the courts nonjudicial powers." State ex rel. Smrha v. General American Life Ins. Co., 132 Neb. 520, 272 N. W. 555, defines justiciable controversy in this language: "When a concrete, contested issue is presented * * * where there is a definite assertion of legal rights and a positive denial thereof, the required condition of being a justiciable issue is met." "Legal rights" referred to by the court must be the personal private rights of the party. Appellee has not pleaded that such rights of his are involved in this case. In the recent case of Miller v. Stolinski, 149 Neb. 679, 32 N. W. 2d 199, it was determined that the defendants had no interest in or duties to perform with regard to the act of the Legislature in question and that therefore there was no controversy presented by the case. In dismissing the action the court quoted Borchard, Declaratory Judgments (2d ed.), p. 76, as follows: "Actions for declaratory judgments brought by individuals to test or challenge the propriety of public action often fail on this ground, either because the plaintiff is deemed not to have an adequate personal interest in the issue, or because the public officer or other person selected as a defendant has no special interest to oppose the complaint or no special duties in relation to the matter which would be affected by any eventual judgment. The absence of adversary or the correct adversary parties is in principle fatal." The doctrine of that case is applicable to and controlling in this case. Appellee has no private property interest to protect, is not a proper party plaintiff in this case, and has no adequate personal interest in the issue involved which legally authorizes him to demand that the issue be adjudicated. Since he is not a proper party to the action he can present no justiciable controversy and is not entitled to seek a declaratory judgment. See, also, Banning v. Marsh, 124 Neb. 207, 245 N. W. 775; State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W.

2d 502; Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397; State of North Dakota ex rel. Strutz v. Perkins County, 69 S. D. 270, 9 N. W. 2d 500; Seiz v. Citizens Pure Ice Co., 207 Minn. 277, 290 N. W. 802; State ex rel. La Follette v. Dammann, 220 Wis. 17, 264 N. W. 627, 103 A. L. R. 1089; Dietz v. Zimmer, 231 Ky. 546, 21 S. W. 2d 999.

The gist of the question in a declaratory judgment suit to test action taken by a municipal corporation is whether or not the plaintiff has as an individual, a special, protectible right which is in controversy and which will be lost or prejudiced unless the court intervenes to preserve it. Whether the form of relief is by injunction, by mandamus, or for a declaratory judgment does not alter the question of whether a private protectible interest is in controversy. The difference between the remedy of injunction, mandamus, or declaratory judgment is the extent of the relief asked or permitted to be granted. The plaintiff does not enlarge the scope of a declaratory judgment action by refraining to ask for an injunction. The inquiry is the same regardless of the extent of the relief sought. The questions are, does he have a private individual right involved in controversy, is there a justiciable issue involving the right presented to the court, and is or will that right be threatened or violated? The rights of appellee in this case are held in common with the general public. His interests as a property owner and taxpayer are not jeopardized or affected as in a taxpayer's suit where wrongful expenditures or the illegal levy of taxes is attempted. The installation of the curb teller machine as authorized by the resolution will affect no special private interest of appellee. His interest as a user of the streets is no different than that of every other citizen, inhabitant, and visitor in the city of Lincoln. He has no special, peculiar, private, protectible interest threatened to be violated nor which can be found or declared by a court to exist such as is required for jus-

tification of a declaratory judgment action. It is significant that the trial court did not attempt to make a declaration of any right or rights of plaintiff. The absence of the existence thereof is the logical explanation of the silence of the court in this respect.

The disposition of this case required by the considerations stated and discussed does not mean that there is no remedy, if the machine is installed and maintained on the sidewalk and the installation of it is illegal. The charter of the city and the criminal code of the state provide methods of relief. Home Rule Charter of Lincoln, Art. II, § 2, subpar. 6, p. 3; §§ 39-118, 41-301, and 41-304, Lincoln Municipal Code 1936; § 28-1016, R. R. S. 1943. The observation made in Powers v. Flansburg, *supra,* is appropriate: "There is nothing * * * to indicate that the criminal laws of the state are in any respect insufficient to punish the defendant and put a stop to the crimes which it is alleged he has committed, if indeed the defendant is guilty as alleged. * * * If the proper officers refuse or neglect to enforce the law, a remedy is provided other than by injunction. If a public nuisance is maintained that affects alike all the members of the community, the public authorities may deal with it, but these plaintiffs have not shown such an interest as will enable them to maintain this action."

The judgment of the district court should be and it is reversed and the cause is dismissed.

REVERSED AND DISMISSED.

IN RE ESTATE OF ELIZABETH EGAN, DECEASED. LEO EGAN, SPECIAL ADMINISTRATOR OF THE ESTATE OF ELIZABETH EGAN, DECEASED, APPELLANT, V. KATHRYN BUNNER, ADMINISTRATRIX OF THE ESTATE OF ELIZABETH EGAN, DECEASED, APPELLEE.

52 N. W. 2d 820

Filed April 11, 1952. No. 33132.

Appeal and Error. The overruling of a motion to dismiss an appeal from the county court to the district court in a probate proceeding wherein upon the face of the record it appears that the district court upon appeal has jurisdiction of the subject matter for hearing upon the merits is not a final order within the purview of section 25-1902, R. R. S. 1943, from which an appeal can be taken to this court.

APPEAL from the district court for Grant County: WILLIAM F. SPIKES, JUDGE. *Appeal dismissed.*

Herman & Van Steenberg, for appellant.

William C. Heelan and *Charles A. Fisher,* for appellee.

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

CHAPPELL, J.

This is an appeal from an order of the district court overruling a motion filed therein by Leo Egan as special administrator to dismiss an appeal taken from the county court by the administratrix. The basis for the motion was that the order of the county court was not a final order from which an appeal could be taken to the district court, and that the district court was without jurisdiction or authority to hear and determine the issues presented by the transcript upon the merits. We dismiss the appeal.

Since the special administrator occupied the position of plaintiff and the administratrix that of defendant, they will be hereinafter designated as such. See In re Estate of Kothe, 131 Neb. 780, 270 N. W. 117.

The record discloses that plaintiff filed a petition in

the county court on September 21, 1950, in the estate of Elizabeth Egan, deceased, praying for his appointment as special administrator of the estate pending a hearing upon and disposition of an application for administration of the estate and the appointment of an administratrix therein, based upon the allegations that there were then on hand and in his possession cattle belonging to the estate which the proposed administratrix was unable to care for and which, being in good marketable condition, should be sold at the then good prices at an advantage for the estate. He also prayed for an order permitting him to sell so many of said cattle as in his judgment would be for the best interests of the estate, and for general equitable relief.

On September 22, 1950, after a hearing, plaintiff was appointed special administrator as prayed. He was required to give bond of $5,000, conditioned as required by law, and was permitted to buy necessary feed for such stock and sell as many of them belonging to the estate as in his judgment would be for the best interests of the estate.

The record does not disclose that he thereafter filed any inventory within two weeks after his appointment, as required by section 30-401, R. S. Supp., 1951. However, on January 5, 1951, plaintiff did file a final account of his administration as special administrator. Therein he reported that he had received $4,883.66 as net proceeds from the itemized sale of 14 cows and 12 steer calves, in which amount the estate had only an undivided one-fourth interest, or $1,220.92, and that the remaining three-fourths interest was the individual property of "your special administrator" under the provisions of a pre-existing verbal operating agreement with his mother, Elizabeth Egan, deceased. He also separately listed 67 other cattle still in his hands, in which he likewise alleged that the estate owned but a one-fourth interest, and that he owned the remaining three-fourths interest therein. All of such cattle he admitted,

however, were branded "OHO" which brand was registered in the name of Elizabeth Egan. The prayer of his account was that the "account be allowed as and for his final account as such special administrator of the estate of Elizabeth Egan, Deceased, and that upon payment and delivery of the assets in his possession to the party entitled thereto he be discharged as such special administrator and the surety on his Official Bond be released from further liability herein."

Thereafter defendant, the duly appointed, qualified, and acting administratrix of the estate, filed numerous appropriate objections to the allowance of such account. To enumerate them here would serve no purpose. It is sufficient to say that the effect of such objections was to substantially allege that plaintiff had failed and neglected therein to timely, fully, fairly, and correctly account as special administrator for all the property and money in his possession or knowledge belonging to the estate, as required by law. Such objections then prayed that a date be set for hearing upon the account and objections thereto, and that upon such hearing plaintiff should be required to make a full, complete, and correct accounting of his acts as special administrator.

On May 16, 1951, a hearing was held in the county court upon the purported account and the objections thereto. Thereafter, on June 7, 1951, the county court rendered a decree in writing, the effect of which was to sustain an oral motion of plaintiff and strike the objections of defendant as premature, and to order, adjudge, and decree that plaintiff's account should be allowed and that he should be discharged from his trust as special administrator upon delivery of the property set forth therein to defendant. Naturally, however, plaintiff's bond was ordered to be and remain in full force and effect until further order of the court.

Therefrom defendant duly perfected an appeal to the district court where a transcript from the county court was timely filed. Thereafter, on July 11, 1951, plain-

tiff filed his petition on appeal in the district court, designating himself therein as "the duly appointed, qualified and acting special administrator" and verifying the same "in his official capacity as special administrator." Plaintiff incorporated in and made a part of such petition his account as special administrator, reaffirmed the same, and alleged that it was true and correct in every respect. He also attached thereto and made a part thereof defendant's objections to his account, alleging that they were improper and untimely, and also recited therein the county court judgment rendered on June 7, 1951, alleging that it was correct. His prayer was for an order overruling defendant's objections, dismissing her appeal, allowing and approving plaintiff's account, or sustaining the decree of the county court, and if such decree should be found correct but indefinite or incomplete, the district court should remand the cause back to the county court for further proceedings.

On the same date plaintiff also filed a motion to dismiss defendant's appeal for the reasons, insofar as important here, that the decree of the county court rendered on June 7, 1951, was not a final order from which an appeal could be taken, and that the district court had no jurisdiction to hear and determine the issues presented upon the merits. On July 26, 1951, defendant filed her answer to plaintiff's petition in the district court, appropriately traversing and presenting the issues to be decided. It prayed that plaintiff should be required to furnish a full, complete, and adequate inventory and accounting of all property, rents, and profits belonging to the estate and turn the same over to defendant, and for general equitable relief.

On September 11, 1951, plaintiff's motion to dismiss defendant's appeal was argued, submitted, and overruled, whereupon plaintiff asked and was granted 10 days within which to file a reply to defendant's answer. Instead of complying therewith, however, plaintiff ap-

pealed to this court from the order of the district court overruling his motion to dismiss defendant's appeal. No order appears in the transcript setting the case for trial on the merits in the district court. Plaintiff simply assumed that the cause would be so tried in that court.

The primary question presented here, as we view it, is whether or not plaintiff's appeal to this court should be dismissed. The answer depends upon the factual situation heretofore recited, and controlling propositions of law hereinafter discussed.

The functions of a special administrator appointed by the county court are to possess, control, and preserve all the estate of decedent until the granting of letters testamentary or of administration. Kelkenney v. Getsey, 137 Neb. 416, 289 N. W. 795. Within two weeks after his appointment a special administrator is required to make an inventory under oath, showing all of the property of deceased which shall have come into his possession or knowledge. § 30-401, R. S. Supp., 1951. A condition of his qualifying bond given to the judge of probate requires that he so return a true inventory thereof and whenever required by the court that he shall deliver all such property to the regular executor or administrator subsequently appointed or to such other person as shall be legally authorized to receive the same. § 30-320, R. R. S. 1943. Upon the granting of letters testamentary or of administration, the power of the special administrator ceases. § 30-321, R. R. S. 1943. However, neither his obligations as such special administrator nor the obligations of his bond are discharged until he reports, accounts for, and delivers all such property to the regular executor or administrator as ordered by the court. The special administrator is an officer of the court, under its direct supervision and control, and any property of the estate in his possession is deemed to be in the hands of the court. Dame, Probate and Administration (3d ed.), § 186, p. 195, § 187, p. 197.

It has long been established in this jurisdiction that county courts have exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons, and that the only jurisdiction thereof which the district court can acquire is by appellate procedure. However, an appeal from the county court when perfected confers upon the district court in the matter appealed the same power possessed by the county court. After the district court becomes so possessed of the case, the county court has no further jurisdiction over the issues so removed. If there should be another trial of the case it must be in the district court which shall proceed to hear, try, and determine the same as provided by sections 30-1606, R. S. Supp., 1951, and 30-1607, R. R. S. 1943, and as provided therein the result, not the case itself, shall be certified back to the county court.

The test of jurisdiction is whether a tribunal had the power to enter upon the inquiry, and not whether its methods were regular, its findings right, or its conclusions in accord with the law. In that connection county courts are without general equity jurisdiction, but in exercising their exclusive original jurisdiction over estates may apply equitable principles to matters within probate jurisdiction and render to the parties interested in the assets of the estate such relief as their respective situations may justify. They have the power to require executors and administrators to exhibit and settle their accounts and to account for all assets of the estate that have come into their possession and to hold them liable for the actual value of any property which they have unlawfully appropriated to their own use. In carrying out their exclusive original jurisdiction in matters relating to the administration of estates of deceased persons, county courts have jurisdiction to determine title to personal property claimed by representatives of decedents' estates. Such is the situation here. This court has gone so far as to conclude that if a third

party who has himself planned or participated in the wasting of an estate and is before the court, as upon the objections to the final account, the court may compel him to refund to the representative what he has unlawfully received. The aforesaid rules have application in the case at bar, controlling decision. Their establishment, together with the reasoning and basis for such rules, will be found in In re Estate of Nilson, 126 Neb. 541, 253 N. W. 675; In re Estate of Statz, 144 Neb. 154, 12 N. W. 2d 829; In re Estate of Marsh, 145 Neb. 559, 17 N. W. 2d 471; and the recent case of In re Estate of Wiley, 150 Neb. 898, 36 N. W. 2d 483.

As a matter of course, when a special administrator ceases to act as such, he must account for and deliver all the property of the estate in his possession or knowledge to the executor or administrator who acts for all interested in distribution of the estate, and who may examine such accounts and if not satisfactory contest their correctness. 21 Am. Jur., Executors and Administrators, § 823, p. 836. In other words, in such a proceeding none of the controlling rules heretofore set forth are in any manner abrogated or affected by sections 30-407, 30-408, and 30-409, R. R. S. 1943, as argued by plaintiff. In re Estate of Bloedorn, 135 Neb. 261, 280 N. W. 908.

We therefore conclude that when plaintiff filed his account as special administrator and prayed for its allowance, to which defendant appropriately filed objections, the county court had exclusive original jurisdiction to hear and determine the issues presented thereby. Nevertheless, the county court after a hearing not only erroneously entered an order striking defendant's objections but also rendered a final judgment approving plaintiff's account and ordering him discharged as special administrator upon delivery of the property as set forth therein to the regularly appointed administratrix, which determined and disposed of the proceedings upon the merits and as such was a final order appealable to

the district court. In re Estate of Hansen, 117 Neb. 551, 221 N. W. 694, is clearly distinguishable from the situation here presented.

Defendant perfected her appeal therefrom to the district court, which conferred upon the district court in such proceeding the same power as that originally possessed by the county court. In such a situation the district court should proceed to hear, try, and determine the issues presented by plaintiff's petition and defendant's answer in the same manner as if it were an original action therein, and certify the result, not the case itself, back to the county court. Therefore, the trial court properly overruled plaintiff's motion to dismiss. The reasoning and basis for the foregoing conclusions will be found in In re Estate of Marsh, *supra;* Jacobs v. Morrow, 21 Neb. 233, 31 N. W. 739; Ribble v Furmin, 69 Neb. 38, 94 N. W. 967; Ribble v. Furmin, 71 Neb. 108, 98 N. W. 420; Prante v. Lompe, 77 Neb. 377, 109 N. W. 496.

As a matter of fact, in such a situation plaintiff by his own petition on appeal and otherwise fully invoked the jurisdiction of the district court and thus made operative the rule that: "A party invoking the court's jurisdiction in a case where the court has jurisdiction of the subject matter is estopped to object thereto afterward." Webber v. City of Scottsbluff, *ante* p. 48, 50 N. W. 2d 533.

It will also be noted that plaintiff was the party who procured the decree in the county court striking defendant's objections, allowing plaintiff's account, and ordering him discharged as special administrator, which makes operative the rule that: "A party cannot predicate error upon a ruling which he procured to be made." Norwegian Plow Co. v. Bollman, 47 Neb. 186, 66 N. W. 292, 31 L. R. A. 747. See, also, Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367.

After plaintiff's appeal to this court from the overruling of his motion to dismiss defendant's appeal from

the county court, defendant filed a motion in this court to dismiss plaintiff's appeal upon the ground that the order sought to be reversed was not a final order within the purview of section 25-1902, R. R. S. 1943. After oral argument upon the motion we overruled the same.

In that connection defendant's motion in this court to dismiss plaintiff's appeal was renewed and more carefully briefed in argument upon the merits. Upon reconsideration and examination of the record in the light of controlling authorities we are now convinced that the motion should have been sustained and the appeal dismissed.

Doubtless the issues presented by plaintiff's account and defendant's objections thereto was a "special proceeding." However, as heretofore observed, the order of the district court overruling plaintiff's motion to dismiss defendant's appeal from the county court did not affect any substantial right of the plaintiff because, as shown by the record, the district court did have jurisdiction to try the issues upon the merits.

A substantial right has been defined as an essential legal right and not a mere technical one. Clarke v. Nebraska Nat. Bank, 49 Neb. 800, 69 N. W. 104; Western Smelting & Refining Co. v. First Nat. Bank, 150 Neb. 477, 35 N. W. 2d 116.

Viewed in such light the order of the district court overruling plaintiff's motion to dismiss defendant's appeal thereto was correct and did not in any manner determine or affect any essential legal right of plaintiff. Rather, the order preserved the jurisdiction and authority of the district court, lawfully conferred and duly invoked by plaintiff himself, to protect all his rights by giving him a hearing upon the merits. Thus it was interlocutory only.

In speaking of two classes of cases involving situations comparable with those heretofore discussed, it was said in Ribble v. Furmin, 69 Neb. 38, 94 N. W. 967: "In the one class of cases, nothing further remains for

the court to do in the proceeding in hand. In the other, notwithstanding the order, before such order can have any substantial effect on the rights of the parties, there must be further action in the same court and in the same proceeding." The case at bar comes squarely within the latter classification.

As stated in 4 C. J. S., Appeal and Error, § 152, p. 323, citing cases: "A judgment or order of an intermediate court refusing to dismiss an appeal, not being a final judgment or order, is not appealable or subject to writ of error, unless it comes within some special statutory provision." Also, as stated at p. 327: "An appeal or writ of error will not lie from or to judgments or orders of an intermediate appellate court in a special proceeding unless it is specially authorized by statute, or unless the statute providing generally for appeals is broad enough to cover them; and, when the statute, as is sometimes the case, expressly authorizes such appeals, a judgment or order, to be appealable, must come clearly within its terms. The proceeding must be a 'special proceeding,' * * * and the proceeding also must affect some substantial right." See, also, 3 C. J., Appeal and Error, § 425, p. 588, § 432, p. 593. As stated in 2 Am. Jur., Appeal and Error, § 80, p. 897: "An order denying a motion for a dismissal of the action is, as a general rule, not reviewable, since such an order lacks finality." To allow an appeal from the overruling of a motion to dismiss in cases comparable with that at bar wherein upon the face of the record it appears that the district court upon appeal had jurisdiction of the subject matter for hearing upon the merits would cause great and unconscionable delays and perpetuate a grave injustice. In such a situation the applicable rules stated in Grimes v. Chamberlain, 27 Neb. 605, 43 N. W. 395, and School District v. Cooper, 29 Neb. 433, 45 N. W. 618, are controlling.

For reasons heretofore stated, we conclude that under the circumstances here presented the order of the dis-

trict court overruling plaintiff's motion to dismiss defendant's appeal thereto from the county court was not a final order within the purview of section 25-1902, R. R. S. 1943, from which an appeal could be taken to this court. Therefore, plaintiff's appeal therefrom to this court should be and hereby is dismissed at plaintiff's costs, and the cause is remanded for further proceedings upon the merits, in conformity with this opinion.

APPEAL DISMISSED.

DUZZENA FRANZEN, APPELLEE, V. ROY BLAKLEY, DOING BUSINESS AS CITY CAFE, ET AL., APPELLEES, STATE OF NEBRASKA, APPELLANT.
52 N. W. 2d 833

Filed April 11, 1952. No. 33147.

1. **Appeal and Error.** Upon appeal the same cause must be presented in this court that was tried in the court below. If an issue is there tried by both parties, and without objection from either that the issue is not sufficiently pleaded, such objection will not be considered in this court as ground for reversal.
2. **Statutes.** Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning.
3. ———. In the absence of anything to indicate the contrary, words must be given their ordinary meaning.
4. ———. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
5. ———. It is not within the province of a court to read plain, direct, and unambiguous language out of a statute.
6. ———. If possible, the entire statute is to be applied as written.
7. **Workmen's Compensation.** To permit an award of compensation under the provisions of section 48-128, R. S. Supp., 1951, a claimant must in fact have a permanent total disability.
8. ———. The Nebraska Workmen's Compensation Act is to be construed liberally so that its beneficent purposes may not be thwarted by technical refinement of interpretation.
9. ———. For workmen's compensation purposes, "total disability" does not mean a state of absolute helplessness, but means

disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.

10. ———. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law.

11. ———. An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted.

12. **Statutes.** If the words used in a legislative act had, at the time used, received a settled construction, we presume that the Legislature adopted them in that sense.

13. ———. It is to be presumed that the Legislature in using language in a statute will give it the same significance that has already been accorded it by the Constitution and laws of the state, unless a different meaning is provided in the enactment itself or must be drawn from its context.

14. **Attorney and Client: Workmen's Compensation.** The right to tax attorney's fees in compensation cases is purely statutory. No other authority to allow an attorney's fee is authorized.

15. **Workmen's Compensation.** Section 48-125, R. S. 1943, relates to an "employer" appealing and failing to reduce the amount of the award and to the taxing of an attorney's fee as costs against the "employer."

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

Clarence S. Beck, Attorney General, *Walter E. Nolte*, and *Clarence A. H. Meyer*, for appellant.

Davis, Stubbs & Healey, *Richard D. Wilson*, and *Cline, Williams, Wright & Johnson*, for appellees.

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

SIMMONS, C. J.

This is an action to recover benefits under the pro-

vision of section 48-128, R. S. Supp., 1951, the second-injury provision of the Workmen's Compensation Act. The matter was heard before one judge of the compensation court, before the compensation court sitting en banc, and on appeal before the district court. Plaintiff prevailed. The State appeals. We affirm the judgment of the district court. Plaintiff cross-appeals asking for attorney's fees. We deny the cross-appeal.

The action was originally brought against plaintiff's employer (a cafe operator), his insurance carrier, and the State of Nebraska. Following the entry of judgment in the district court, plaintiff filed a satisfaction of the judgment insofar as it related to her employer and the insurance carrier. The issue here is between the plaintiff and the State, hereafter called the defendant. The ultimate question presented is the right of plaintiff to recover from the Second Injury Fund.

Both parties agree that the cause is here for trial de novo.

Plaintiff is a married woman. She was born in November 1893. She had a grade-school education. She became engaged in part-time gainful employment in 1935, generally doing cooking, waiting tables, and kindred work.

On December 25, 1941, in an automobile accident, she fractured her right wrist. This was not a compensable injury. Plaintiff's expert witness testified that this resulted in a permanent partial disability of her right hand of 35 to 40 percent. An expert witness called by the employer fixed the permanent partial disability of her right hand and wrist at 25 percent.

Plaintiff began to work for the defendant employer in 1946 or 1947, cooking, washing dishes, waiting tables, and whatever there was to do.

On September 21, 1949, while so employed, she fell and broke her left wrist. This was a compensable injury. Plaintiff's expert witness testified that this resulted in a permanent partial disability of 50 to 65 per-

cent. Defendant employer's expert witness fixed the percentage of permanent partial disability at 35 or 40 percent.

The plaintiff's evidence all goes to the effect that following the 1941 accident she was able to care for herself and to do her housework and the work of her employment by relying largely on her good left hand. Following the second accident she was not able to do the work of her former employment, or any other kind of work that required the effective use of her hands. She was able to do limited housework at home. She required assistance in dressing, cooking, and in much of her housework. Defendant employer's expert witness corroborated this evidence to a material extent. Plaintiff's expert, a practitioner in industrial medicine, testified in effect that because of the condition of her hands she was unemployable. We find no substantial evidence to the contrary.

Considering this evidence, the district court found that plaintiff's 1941 injury resulted in a permanent partial disability of 30 percent of her right hand, and that plaintiff's 1949 injury resulted in a permanent partial disability of 50 percent of her left hand.

The above were findings of fact made by the compensation court which the district court held were supported by the record. We agree with those findings and adopt them as our own. Disagreeing with the compensation court which found only a permanent partial disability, the district court found that plaintiff was totally disabled from earning wages in the same kind of work or work of a similar nature that she had been accustomed to perform or any other kind of work which a person of her mentality and attainments could do, and that plaintiff either in her own particular line of work, or in any other for which she would be fitted, was totally disabled. The district court further found that plaintiff was entitled to recover from the Second Injury Fund "on account of the permanent and total disability"

caused by the 1949 injury combined with the disability caused by the 1941 injury. The district court entered a judgment in accord with the findings.

The defendant contends that there was no issue of total permanent disability before the workmen's compensation court and that the district court acted in excess of its powers under section 48-184, R. S. Supp., 1951.

Plaintiff pleaded in the compensation court that she had a permanent partial disability both as to the 1941 and the 1949 injuries; that she had a permanent disability affecting both hands; and that by reason of the combination of injuries she was entitled to compensation from the Second Injury Fund. The defendant denied that the plaintiff was entitled to any recovery from the Second Injury Fund.

The evidence taken before the compensation court was offered and received as the evidence in the district court. There the defendant was shown to have cross-examined several witnesses, substantially all the questions going to the issue of whether or not plaintiff was totally disabled. It appears to have been accepted that plaintiff's disabilities were permanent.

In its petition on appeal in the district court, the defendant gave as a reason for refusing to accept the award that it allowed plaintiff recovery from the Second Injury Fund for a condition other than permanent and total disability. Plaintiff in her cross-petition on appeal alleged that the compensation court erred in not finding that she was permanently totally disabled. In its motion for a new trial defendant made no direct reference to this question. It is apparent throughout that the matter proceeded at all times on the issue of plaintiff's permanent and total disability.

We do not determine whether or not the issue was sufficiently pleaded. The applicable rule is: "Upon appeal the same cause must be presented in this court that was tried in the court below. If an issue is there tried by both parties, and without objection from either

that the issue is not sufficiently pleaded, such objection will not be considered in this court as ground for reversal." In re Application of Bruno, 153 Neb. 445, 45 N. W. 2d 178.

Section 48-128, R. S. Supp., 1951, provides in part: "If an employee receives an injury which of itself would cause only partial disability but which, combined with a previous disability other than one caused by disease, does in fact cause permanent total disability, the employer shall be liable only for the partial disability which would have resulted from the second injury in the absence of any preexisting disability, and for the additional disability the employee shall be compensated out of a special fund created for that purpose, which sum so set aside shall be known as the 'Second Injury Fund.' "

The defendant contends that there must be a finding, sustained by sufficient evidence, of "permanent total disability" before the employee can be compensated out of the Second Injury Fund. With that contention we agree.

The above provision was enacted in 1947 as an amendment to section 48-128, R. S. 1943. Laws 1947, c. 174, § 1, p. 559. Section 48-128, R. S. 1943, provided: "If an employee receives an injury, which, of itself, would cause only partial disability, but which, combined with a previous disability, does in fact cause total disability, the employer shall be liable only as for the partial disability, so far as the subsequent injury is concerned." It will be noted in the amended act that the Legislature inserted the qualifying "other than one caused by disease" as to "a previous disability," and the qualifying "permanent" as to total disability.

The title of the 1947 act in part is that it is one "to provide for the payment of compensation on account of permanent total disability resulting from second injuries * * *."

The rule is: "* * * '"* * * where the words of a

statute are plain, direct and unambiguous, no interpretation is needed to ascertain their meaning * * *.'" In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read plain, direct, and unambiguous language out of a statute. If possible, the entire statute is to be applied as written." Mook v. City of Lincoln, 146 Neb. 779, 21 N. W. 2d 743.

The meaning of the statute is clear. We hold that to permit an award of compensation under the provisions of section 48-128, R. S. Supp., 1951, a claimant must in fact have a permanent total disability.

This brings us to the defendant's contention that the evidence, and the findings based thereon, do not sustain a finding of permanent total disability. Defendant argues that the disabilities here involved are scheduled disabilities under subsection (3) of section 48-121, R. S. Supp., 1951; that under that section there must be a permanent total loss of the use of both hands in order to constitute total permanent disability; and that as to subsection (3) disabilities it is immaterial whether an industrial disability is present or not present. Defendant relies upon Bronson v. City of Fremont, 143 Neb. 281, 9 N. W. 2d 218, and Paulsen v. Martin-Nebraska Co., 147 Neb. 1012, 26 N. W. 2d 11.

Defendant argues that 30 percent and 50 percent permanent partial disabilities do not add up to permanent total disability. As a matter of arithmetic, we agree. But the answer is not that easy.

The applicable rule of construction is that the Workmen's Compensation Act is to be construed liberally so that its beneficent purposes may not be thwarted by technical refinement of interpretation. Ludwickson v. Central States Electric Co., 135 Neb. 371, 281 N. W. 603; Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N.

W. 2d 212; Peek v. Ayres Auto Supply, 153 Neb. 239, 44 N. W. 2d 321.

Defendant in its premise overlooks two essential matters. First, plaintiff's disability to her right hand is not, as such, a compensable injury under section 48-121, R. S. Supp., 1951. It is a fact condition which becomes material in applying the provisions of section 48-128, R. S. Supp., 1951. Second, the Legislature in section 48-128, R. S. Supp., 1951, was not undertaking to provide compensation for a previous disability other than one caused by disease, as such, but rather was undertaking to provide compensation for permanent total disability resulting from a combination of the previous fact condition with a compensable injury. Section 48-128, R. S. Supp., 1951, is a new and additional compensation provision and one designed to distribute the burden of compensation between the employer liable for the compensable injury and the Second Injury Fund.

In Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262, filed May 31, 1946, a few months before the 1947 legislative session, we held consistent with our previous opinions that:

"For workmen's compensation purposes, 'total disability' does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.

"A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law."

It is noted that the 1947 act was amended by the 1949 Legislature. Laws 1949, c. 161, § 2, p. 411. The Legislature did not change the language of that part of the

act here involved. Within the year before that session began our opinion was filed in Sporcic v. Swift & Co., 149 Neb. 246, 30 N. W. 2d 891. We there followed Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561, and held: "An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted."

It has long been the rule that if the words used in a legislative act had, at the time used, received a settled construction, we must presume that the Legislature adopted them in that sense. Kendall v. Garneau, 55 Neb. 403, 75 N. W. 852; Thurston County Farm Bureau v. Thurston County, 136 Neb. 575, 287 N. W. 180.

"It is to be presumed that the legislature in using language in a statute will give it the same significance that has already been accorded it by the constitution and laws of the state, unless a different meaning is provided in the enactment itself or must be drawn from its context." State ex rel. Winnett v. Omaha & C. B. St. Ry. Co., 96 Neb. 725, 148 N. W. 946.

Consistent with the findings of the trial court, we find that plaintiff has in fact a permanent total disability and is entitled to the benefits of section 48-128, R. S. Supp., 1951.

This brings us to plaintiff's cross-appeal.

In the district court plaintiff prayed for the recovery of an attorney's fee which that court denied. Plaintiff claims an award for attorney's fees in the district court and here. This claim is based upon the provisions of section 48-125, R. S. 1943, which in part provides: "Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are held before

the compensation court, a reasonable attorney's fee shall be allowed the employee by the court. In the event the employer appeals to the district court from the award of the compensation court, or any judge thereof, and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court."

In this case the defendant State appealed and the plaintiff cross-appealed from the award of the compensation court. Plaintiff's employer answered in the district court. The district court sustained the award as to the defendant employer.

It will be noted that section 48-125, R. S. 1943, relates to an "employer" appealing and failing to reduce the amount of the award and to the taxing of an attorney's fee as costs against the "employer." Obviously the defendant State was not plaintiff's "employer."

The right to tax attorney's fees in compensation cases is purely statutory. Faulhaber v. Roberts Dairy Co., 147 Neb. 631, 24 N. W. 2d 571; Sporcic v. Swift & Co., 149 Neb. 489, 31 N. W. 2d 404. As we said in Rexroat v. State, 143 Neb. 333, 9 N. W. 2d 305, no other authority to allow an attorney's fee is authorized.

The cross-appeal is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

WILLIS F. FULK ET AL., APPELLANTS, V. SCHOOL DISTRICT NO. 8 OF LANCASTER COUNTY ET AL., APPELLEES.
53 N. W. 2d 56

Filed April 18, 1952. No. 33128.

1. **Schools and School Districts.** School boards of Class II are

creatures of statute with power to bind the district only within the limits fixed by the Legislature.

2. ———. A Class II school district is a creature of statute possessing no powers to contract beyond those granted by the Legislature.
3. ———. In case a Class II school district enters into a contract without the power granted by the Legislature such contract may be declared void and invalidated in an appropriate action.
4. ———. Power of a Class II school district may not flow from emergency, but only from a statutory grant.
5. ———. Within the meaning of the statutes governing Class II school districts the purchase of a residence for the superintendent of schools does not come within the powers granted.
6. **Work and Labor: Schools and School Districts.** Where action of a public organization such as a school district is illegal and void not for lack of power but for failure to properly exercise power which exists, the organization is bound to the extent that it has received the benefits of the action.
7. ———: ———. Where action of a public organization such as a school district is ultra vires and there is no power to act in the premises at all no liability may be imposed upon the organization.
8. **Equity.** The defense of laches is not available to defeat an action in equity where there has been no material change in the defendant's position or in the subject matter of the action caused by plaintiff's delay; nor where the plaintiff has been ignorant of his rights, or, though apprehensive of them, there was such an obscurity in the transaction that it was difficult to gain the facts upon which to maintain the action.
9. **Actions.** A taxpayer may institute appropriate action to test the validity of the expenditure of money by a Class II school district and to have adjudicated an appropriate remedy.
10. **Schools and School Districts.** Where a sale of real estate has been made to a Class II school district which was void for the reason that the district was without power to make the purchase the seller is under a legal obligation to restore the consideration received to the district.
11. **Officers: Schools and School Districts.** In a case where there has been an expenditure of the funds of a Class II school district which expenditure was unlawful for want of power, the officers or members of the board who by their act or acts gave efficacy to the expenditure are liable therefor to the district.
12. **Attorney and Client.** Except as provided by law or by a uniform course of procedure, recovery of attorney's fees is not allowable in this jurisdiction.

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

Joseph S. Wishart and *Bartlett E. Boyles,* for appellants.

Beghtol & Rankin, John C. Mason, Kenneth E. Anderson, Nate Holman, C. Russell Mattson, and *Clark Jeary,* for appellees.

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

YEAGER, J.

This is an action in equity by Willis F. Fulk and Walter J. Olsen, residents, taxpayers, and electors of School District No. 8 of Lancaster County, Nebraska, plaintiffs and appellants, against School District No. 8 of Lancaster County, Nebraska, Ross Nisley, Conrad Leader, Robert N. Stall, Otto W. Endorf, Vance Ruckle, and John Te Selle, as members of the school board of the district and as individuals, Dale C. Sturdy, and Dorothy V. Sturdy, defendants and appellees, to have declared null, void, and of no effect a deed executed and delivered to the district on or about October 8, 1949; to have the district restored to the condition and situation occupied by it before the transaction was made and consummated; to have liability adjudicated against the members of the board and the defendants Sturdy for such restoration; and to have a trust impressed upon the lands described in the deed for the purpose of insuring restoration in whole or in part and for costs and attorney's fees.

There was a trial to the court at the conclusion of which findings of fact were made and a decree was rendered declaring valid the purchase represented by the deed and dismissing plaintiffs' petition.

Following the filing of a motion for new trial which was overruled the plaintiffs have appealed.

The assignments of error are: (1) That the court erred in finding that the district faced the alternative of purchasing a residence property or of closing its school, and that a local and statewide emergency existed in regard to such property; (2) that the court erred in finding that the residence of the superintendent is a part of the school system and is used for the necessary functions and duties of the superintendent, either as a matter of law or of fact; (3) that the court erred in finding that the acts of the school board and the members thereof in making the purchase and in expending the funds of the district were authorized and valid as a matter of law; and (4) that the decree infers that the purchase of the property is an authorized power of Class II school districts, and that such inference is erroneous as a matter of law.

The background of the action is substantially the following: During the year 1948 and prior to August 27, 1949, the defendant school district, which will be hereinafter referred to as the school district, was a school district which had been organized and was operating pursuant to Chapter 79, article 6, R. S. 1943. As a district under this organization it will be referred to hereinafter as an article 6 district. By legislative action in 1949 practically the entire body of the public school laws of the state was rewritten. By the school laws of 1949 this district became classified under Chapter 79, article 1, and denominated Class II. § 79-102, R. R. S. 1943. This legislation was approved May 21, 1949, and by operation of law became effective August 27, 1949.

As an article 6 district the district had a board consisting of six trustees. These trustees by the provisions of statute became the members of the board of the district under the new classification. § 79-104, R. R. S. 1943.

The corporate status and the existing rights and liabilities of the district were not changed. It was provided: "The adoption of this revision of the school laws shall not affect the corporate status of existing school

districts, nor disturb existing rights and liabilities * * *." § 79-103, R. R. S. 1943.

The school law with regard to this district before change of classification contained the following with regard to acquisition of and payment for a school site and building: "The qualified voters shall also have power at any annual or special meeting to direct the purchasing or leasing of any appropriate site and the building, hiring or purchasing of a schoolhouse, and the amount necessary to be expended the succeeding year, and to vote a tax on the property of the district for the payment of the same." § 79-210, R. S. 1943.

Section 79-203, R. S. 1943, provides in part as follows: "No schoolhouse site shall be changed nor taxes voted for building, purchase or lease of a schoolhouse at any district meeting unless notices shall have been given of such meeting, as above provided, including therein the fact that such subjects will then be considered."

The notices referred to are contained in this section and section 79-202, R. S. 1943. Section 79-202, R. S. 1943, invalidates any action of a special meeting in the absence of notice stating the object of the meeting. By the terms of section 79-203, R. S. 1943, the regular annual meeting is not invalidated by failure of notice. No schoolhouse site may be changed and no taxes may be voted for building, purchase, or lease of a schoolhouse at such meeting in the absence of notice. See State ex rel. Arterburn v. Cruise, 111 Neb. 114, 196 N. W. 116.

In the 1949 revision the following was substituted for all intents and purposes for section 79-210, R. S. 1943: "The qualified voters of a school district of the first or second class shall also have power at any annual or special meeting (1) to direct the purchasing or leasing of any appropriate site and the building, hiring, or purchasing of a schoolhouse or other school buildings, (2) to determine the amount necessary to be expended for such purposes the succeeding year, and (3) to vote a

tax on the property of the district for the payment of the same." § 79-506, R. R. S. 1943.

It will be observed that in this revised section appear the words "or other school buildings" whereas they did not appear in the old section.

The restrictive provisions of sections 79-202 and 79-203, R. S. 1943, with minor changes of no importance here appear in sections 79-502 and 79-503, R. R. S. 1943, which sections are a part of the revision of 1949.

The 1949 revision contains the following: "The school board or board of education shall (1) provide the necessary appendages for the schoolhouse, * * *." § 79-440, R. R. S. 1943.

The officers of the district, as an article 6 district, were a moderator, a director, and a treasurer. § 79-603, R. S. 1943. The officers were elected by the trustees. The officers after the revision are a treasurer, a secretary, and a president. § 79-701, R. R. S. 1943.

Among the duties of the president is to countersign all orders on the treasury for money to be disbursed by the district and all warrants of the secretary on the county treasurer for money raised for district purposes or apportioned to the district by the county superintendent. § 79-452, R. R. S. 1943.

The treasurer is the custodian of the funds of the district. It is his duty to apply for and receive the money apportioned to the district or collected for the district by the county treasurer. It is also his function to pay out the funds of the district on order of the secretary countersigned by the president. § 79-460, R. R. S. 1943. He is also required to give bond for the faithful performance of his duties. § 79-459, R. R. S. 1943.

On June 14, 1948, at the regular annual meeting of the district the following proceeding was had as shown by stipulation of the parties at the trial:

"Motion made by Ray Clark, seconded by Ross Nisley the School Board be authorized to provide a house for superintendent, not to exceed over $2,500.00, superin-

tendent to pay suitable rent. Eight votes for, two against, one not voting. Carried."

There appears to have been a notice of this meeting. Notice however was not given of any purpose to vote a tax for the building, purchase, or lease of a schoolhouse or other school building.

Nothing was done pursuant to this pretended authorization until September 27, 1949. On this date the record of the minutes indicates that there was a special meeting of the board. The portion of the minutes relating to this subject is the following:

"Motion by Ruckles Sec. by Endorff board act on June 14th 1948 Annual Meeting Motion of purchasing house for Superintendent not to cost over $2500.00 Voted by ballot 4 yes and 2 No Motion Carried."

Another special meeting of the board was held September 30, 1949. With reference to the subject under consideration here the following appears in the minutes:

"School board met at school house in special session at 8:00 P. M.

"Meeting was called by the chairman for the purpose of acting on June 14th 1948 Annual Meeting Motion of purchasing house for Superintendent.

"The board Voted to purchase the Dale C. Sturdy property for Superintendent Residence at $2500.00.

"Roll call Nisley yes Ruckles yes, Stall yes Endorff yes Leader yes TeSelle Not Voting. Carried"

Te Selle testified that at a later date he registered a negative vote. Whether or not this negative vote was recorded does not appear.

There is nothing to indicate that these were or were intended to be district meetings. They clearly were only special meetings of the board. Also there is nothing indicating that the action taken was communicated to the voters of the district.

On September 30, 1949, the officers of the district, namely the defendants Nisley, president, Leader, secre-

tary, and Stall, treasurer, caused to be paid to the defendants Sturdy $500.

By written instrument dated October 7, 1949, these three officers of the district on behalf of the district agreed to purchase Lots 1 and 2, Block 3, West Bennet, an addition to the Village of Bennet, Nebraska, which lots are located in the northwest quarter of the northwest quarter of the northeast quarter of Section 10, Township 8, Range 8, in Lancaster County, Nebraska, for $2,500. The instrument recited a previous payment of $500.

On October 8, 1949, the defendants Sturdy conveyed this real estate by warranty deed to the district. Three warrants were issued to them payable out of the funds of the district for the balance of the $2,500, one for $600 and two each for $700.

We think we may assume that the payments were made pursuant to the requirements of sections 79-452 and 79-460, R. R. S. 1943.

There was no grant of authority for any action taken in this respect other than that heretofore quoted herein as having occurred on June 14, 1948, and September 27 and 30, 1949.

This action of the board based upon the background which has been outlined was validated by the findings and decree of the district court.

Here the plaintiffs reassert the invalidity of the action taken on the grounds asserted in the district court.

Basic in the determination is the question of whether or not the district or the board had statutory power to do the thing which was here done. Unless they or one of them had such power the action is void.

In Ladd v. School District, 70 Neb. 438, 97 N. W. 594, it was said: "School boards are creatures of the statute and their powers are limited. They can bind the district only within the limits which the legislature has fixed; beyond that, their acts are void."

In American Surety Co. v. School District, 117 Neb.

6, 219 N. W. 583, it was said: "A school district is a creature of statute possessing no powers whatever beyond those given by the legislature, and is unable to contract, ad libitum, as individuals may do, but only respecting objects, and to the extent, the law permits."

In School District of Omaha v. Adams, 151 Neb. 741, 39 N. W. 2d 550, it was said: "It should be pointed out that a board of education is a creature of statute, and as such possesses no other powers than those expressly granted by the Legislature."

It follows as of course that where a contract is entered into by a school district without power so to do such contract may be declared void and invalidated in an appropriate action. Ladd v. School District, *supra;* Markey v. School District, 58 Neb. 479, 78 N. W. 932; Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649. The last case cited is not a case involving a school district but strictly speaking a municipal corporation, also a creature of statute with defined powers. In that case it was said: "A contract, entered into by a city without power, express or implied, so to do, is void, and its performance may be enjoined."

In the light of these principles and the powers of school districts of this class as defined by statute it becomes readily apparent that the first assignment of error must be sustained. We have not found therein any emergency power embracing this subject reposed by the Legislature in the district and none has been cited. Likewise we have been cited to no authority the effect of which is to say that there is such implied emergency power.

This court has made it clear that the power of a creature of statute does not flow from emergency, but only from statute. Speaking to this subject in State ex rel. Boxberger v. Burns, 132 Neb. 31, 270 N. W. 656, this court said: "The emergency, as serious as it appears to be, does not empower the county commissioners to

do anything except what they are empowered by law to do."

As to the second assignment of error it appears to be a proper statement that the question of whether or not a residence for the school superintendent was from a factual or practical viewpoint a need is not of controlling importance in determining the legality of this transaction. The controlling question is whether or not the legislative grant contains express or implied power to purchase a residence for the use and occupancy of the school superintendent. Unless it does contain such a grant then, as pointed out in the authorities considered in the discussion of the first assignment of error, the power does not exist.

The plaintiffs insist that there is no such grant of power. The defendants on the other hand insist that there is. They contend substantially that before revision the power flowed from the provision of section 79-210, R. S. 1943, permitting the voters to "direct the purchasing or leasing of any appropriate site and the building, hiring or purchasing of a schoolhouse." They contend substantially that after revision the power flowed from the provision of section 79-506, R. R. S. 1943, to "direct the purchasing or leasing of any appropriate site and the building, hiring, or purchasing of a schoolhouse or other school buildings."

It appears to be that in the former instance the contention is that residence for the superintendent is included within the meaning and definition of "schoolhouse." In the latter it appears that the contention is that residence for the superintendent is included in the meaning of the phrase "schoolhouse or other school buildings."

Numerous cases are cited in support of defendants' contention in this respect but only those from the state of Texas do so.

In Adams v. Miles (Tex. Civ. App.), 300 S. W. 211, in a paraphrase of a statute the court said that the

grant of power allowing the use of school funds for buying school sites, buying, building, and repairing, and renting schoolhouses "and for other purposes necessary in the conduct of public schools to be determined by the board of trustees," amounted to a grant of power to construct and operate dormitories for teachers. This holding was affirmed in Adams v. Miles (Tex. App.), 41 S. W. 2d 21. See, also, Landrum v. Centennial Rural High School Dist. (Tex. Civ. App.), 146 S. W. 2d 799.

Young v. Linwood School District No. 17, 193 Ark. 82, 97 S. W. 2d 627, one of the cases cited, holds that "school buildings" included within its meaning a gymnasium with rooms for home economics and other facilities for the training of students in activities contributing to broader life. This holding was sustained in a brief paragraph in Gibson v. State Board of Education, 201 Ark. 1165, 148 S. W. 2d 329.

Under a statute which authorized a school district to construct necessary appendages for a schoolhouse, the Kansas Supreme Court in Hemme v. School District, 30 Kan. 377, 1 P. 104, held that whether or not a well for the purpose of supplying water to a school was a necessary appendage was a question for a jury.

McNair v. School District No. 1, 87 Mont. 423, 288 P. 188, 69 A. L. R. 866, is a case which treats very comprehensively with what should be properly regarded as the over-all attributes of public education. The breadth as in that case presented appears to be inclusive of those things which contribute not only to the mental training of school children but also to physical well being and improvement and such other qualities as may be regarded as improving their fitness to fill better their place in the established order. In this light it was concluded a school gymnasium was within the meaning of law a schoolhouse. There is nothing in the opinion from which it might be inferred that the court intended to include within the term anything except that which

might be regarded as the educational plant or unit itself.

Reiger v. Board of Education, 287 Ill. 590, 122 N. E. 838, is a case where the court approved the purchase of land more than a block from the schoolhouse site for playgrounds and an athletic field. The approval was on the theory that these activities were a part of the educational program.

Alexander v. Phillips, 31 Ariz. 503, 254 P. 1056, 52 A. L. R. 244, is a case which holds that "schoolhouse" includes such buildings and structures as may be used for the dissemination of education and training including physical education. Pursuant to this holding the issuance of bonds for the construction of a stadium was approved.

In the case of Creager v. School District No. 9, 62 Mich. 101, 28 N. W. 794, no question of definition was involved. The only question presented was that of whether or not the director had power to contract for a fence around school property.

In certain jurisdictions the courts have concluded that housing facilities for teachers may not be regarded as schoolhouses or school buildings. Denny v. Mecklenburg County, 211 N. C. 558, 191 S. E. 26, is one of these. The question there involved appears in the opinion in the following language: "Does the special authorization to the counties of the State, * * *, to issue bonds and notes for the special purposes therein named, including the 'erection and purchase of schoolhouses' and their 'necessary equipment,' carry with it special authority to erect and maintain teacherages in connection with rural consolidated schools?" The question was answered as follows: "To hold as a matter of law that a teacherage is a part of the necessary equipment of a rural consolidated school would be to go farther than the General Assembly has gone, and, perhaps, entail some judicial engraftment. * * * A teacherage, which is to be run for profit and solely for the benefit of the

teachers, is not included within its terms."

Hansen v. Lee, 119 Wash. 691, 206 P. 927, is a case of like import. In this case it was said: "It is not necessary to cite authorities to support the statement that school districts and their directors have only such powers as are by statute given them. A careful reading of all of the provisions of statutes affecting this question * * * shows that they do not, either expressly or by reasonable implication, grant any power or authority to school districts * * * or to their board of directors, to erect dwellings for the use of school teachers." This language was quoted with approval in Denny v. Mecklenburg County, *supra.*

In Pennsylvania fourth class school districts are by statute empowered to purchase or build residences for principals, teachers, and janitors. In Freeport School District v. County of Armstrong, 162 Pa. Superior Ct. 237, 57 A. 2d 692, an action relating to the taxability of such property the court held it was not immune from taxation.

In a summary of numerous pertinent and illuminating observations in the opinion the court said in the concluding paragraph: "Although lawfully acquired, this real estate is not used nor to be used for public purposes, nor for the establishing of a public school system in the Commonwealth, nor for administering the same. Its use, on the contrary, is a private one, being at most a convenience to the school district, and at the same time that use is a commercial one, producing revenue. We do not deem it important that actual rent was charged, rather than a scheme of lowering the salary of the principal and giving the property rent-free. Unless specifically exempted by the Legislature, it is subject to taxation."

We think that the conclusions found in the cases sustaining the position of plaintiffs and the reasoning supporting them represent the basic attitude which has been extended uniformly by the courts of this jurisdiction

toward public school districts and their officers where the corporate form is set forth and the power is prescribed and circumscribed in the statute of their creation. Also we think this is the attitude which should be and remain implicit in the administrative and executive control of such organizations.

In this view we conclude that the purported purchase of the dwelling house in question was illegal and void for the reason that the school district was without power either by vote or by action of the board to make such purchase. It is neither a schoolhouse, nor another school building, nor an appendage for a schoolhouse.

Having come to this conclusion it becomes necessary to characterize the illegal and void action in order to ascertain the proper remedial attitude.

Cases in this jurisdiction hold to the view that where the action of the public organization is illegal and void not because of a lack of power but because of a failure to properly exercise existing power the organization is bound to the extent that it has received the benefits of the action. Grand Island Gas Co. v. West, 28 Neb. 852, 45 N. W. 242; Lincoln & Dawson County Irr. Dist. v. McNeal, 60 Neb. 613, 83 N. W. 847; Cathers v. Moores, 78 Neb. 17, 113 N. W. 119, 14 L. R. A. N. S. 298; Scheschy v. Binkley, 124 Neb. 87, 245 N. W. 267; Harms v. School District, 139 Neb. 714, 298 N. W. 549.

In a situation however where the action is ultra vires and no power exists to act in the premises at all no liability may be imposed upon the statutory creature. Ladd v. School District, *supra;* Markey v. School District, *supra;* Interstate Power Co. v. City of Ainsworth, *supra;* 10 McQuillin, Municipal Corporations (3d ed.), § 29.04, p. 165.

The necessary conclusion is that the action which is under inquiry here was taken without any power so to do by the district or its officers. It was ultra vires and therefore no liability therefor could attach to the district, and it was and is in nowise bound by the action.

Under the circumstances action by these voters and taxpayers is proper to restore to the district the funds which were illegally applied in payment of the purchase price.

The defendants urge that laches on the part of plaintiffs defeats their right to maintain action.

The petition herein was filed on January 7, 1950. The details as to the dates involved in the consummation of the purchase have been set forth hereinbefore. The record does not disclose that the plaintiffs and others occupying a like status in the district were informed of the events as they transpired. How long after the completion of the transaction the plaintiffs came into possession of the information in relation thereto does not adequately appear. Whether or not the action was ever publicized in the district likewise does not appear. It does appear that the action taken at the district meeting in June 1948 was known. It appears significant that the record discloses that efforts to carry into effect the expressed purpose of that action were at least temporarily abandoned because of voiced opposition in the district. It also appears significant that when more than a year later the board did put forth the effort to carry into effect the expressed purpose of the June 1948 meeting the matter was not resubmitted to the district at a regular meeting or one called specially for that purpose. Significant also, we think, is the fact, disclosed by the record, that at least some of the board had information from the office of the Department of Public Instruction that the Attorney General had by opinion ruled that school districts such as this had no statutory authority to purchase residences for superintendents.

Under these facts and circumstances, if this were a case where the rule with regard to laches had application, it could not well be said that these plaintiffs were guilty of laches.

Reasonably it may be said that the plaintiffs were

lulled into a false sense of security by a failure of the board to act promptly at least by making provision for a residence for the commencement of the next succeeding school term.

Reasonably it may be also said that the plaintiffs could not be required to assume that the board would attempt to exercise a power, if it had such power as it chose to exercise, except in a lawful manner, which was not done as is apparent from the statutory provisions heretofore quoted in this opinion.

Reasonably it may be inferred that the plaintiffs had no such notice as would have required or justified action on their part in advance of the completion of this pretended purchase.

The rules with reference to laches as a defense are collected and well stated in Geiss v. Trinity Lutheran Church Congregation, 119 Neb. 745, 230 N. W. 658. One of them, a quotation from a note to Felix v. Patrick, 145 U. S. 317, 36 L. Ed. 719, 12 S. Ct. 862, is the following: " 'The objection of laches is not tenable to defeat an equity cause, where there has been no material change in defendant's position, or in the subject-matter of the action, caused by plaintiff's delay; or where the plaintiff has been ignorant of his rights, or, though apprehensive of them, there was such an obscurity in the transaction that it was difficult to gain the facts upon which to maintain the action' * * *."

This statement in all of its elements appears to have application to the situation, and we think the first element has special application. It cannot well be said that there was any material change in the position of the defendants between the date of the completed transaction and the date of the filing of the petition herein.

There is another and more cogent reason why the plaintiffs must be allowed to prevail in this action. As pointed out the pretended purchase was not a mere irregularity. It was ultra vires and void. In any such case a taxpayer may institute appropriate action to test

the validity of the action and to have adjudicated the proper and appropriate remedy. Grand Island Gas Co. v. West, *supra;* Ladd v. School District, *supra;* Cathers v. Moores, *supra;* State ex rel. Arterburn v. Cruise, *supra;* Interstate Power Co. v. City of Ainsworth, *supra.*

The district court therefore erred in refusing to set aside the pretended purchase, and in refusing by its decree to restore the school district as nearly as possible to its situation before the illegal expenditure of its funds.

The pretended purchase being void the district as of course by the deed received nothing from the defendants Sturdy except color of title to the real estate. These defendants therefore are under a legal obligation to restore to the district the $2,500 received. Cathers v. Moores, *supra;* Neacy v. Drew, 176 Wis. 348, 187 N. W. 218; McCloud & Geigle v. City of Columbus, 54 Ohio St. 439, 44 N. E. 95; 10 McQuillin, Municipal Corporations (3d ed.), § 29.04, p. 170.

In Cathers v. Moores, *supra,* a recovery was not allowed but the language of the opinion draws the distinction between the cases where recovery may and may not be had against the other contracting party. The same substantial distinction is drawn in Neacy v. Drew, *supra.*

The following appears in the citation from 10 McQuillin, Municipal Corporations (3d ed.), § 29.04, p. 170: "The municipal corporation cannot in any manner bind itself by any contract which is beyond the scope of its powers, or entirely foreign to the purposes for which it was created, or which is forbidden by law, or which is against public policy, and, as stated, all persons contracting with the corporation are held to know the limitations in these respects. Hence, every contractor for the doing of public work is bound to take notice, not only of the terms of the ordinance under which the contract is made, but also of the provisions of the charter or statute under which the ordinance has been passed.

In brief, he is required to see not only that his contract complies substantially with the ordinance, but he is compelled to go further and ascertain whether the ordinance is authorized by the controlling law. So, persons dealing with quasi-public corporations, as counties, school districts and the like are bound to take notice of the power and authority of the officers and agents of such corporation. And it has been said that those who deal with the agents of a municipality must assume the risk that all necessary steps requisite to a legal contract have been taken. However, it has been held that where the municipality has power to enter into the contract, but does not observe the required formalities, persons dealing with the municipality need not take notice of the defects."

The rule is approved in McCloud & Geigle v. City of Columbus, *supra.* The court in the opinion set forth several observations which sustain the reasonable validity of the rule among which is the following: "An occasional hardship may accrue to one who negligently fails to ascertain the authority vested in public agencies with whom he deals. In such instances, the loss should be ascribed to its true cause, the want of vigilance on the part of the sufferer, and statutes designed to protect the public should not be annulled for his benefit."

The plaintiffs contend that there is also a liability against the members of the school board for authorization of the expenditure of funds. Of the authorities cited only one tends to support this contention. That one is the case of Burns v. Essling, 163 Minn. 57, 203 N. W. 605. In that it was held that a liability existed against the members of the board on account of the payment of a claim which had been audited and allowed by them which had not been authenticated as provided by law. It will be noted in this connection that there was direct participation in the act which gave efficacy to the instrument of payment.

Other authorities relied on are City of Blair v. Lantry,

21 Neb. 247, 31 N. W. 790; Superior Grade School District No. 110 v. Rhodes, 147 Kan. 29, 75 P. 2d 251; City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 47 N. E. 2d 265, 146 A. L. R. 750; Chicago Park Dist. v. Herczel & Co., 373 Ill. 325, 26 N. E. 2d 119; 4 McQuillin, Municipal Corporations (3d ed.), § 12.217, p. 176.

The effect of all of these authorities is to say in instances that the officers participating in the act which was held to be illegal were liable and in other instances that the officer having charge of the funds and his bondsman were liable.

We think that the appropriate rule should be, and it is so declared, that liability in situations such as this one can attach only to such officers and members of school boards as performed or participated in some act which gives efficacy to illegal expenditure.

As we view the record therefore no member of the board as such performed any such act. They did not on September 27 or 30, 1949, or at any other time do anything more than at most generally authorize the purchase of a residence. They did not directly or indirectly authorize the withdrawal of money from the funds of the district for the payment of the purchase price of this real estate.

The three officers, namely, the defendants Ross Nisley, Conrad Leader, and Robert N. Stall, did so perform. They executed a sales agreement and made a down payment. They, doubtless in the manner provided by statute, which required participation by all three, caused to be drawn and delivered four warrants in payment of the purchase price. For these acts they must be held liable.

Having concluded that the defendants Sturdy and the defendants Nisley, Leader, and Stall are liable it becomes necessary to declare the extent and limits of their respective liabilities. As a guide in this respect no precedent has been cited and none has been found. This however is an action in equity and it is the duty of

this court to equitably determine this question.

Therefore in the light of the record it does not appear equitable that the defendants Sturdy should be required to respond beyond or above the $2,500 received or the present value of the real estate, or $2,500 of its value should the present value exceed $2,500. It is apparent that they acted in good faith and if this had been a transaction between private persons their acts could not have been the subject of legal or other criticism.

If this will not restore the district to its status before the illegal expenditure was made, the defendants Nisley, Leader, and Stall should be required to respond.

The total response should be $2,500 with interest at the legal rate from the date of the respective payments and the costs of the litigation.

In their petition in the district court plaintiffs ask for attorney's fees for their attorneys. This question is of necessity not presented by the assignments of error since the plaintiffs did not prevail. We think however that in the light of what shall be the ultimate determination herein and of the fact that the case is triable de novo here that the right to attorney's fees should be considered.

On this question this court said in Higgins v. Case Threshing Machine Co., 95 Neb. 3, 144 N. W. 1037: "It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute." See, also, State ex rel. Charvat v. Sagl, 119 Neb. 374, 229 N. W. 118; Voss v. Voss, 144 Neb. 819, 14 N. W. 2d 849; Shepard v. Shepard, 145 Neb. 12, 15 N. W. 2d 195; Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623.

We are not aware of a uniform course of procedure

whereby attorney's fees are allowable in cases such as this one or of a statute authorizing their allowance.

In conformity with and in furtherance of the conclusions arrived at herein the decree of the district court is reversed and the cause remanded with directions to render decree declaring that the sale and purchase of the real estate involved was and is void; that by the deed in question the school district obtained only color of title to the real estate and in actuality it remains the property of the defendants Sturdy; that the defendants Sturdy are indebted to the defendant school district in the amount of $2,500; that the defendants Sturdy be allowed 60 days from the date of the issuance of mandate herein to pay the $2,500; that for failure to pay the $2,500 within the allotted 60 days the court shall appoint a referee who shall sell the real estate as under execution; that on such sale if the amount received shall equal or exceed $2,500 the amount of $2,500 shall be paid to the defendant school district; if it shall exceed $2,500 the excess shall be paid to the defendants Sturdy; and if it shall be less, the amount so received shall be paid to the district.

If a sale shall be had due report thereof shall be made to the district court. In the event that the court shall then find that the sale was for less than $2,500 the court shall render judgment in favor of the school district and against the defendants Nisley, Leader, and Stall for the difference between $2,500 and the lesser amount received.

Whether the amount of $2,500 shall come to the district from the defendants Sturdy or by sale of the real estate or in part by sale and in part by judgment against the defendants Nisley, Leader, and Stall, judgment shall be rendered in favor of the school district and against the defendants Nisley, Leader, and Stall for interest at the legal rate on the payments made on the purchase from the respective dates of such payments until the date of payment of the $2,500 or judgment therefor.

All costs including the costs of sale, should sale be required, shall be taxed to the defendants Nisley, Leader, and Stall.

REVERSED AND REMANDED WITH DIRECTIONS.

JESSE L. FREEMAN ET AL., APPELLANTS, V. THE CITY OF NELIGH, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
53 N. W. 2d 67

Filed April 18, 1952. No. 33139.

1. **Appeal and Error.** An issue not presented in the trial court may not be raised for the first time in the Supreme Court.
2. **Officers.** Offices are created for the benefit of the public and for the good order and peace of society. The authority of officers is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined.
3. **Officers: Municipal Corporations.** The title of or right to hold the offices of city councilmen cannot be collaterally attacked as a ground for enjoining the enforcement of a city ordinance enacted by them.
4. **Constitutional Law.** Section 17-511, R. S. 1943, is not unconstitutional for failure of lawful classification of property owners or violation of due process.
5. **Municipal Corporations.** The method prescribed by section 17-511, R. S. 1943, granting to cities of the second class power to pave or otherwise improve their streets, is mandatory and jurisdictional, but when the governing boards of such municipalities act within the prescribed limitations thereof, they have power and authority to act thereunder.
6. **Continuances: Appeal and Error.** Affidavits used on the hearing of a motion for a continuance cannot be considered in the appellate court unless preserved by a bill of exceptions.
7. ———: ———. A motion for the continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the trial court. Unless abuse of such discretion is shown, ruling on the motion will not be disturbed.

APPEAL from the district court for Antelope County: ROBERT D. FLORY, JUDGE. *Affirmed.*

Brogan & Brogan, and *Lightner & Johnson*, for appellants.

Elven A. Butterfield, Thomas L. Grady, and *Perry & Perry*, for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and ANKENY, District Judge.

CHAPPELL, J.

In this action plaintiffs sought to enjoin defendants, City of Neligh, a municipal corporation of the second class, the mayor thereof, and four individuals allegedly purporting to be members of the city council, from entering into contracts for street improvements, issuing bonds, and levying special assessments to pay therefor under an alleged null and void ordinance creating street improvement districts Nos. 4 to 12 inclusive, in the manner provided by section 17-511, R. S. 1943, an alleged unconstitutional statute.

With consent of all counsel, after a pre-trial conference, the case was set for hearing upon the merits September 4, 1951, at 10 a. m. At that time by leave of court, as provided by section 25-1148, R. R. S. 1943, oral evidence was adduced by the parties upon plaintiffs' motion and application for a continuance predicated upon defendants' alleged refusal to produce or permit plaintiffs to timely inspect and compare certain original records of the city with a certified copy of the proceedings involved. A continuance was denied, but the hearing was adjourned from 10:40 a. m. to 1:30 p. m., as requested by plaintiffs' counsel, to permit them to inspect and compare a relevant transcript of the proceedings with the original records, which concededly plaintiffs' counsel had theretofore inspected for a couple of hours. At 1:30 p. m., without further objections by plaintiffs, the trial court proceeded to hear the issues presented upon the merits.

Plaintiffs adduced their evidence and rested, whereupon defendants severally moved to dismiss plaintiffs' action for want of any lawful right and sufficient evidence to entitle them to injunctive relief as prayed. Defendants' motion was argued and submitted to the trial court, whereupon the court entered an order sustaining the motion, finding generally against plaintiffs and in favor of the defendants, and dismissing the action at plaintiffs' costs. Their motion for new trial was subsequently overruled and plaintiffs appealed, assigning some 12 alleged errors, but arguing only those assigning that: (1) The judgment was not sustained by the evidence but was contrary thereto and contrary to law; and (2) the trial court erred in refusing to grant plaintiffs a reasonable continuance. We conclude that the assignments should not be sustained.

In order to clarify the issues presented to the trial court as distinguished from those raised for the first time in this court, we summarize the pleadings. In that connection plaintiffs substantially alleged in their petition that they were residents and taxpayers of defendant city and that said city was a municipal corporation of the second class, of which defendant F. G. Benning was mayor and the other four individual defendants purported to be members of the city council.

Paragraph 3 alleged that on or about March 12, 1951, while so purporting to act as members of the council, such defendants attempted to pass ordinance No. 285 creating the aforesaid paving districts, which ordinance was null and void by reason of sections 17-611 and 18-301, R. S. 1943, in that upon other occasions but not in the proceedings here involved the four members of the council had allegedly been severally interested directly or indirectly in contracts to which defendant city was a party, thereby disqualifying themselves to be or act as members of the city council and pass such ordinance. Concededly, such defendants had been duly elected and qualified, and there was no allegation that any one or

more of them had been theretofore removed from office by appropriate proceedings.

Paragraph 4 alleged that said ordinance was null, void, and of no effect because it was not read upon three different days as required by law, and that the rule requiring it to be so read was not suspended as provided by section 17-614, R. S. 1943.

Paragraph 5 alleged that even if such ordinance was validly enacted, the notices and subsequent proceedings were invalid and of no force because under the provisions of section 18-130, R. S. 1943, said ordinance could not have gone into effect until 30 days after its passage, but nevertheless defendants did not allow said time to elapse but within such period, before such ordinance became effective, they began to publish notice of creation of the districts, which, for want of an effective ordinance then existing, made all subsequent proceedings null and void.

Paragraphs 6, 7, and 8 alleged, insofar as important here, that section 17-511, R. S. 1943, under which defendants purported to act, was unconstitutional because its provisions did not give resident adjacent property owners who were required to help pay for the improvements the same right to object to creation of the districts as that given to resident directly abutting property owners. There was thus allegedly created an unreasonable classification of property owners which deprived resident adjacent owners of their property without due process of law. Other reasons for unconstitutionality were alleged in such paragraphs but they were all specifically abandoned in the brief.

Plaintiffs thereafter alleged that they had no adequate remedy at law and that unless defendants were enjoined from so unlawfully proceeding as they threatened to do, plaintiffs would suffer irreparable damages and be deprived of their property without due process of law. The prayer asked for injunctive relief in conformity with and predicated upon the aforesaid allegations.

Defendants' answer admitted that plaintiffs were residents and taxpayers of the city; and alleged that the defendant Benning was the mayor and the other four individual defendants were the duly elected and acting members of defendant city council. Defendants specifically denied the allegations in paragraph 4 of plaintiffs' petition and alleged that the rules with regard to the reading of such ordinance were duly suspended and said ordinance was unanimously adopted by members of the council; and denied generally all other allegations in plaintiffs' petition. Defendants' prayer was for dismissal of plaintiffs' action. Plaintiffs' reply thereto denying generally perfected the issues.

Plaintiffs argued in their brief that they were entitled to an injunction because objections to creation of some of the districts were timely filed but the city had failed, neglected, or refused to perform its quasi-judicial function requiring it to ascertain and determine whether or not they were timely filed and sufficient to extinguish the right of the council to proceed, but nevertheless it threatened or continued to unlawfully proceed under the statute and ordinance here involved. The duty of a city council in such a situation was discussed in Hiddleson v. City of Grand Island, 115 Neb. 287, 212 N. W. 619, wherein a statute comparable with the pertinent provisions of section 17-511, R. S. 1943, was construed and applied. However, contrary to plaintiffs' contention, no such issues were pleaded in plaintiffs' petition, and the record does not disclose that the case was tried upon any such theory. Thus, such issues were never presented to the trial court by plaintiffs, and we are not required to decide or discuss them further except to apply the rule that: "An issue, not presented in the trial court, may not be raised for the first time in the supreme court." Stroud v. Payne, 124 Neb. 612, 247 N. W. 595. See, also, Harlan County v. Thompson, 125 Neb. 65, 248 N. W. 801; State ex rel. Sorensen v. Commercial State Bank, 126 Neb. 482, 253 N. W. 692.

At the hearing upon the merits, the trial court sustained defendants' motion to strike paragraph 3 of plaintiffs' petition and ultimately excluded as incompetent and immaterial all evidence offered and adduced by plaintiffs with relation to other purported contractual transactions with the city in which the four individual members of the city council were alleged to have directly or indirectly had an interest. Plaintiffs argued that the trial court erred in so doing. We conclude that it did not.

In that connection, section 17-611, R. S. 1943, provides in part: "No officer of any city or village shall be interested, directly or indirectly, in any contract to which the corporation, or any one for its benefit, is a party. Any such interest in any such contract shall avoid the obligation thereof on the part of such corporation. No officer shall receive any pay or perquisites from the city other than his salary."

Thereafter section 18-301, R. S. 1943, provides: "Any officer of any city in this state who shall be interested, directly or indirectly, in any contract to which the city is a party, or who shall enter into any contract to furnish or shall furnish to any contractor or subcontractor with a city of which he is an officer, any material to be used in performing any contract with such city, shall, upon conviction thereof, be fined in any sum not less than one thousand dollars nor more than five thousand dollars."

Be that as it may, no such contracts are in any manner involved in this case by pleadings or otherwise. In ruling as it did, the trial court correctly applied applicable and controlling rules of law.

This court has heretofore concluded that the title of or right to hold an office cannot be adjudicated by injunction. Fort v. Thompson, 49 Neb. 772, 69 N. W. 110; Osborn v. Village of Oakland, 49 Neb. 340, 68 N. W. 506. In such cases an adequate remedy at law is provided by statute. Here the city was concededly a de jure

municipal corporation and entitled to a city council, the members of which were also de jure insofar as this record discloses. There was no claim or contention that they were not duly elected and qualified as such or that they were theretofore removed by judicial proceedings or otherwise. Therefore, if the ordinance involved was duly passed or adopted it will be upheld.

On the other hand, if the ordinance was duly passed or adopted, we may assume for the purpose of argument only that the four members of the city council were de facto officers and arrive at the same result, because: "The acts of a de facto officer are valid and binding, so far as the interests of the public or third persons are involved." Magneau v. City of Fremont, 30 Neb. 843, 47 N. W. 280, 27 Am. S. R. 436, 9 L. R. A. 786. See, also, State v. Gray, 23 Neb. 365, 36 N. W. 577.

As stated in 62 C. J. S., Municipal Corporations, § 493, p. 934: "Offices are created for the benefit of the public, * * *. For the good order and peace of society their authority is to be respected and obeyed, until in some regular mode prescribed by law their title is investigated and determined. The de jure existence of corporate offices and officers may be determined only in a direct proceeding * * * and the title or right of a de facto officer to the office may not be collaterally attacked. * * * The acts of officers de facto with respect to public matters affecting the public interests are to be regarded as valid and binding; as much so as if the same acts had been performed in the same manner by an officer de jure, and the legality of such acts may not be collaterally attacked." See, also, State v. Central States Electric Co., 238 Iowa 801, 28 N. W. 2d 457, a case factually comparable with that at bar.

We turn then to the factual issues presented by paragraph 4 of plaintiffs' petition. In that regard, plaintiffs offered in evidence, without reservation, a certified transcript of the proceedings involving enactment of the ordinance. Such transcript and other evidence

also adduced by plaintiffs discloses without per adventure of a doubt that section 17-614, R. S. 1943, was unanimously complied with in every respect by the city council. Therefore, we conclude that the allegations of paragraph 4 of plaintiffs' petition were not sustained by any competent evidence.

Plaintiffs cited no authority to support the allegations of paragraph 5 of their petition except the pertinent statutes. We conclude that such statutes do not sustain them. In that connection, section 17-511, R. S. 1943, provides: "Whenever the governing body shall deem it necessary to make any of the improvements named in section 17-509, said governing body shall by ordinance create paving, graveling or other improvement district or districts, *and after the passage, approval and publication of such ordinance, shall publish notice of the creation of any such district or districts* for six days in a legal newspaper of the city or village, if a daily newspaper, or *for two consecutive weeks, if the same be a weekly newspaper.* If a majority of the resident owners of the property directly abutting on the street, streets, alley or alleys to be improved, shall file with the city clerk or the village clerk *within twenty days after the first publication of said notice,* written objections to the creation of such district or districts, said improvement shall not be made as provided in said ordinance; but said ordinance shall be repealed. If said objections are not filed against the district in the time and manner aforesaid, the governing body shall forthwith cause such work to be done or such improvement to be made, and shall contract therefor, and shall levy assessments on the lots and parcels of land abutting on or adjacent to such street, streets, alley or alleys especially benefited thereby in such district in proportion to such benefits, to pay the cost of such improvement." (Italics supplied).

Also, section 17-613, R. S. 1943, insofar as important here, provides: "All ordinances of a general nature shall, before they take effect, be published, *within one*

month after they are passed, in some newspaper published in such city or village, * * *." (Italics supplied).

The record discloses that ordinance No. 285 was duly introduced and unanimously passed, approved, and ordered published by the council on March 12, 1951. It was thereafter published on March 14, 1951, within one month after it was passed, as required by section 17-613, R. S. 1943. Thereafter, notice of creation of the district was published on March 22 and March 29, 1951, respectively, for two consecutive weeks in a weekly newspaper, after passage, approval, and publication thereof, as required by section 17-511, R. S. 1943.

Section 18-130, R. S. 1943, does provide that: "no ordinance * * * shall go into effect until thirty days after the passage of the same." Assuming, without deciding, that this section has application, we find no provision in the pertinent statutes requiring that publication of notice of the creation of districts shall not be published until after such 30-day period has elapsed. Rather, the language of the statutes involved and relied upon by plaintiffs indicates that the contrary is true. Such a conclusion is logical because the very purpose of such publication is to give notice to and permit resident owners of directly abutting property to timely object and prevent the ordinance from ever becoming effective or to otherwise make the ordinance lawfully valid and effective. In other words, such publications and notices are mandatory and jurisdictional steps without which an ordinance never would become effective. Manners v. City of Wahoo, 153 Neb. 437, 45 N. W. 2d 113. We therefore conclude that the ordinance was not null and void for any reason alleged in paragraph 5 of plaintiffs' petition.

We also find no merit in paragraphs 6, 7, and 8, alleging as aforesaid that section 17-511, R. S. 1943, is unconstitutional for failure of lawful classification and violation of due process.

In Hoopes v. City of Omaha, 99 Neb. 460, 156 N. W.

1047, this court said: "The word 'adjacent,' in the popular sense thus used, obviously means something in addition to, or different from, 'abutting.' * * * In construing the word 'adjacent,' it was said in Dunker v. City of Des Moines, 156 Ia. 292: 'The word "adjacent" is, at least, somewhat indefinite. Ordinarily, it means "to lie near, close, or contiguous." Webster. Even in its strictest sense it means no more than lying near, close, or contiguous, but not actually touching.' This definition is approved in Hennessy v. Douglas County, 99 Wis. 129; Northern P. R. Co. v. Douglas County, 145 Wis. 288." It will be noted, of course, that "directly abutting" means actually "touching." Resident owners of directly abutting property are most directly interested in obtaining the improvement or extinguishing the right to make it, as provided by section 17-511, R. S. 1943. Their property is directly benefited by the improvement and bears the brunt of assessments levied therefor. Resident adjacent property owners are only incidentally interested or benefited, because their property does not abut upon or touch the improvement. Further, their property bears a small part if any of the assessments levied therefor. In other words, as heretofore observed, the property of directly abutting and adjacent owners is differently situated.

As stated in Field v. Barber Asphalt Co., 194 U. S. 618, 24 S. Ct. 784, 48 L. Ed. 1142, involving a somewhat different but comparable situation: "It is well settled, however, that not every discrimination of this character violates constitutional rights. It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the State from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed."

Therein it was also said: "If the legislature saw fit

to give to those most directly interested and whose consent could be most readily obtained, the right to protest, such action did not deprive other persons of rights guaranteed by the Constitution."

It is now elementary in this jurisdiction as well as elsewhere that an opportunity to be heard with right of review upon the question of assessments for benefits is all that is required to satisfy the due process provisions of the constitutions. Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397. See, also, Hoopes v. City of Omaha, *supra,* citing and quoting with approval from Londoner v. City and County of Denver, 210 U. S. 373, 28 S. Ct. 708, 52 L. Ed. 1103.

We come finally to the question of whether or not in the light of issues heretofore discussed the trial court erred in refusing a longer continuance. We conclude that it did not. In that connection, plaintiffs' motion for a continuance was supported by several affidavits filed therewith, but they were not made a part of the bill of exceptions. Therefore, such affidavits cannot be considered because of the rule that: "'Affidavits used on the hearing of a motion for a continuance cannot be considered in the appellate court unless preserved by a bill of exceptions.' Nelson & Cook v. Johnson, 44 Neb. 7, 62 N. W. 244." Macumber v. Gillett, 138 Neb. 714, 294 N. W. 854.

As heretofore observed, however, there was some oral evidence adduced by the parties upon that question prior to trial on the merits. We have examined such evidence in the light of the rule that: "A motion for the continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the court. Unless abuse of such discretion is shown, ruling on the motion will not be disturbed." Waldron v. Lapidus, 121 Neb. 54, 236 N. W. 139. See, also, Mahaffy v. Hansen Live Stock & Feeding Co., 105 Neb. 9, 178 N. W. 829; Harrington v. Hedlund, 89 Neb. 272, 131 N. W. 212.

The evidence discloses that the records of the city

which plaintiffs desired more time to inspect were entirely immaterial and had no relation to appropriate issues presented upon the merits. Plaintiffs were given ample time to inspect and compare the competent material and related records. We conclude that the trial court did not abuse its discretion.

Other matters were assigned as error but they were either not argued in the brief or if argued they involved issues not raised in the trial court but raised for the first time in this court. Such questions will not be discussed.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed. All costs in the district court and in this court are ordered taxed to plaintiffs.

AFFIRMED.

AL PERRY, APPELLEE, V. FRANK GROSS ET AL., APPELLANTS.
53 N. W. 2d 73

Filed April 25, 1952. No. 33086.

1. **Evidence.** Parol evidence of a prior or contemporaneous oral agreement is not admissible to vary, alter, or contradict the terms of a written agreement.
2. ———. The parol evidence rule is one of substantive law as well as of evidence and as a rule of substantive law it renders ineffective proof of an oral prior or contemporaneous agreement the effect of which would be to vary, alter, or contradict the terms of a written agreement.
3. ———. As an exception to the parol evidence rule a distinct oral agreement constituting a condition on which performance of a written contract or agreement is to depend is enforceable.
4. **Appeal and Error.** An assignment of error is too indefinite to present a question for review where a motion for new trial assigns numerous grounds therefor and the assignment of error in this court fails to specify to which one or more of the various points made by the motion the assignment was intended to apply.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Affirmed.*

Donovan, Frohm & Dalton, for appellants.

Leonard A. Hammes and *John A. McKenzie,* for appellee.

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

YEAGER, J.

This is an action at law by Al Perry, plaintiff and appellee, against Frank Gross, Victor L. Gross, and Gross Real Estate Brokers, defendants and appellants, for the recovery of money had and received by defendants from the plaintiff in the amount of $2,000 with interest.

The cause was tried to a jury and a verdict was returned in favor of plaintiff. Judgment was rendered on the verdict.

After judgment the defendants filed an alternative motion for judgment notwithstanding the verdict or for a new trial. The alternative motion was predicated on motions made respectively at the close of plaintiff's evidence and at the close of all the evidence for a directed verdict, which were overruled. The alternative motion was overruled.

From the judgment and the order overruling the alternative motion the defendants have appealed.

In the brief as grounds for reversal there are five assignments of error. One of the five is predicated on the refusal of the court to sustain a motion to strike evidence which had been adduced on behalf of the plaintiff. The other four fairly analyzed and applied challenge the sufficiency of the evidence to sustain a cause of action in favor of the plaintiff and against the defendants.

The substantial contention of the defendants is that the pleaded and proved theory of plaintiff's action furnishes no legal basis for the recovery of judgment against the defendants.

To the extent necessary to state here the plaintiff alleged that on August 10, 1948, he signed a listing agreement with defendants whereby they became agents to sell for him the west half of Lot 11, Block 20, West Benson, an addition in Douglas County, Nebraska, for $16,500 net to plaintiff. At that time the defendants as agents for the owners had for sale a tract of land for $22,500 which they offered to plaintiff. The plaintiff desired and offered to buy the land but informed the defendants that he would be unable to do so unless his property could be sold. Thereupon by oral agreement between him and the defendants he advanced to defendants $2,000 not as part payment on the purchase price of the land but to show good faith in his offer to purchase the land. If the defendants failed to sell his property they were to return the $2,000 to him. The defendants failed to sell plaintiff's property, and in consequence plaintiff demanded repayment of the $2,000 which was refused. The prayer is for judgment in this amount with interest.

The defendants answered the petition at length but in the light of the character and quality of the assignments of error it appears necessary to say only that the allegations of the petition charging liability were denied, and they alleged that the $2,000 was paid to defendants as a down payment to be paid by them to Howard R. Young and Sarah C. Young on the purchase price of land belonging to them which plaintiff agreed to purchase under a written sales agreement entered into between plaintiff and defendants on August 10, 1948. The agreed purchase price of the land which land is the same as was referred to in plaintiff's petition was $22,500.

As is apparent from what has been said with reference to the contents of the petition plaintiff's cause of action is dependent upon the alleged oral agreement as to the disposition of the $2,000 in event of failure of sale of plaintiff's property by the defendants.

That there was sufficient evidence to sustain the finding of the jury that the parties entered into the alleged oral agreement there can be no doubt. The plaintiff and his wife testified to it completely and comprehensively. The serious question in this connection is, assuming that the oral agreement was proved, does it support or sustain a right of recovery in favor of plaintiff? The defendants substantially insist that it does not.

Their theory is that the contract proved is an oral contemporaneous agreement the effect of which if enforced would be to vary, alter, and contradict the terms of a written agreement, a thing not permissible under well-established principles of law.

The principle for which the defendants contend is well established. Parol evidence of a prior or contemporaneous agreement is not admissible to vary, alter, or contradict the terms of a written agreement. Smith v. Bailey, 105 Neb. 754, 181 N. W. 926; Spiegal & Son v. Alpirn, 107 Neb. 233, 185 N. W. 415; Davis v. Ferguson, 111 Neb. 691, 197 N. W. 390; Cox v. Rippe, 146 Neb. 309, 19 N. W. 2d 514; Arman v. Structiform Engineering Co., Inc., 147 Neb. 658, 24 N. W. 2d 723.

Also the parol evidence rule is not merely one of evidence. It is one of substantive law as well. As a rule of substantive law it renders ineffective proof of an oral prior or contemporaneous agreement the effect of which would be to vary, alter, or contradict the terms of a written agreement. The admission of evidence without objection in proof of an oral agreement which is in violation of the parol evidence rule furnishes no basis for enforcement of the oral agreement. Theno v. National Assurance Corp., 133 Neb. 618, 276 N. W. 375; Arman v. Structiform Engineering Co., Inc., *supra*.

There are however what have been regarded in the decisions as exceptions to the parol evidence rule. The plaintiff contends that the instant case falls within this category.

In the decisions of this court and of courts of other

jurisdictions exceptions to the rule have been recognized.

In Norman v. Waite, 30 Neb. 302, 46 N. W. 639, it was said: "The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct oral agreement which constitutes a condition on which the performance of the written contract or agreement is to depend." This pronouncement was followed in Exchange Bank of Ong v. Clay Center State Bank, 91 Neb. 835, 137 N. W. 845, and Johnson v. Shuler, 134 Neb. 25, 277 N. W. 807. See, also, Davis v. Sterns, 85 Neb. 121, 122 N. W. 672; Seminole Bond & Mtg. Co. v. Investors Realty Co., 127 Neb. 193, 254 N. W. 732; Mire v. Haas (La. App.), 174 So. 374; Smith v. Fergus County, 98 Mont. 377, 39 P. 2d 193; Moore v. Wilson (Tex. Civ. App.), 138 S. W. 2d 1099; Annotation, 25 A. L. R. 822.

The oral agreement appears to fall within the category described in the quotation from Norman v. Waite, *supra*, that is, a distinct oral agreement which constitutes a condition on which performance of the written contract or agreement was to depend.

We conclude therefore that the oral contract alleged was valid and that neither the contract nor proof thereof was violative of the parol evidence rule.

As has been already pointed out the evidence of plaintiff was sufficient as proof of the oral agreement.

It is this evidence which has been held to be sufficient as proof of the oral agreement that forms the basis of the fifth assignment of error.

Plaintiff's evidence in proof of the oral agreement was adduced and admitted without objection. At the close of plaintiff's evidence the defendants moved that it be stricken as being inadmissible under the parol evidence rule.

What has already been said herein with regard to the parol evidence rule fully disposes of this assignment adversely to the defendants.

One of the four assignments of error which have been considered collectively herein complains that the court erred in overruling the motion for a new trial. The motion contains 27 separate alleged grounds of error. Neither the assignment in the brief nor the discussion thereof directs attention to any one or more of the assignments in the motion. In the light of this the assignment does not require consideration by the court.

In discussing a like situation this court said in Walker v. Allen, 58 Neb. 537, 78 N. W. 1070: "The assignment is too indefinite to present a question for review, because the motion for a new trial assigns several distinct grounds therefor, and the assignment of error in this court omits to specify to which one of the various points made by the motion the assignment was intended to apply."

The judgment of the district court is affirmed.

AFFIRMED.

MABEL R. HORN, APPELLANT, V. HARRY E. GATES ET AL., APPELLEES.

53 N. W. 2d 84

Filed April 25, 1952. No. 33095.

1. **Homesteads.** Whether one has acquired a homestead, or having acquired it has abandoned it, is a question of fact.
2. ———. The burden rests upon one asserting an abandonment of a homestead to establish such abandonment by a preponderance of the evidence.
3. ———. An intention to abandon and an actual abandonment must concur to establish the abandonment of a homestead interest.
4. ———. Ordinarily, where the owner of a homestead removes therefrom with his family and moves to another home, of which he is the owner, it will be presumed that he has abandoned the

first home and thereby the homestead right in it. But this, like other presumptions, may be rebutted by evidence to the contrary.

5. ———. A person cannot at the same time have two homesteads, nor can he have two places either of which, at his election, he may claim as his homestead.

6. ———. Our statute uses the term "homestead" in its commonly accepted meaning—the house and land where the family dwells.

7. **Homesteads: Executors and Administrators.** Immediately upon the death of a husband the homestead vests in his widow and should not be taken into account in the administration of his estate.

8. ———: ———. If, at the time of the husband's decease, there was a homestead the widow cannot abandon that homestead and select another out of the estate in lieu thereof.

APPEAL from the district court for Sarpy County: THOMAS E. DUNBAR, JUDGE. *Reversed and remanded.*

William R. Patrick, and *Smith & Smith,* for appellant.

William Ritchie, for appellees.

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

WENKE, J.

Mabel R. Horn brought this action in the district court for Sarpy County to partition a tract of land located therein, consisting of 330 acres, in which she claims to be the owner of an undivided one-third interest. Loverna E. Gates filed an answer claiming a homestead right in 160 acres of this land, including the house located thereon. Trial was had and the court found Loverna E. Gates had a homestead right therein and set out to her a life estate in the 160 acres thereof which she had selected therefrom, including the house located thereon. It ordered partition of the balance of the tract, finding that Loverna E. Gates, Harry E. Gates, and Mabel R. Horn each owned an undivided one-third interest therein.

Mabel R. Horn filed a motion for new trial and, from the overruling thereof, took this appeal. By her appeal she questions the correctness of the trial court's

decision as it relates to the decreeing of a homestead right in the farm, consisting of a life estate in 160 acres of the land, to Loverna E. Gates. This being an action in equity we will consider the record de novo. In doing so the following principles are applicable:

"Whether one has acquired a homestead, or having acquired it has abandoned it, is a question of fact * * *." Waltz v. Sheetz, 144 Kan. 595, 61 P. 2d 883.

"The burden rests upon one asserting an abandonment of a homestead to establish an abandonment by a preponderance of the evidence. Karls v. Nichols, supra. An intention to abandon and an actual abandonment must concur to establish the abandonment of a homestead interest. National Bank of Commerce v. Chamberlain, 72 Neb. 469, 100 N. W. 943." Phifer v. Miller, 153 Neb. 748, 45 N. W. 2d 907. See, also, Whitford v. Kinzel, 92 Neb. 373, 138 N. W. 597; Blumer v. Albright, 64 Neb. 249, 89 N. W. 809; Union Stock Yards Nat. Bank v. Smout, 62 Neb. 227, 87 N. W. 14; Flynn v. Riley, 60 Neb. 491, 83 N. W. 663.

The record discloses the following facts: Sometime in 1887 Loverna E. Gates, one of the appellees, and Charles E. Gates were married. They immediately moved onto this land in Sarpy County and continued to live on it until sometime in December 1923. During this time their two children were born, a daughter, Mabel R., now Mabel R. Horn the appellant, and a son, Harry E., one of the appellees. In the fall of 1923 Charles E. Gates, then being about 59 years of age, decided to retire. This decision was influenced by the health of his wife. She had had the flu "quite a while before" and had never fully recovered therefrom. To carry out this purpose he bought a five-room residence with basement, located at 3803 South Twenty-third Street in South Omaha, which is legally described as Lot 16, Block 4, Spring Lake Park Addition to the City of Omaha. Charles E. and Loverna E. Gates moved into this property sometime in December 1923. At that time

Mabel was living with her husband, Alva, in Papillion, Nebraska, and Harry E., the son, together with his wife, the appellee Gertrude Gates, were living on this farm but in a house about one-half mile west of the home place. When the parents moved they took with them all the furniture they needed to furnish the new home, which was smaller than the one on the farm, and left the balance. However, they did not reserve a room in the house on the farm in which to keep it nor to return to. It is apparent they left it because they could not use it in the new home. After they moved out the son, together with his family, immediately moved into the home place. They have lived there ever since, renting it from the father during the latter's lifetime. When the parents moved they also left some implements and two horses. These the son used, as long as serviceable, in his farming operations.

The farm was only six miles from the new home in South Omaha. After they moved the father, usually accompanied by the mother, came out to the farm often, especially if the weather was good. While there he took care of the garden and also did some light work in the fields. However, the parents always returned to their own home for the night. In fact, the evidence shows there was only one occasion, during approximately 25 years, that the parents stayed away from their home in South Omaha over night. That occurred when a break in a gas main made it necessary for them to do so.

After they moved to South Omaha Charles E. Gates, on February 2, 1924, registered for voting stating he was a retired farmer whose residence was "3803 South 23rd Street." The parents continued to live in this residence until Charles E. Gates died on August 10, 1948. Thereafter Loverna, the widow, lived for some five or six months with her daughter in Papillion. Since then she has been living with her son on the farm.

Charles E. Gates died intestate and at the time of

his death he was the owner of the 330 acres herein being sought to be partitioned and the residence property located at 3803 South Twenty-third Street. He left as his heirs at law his widow and two children, all of whom have herein been sufficiently identified.

This court has often said that the homestead law should be liberally construed in favor of those for whose benefit it was enacted. See, First Nat. Bank of Tekamah v. McClanahan, 83 Neb. 706, 120 N. W. 185; Hanlon v. Pollard, 17 Neb. 368, 22 N. W. 767; Bowker v. Collins, 4 Neb. 494. But naturally such construction must be within the limits of those principles applicable thereto and not in violation thereof.

The following principles, which have a bearing here, have been announced by this court:

"We do not think that the fact of registration, even if it be conceded that it was procured to be made by the party in person * * * would be conclusive proof of the abandonment of the homestead, but would be a fact to be considered, as any other fact in the case, and to be given such weight as it was entitled to under the rules governing the consideration of testimony." Mallard v. First Nat. Bank of North Platte, 40 Neb. 784, 59 N. W. 511.

"Ordinarily, where the owner of a homestead removes therefrom with his family and to another home, of which he is the owner, it will be presumed that he has abandoned the first home and thereby the homestead right in it. But this, like other presumptions, may be rebutted by evidence to the contrary, * * *." Allen v. Holt County, 81 Neb. 198, 115 N. W. 775.

"A person cannot at the same time have two homesteads, nor can he have two places either of which at his election he may claim as his homestead." Hair v. Davenport, 74 Neb. 117, 103 N. W. 1042. See, also, Berggren v. Bliss, 122 Neb. 801, 241 N. W. 544; Wapello County v. Brady, 118 Iowa 482, 92 N. W. 717; Preston v. Ottawa County Nat. Bank, 138 Okl. 133, 280 P. 581.

"Our statute uses the term 'homestead' in its commonly accepted meaning—the house and land where the family dwells." Meisner v. Hill, 92 Neb. 435, 138 N. W. 583. See, Berggren v. Bliss, *supra;* Bowker v. Collins, *supra.*

"If the legal title to the homestead is in the husband, and there are no claims of his creditors against it, upon his death the homestead vests in the widow for life, without regard to its value, and in the absence of a will of the husband his heirs take the homestead subject to the life estate of the widow." Meisner v. Hill, *supra.*

"Under our statute, when the holder of the legal title of the homestead dies, the law creates new estates, a life estate in his widow and an estate in remainder in his children and heirs. It is immaterial whether the widow and children continue to occupy the premises. Their estates do not depend upon the occupancy thereof after the death of the holder of the legal title, but vest in them absolutely on his death." Naiman v. Bohlmeyer, 97 Neb. 551, 150 N. W. 829.

"Immediately upon the death of the husband, the unincumbered homestead vested in his widow and could not be taken into account in the administration of his estate. In re Hadsell, 82 Neb. 587." Dillon v. Dillon, 103 Neb. 322, 171 N. W. 917. See, also, Bartels v. Seefus, 132 Neb. 841, 273 N. W. 485; Hobson v. Huxtable, on rehearing, 79 Neb. 340, 116 N. W. 278.

If, at the time of the husband's decease, there was a homestead, the widow cannot abandon that homestead and select another out of the estate in lieu thereof. See, In re Estate of Nielsen, 135 Neb. 110, 280 N. W. 246; Thompson on Homesteads and Exemptions, § 542, p. 459; Hendrix v. Hendrix, 46 Tex. 6; Chambers v. McPhaul, 55 Ala. 367; Harris v. Howard, 26 Ky. L. R. 366, 81 S. W. 275; Anderson v. Shannon, 146 Kan. 704, 73 P. 2d 5, 114 A. L. R. 200; Powell v. Powell, 189 Okl. 255, 116 P. 2d 889; McGaugh v. Davis, 150 Ala. 558, 43 So. 745.

While the widow testified she never thought much about a homestead, that in her younger days she thought the farm was her home, that she did not want to go to South Omaha, and that she called the farm the home place, nevertheless, the record shows they did move to the residence property they bought in South Omaha and lived there without interruption for about 25 years, until her husband died. We are satisfied, from all the circumstances shown by the record, that these folks decided to retire from the farm and did so in 1923; that while this decision was influenced by the condition of the wife's health it was not solely because thereof; that when they moved it was their intention to abandon the home on the farm and make a new home in the residence property which they had purchased, which is fully shown by the many years they lived there and their manner of living during those years; and that when Charles E. Gates died the residence in South Omaha was their homestead. Therefore, upon his death, it vested in her as such and she was not free to make a selection of 160 acres from the farm.

Having come to the conclusion that the widow did not have a homestead right in the 330 acres of farm land which appellant sought to partition, the holding of the trial court to that effect is in error and is reversed. We find that appellant, Mabel R. Horn, and appellees, Loverna E. Gates and Harry E. Gates, each have an undivided one-third interest in the 330 acres of farm land as tenants in common, being the sole heirs at law of Charles E. Gates, deceased, and that appellant is entitled to a decree for the partition thereof accordingly.

It is therefore ordered that the decree of the trial court be reversed and the cause remanded with directions that it enter a decree in accordance herewith.

REVERSED AND REMANDED.

EARL KLINGINSMITH, APPELLANT, V. ROSS ALLEN, APPELLEE.
53 N. W. 2d 77

Filed April 25, 1952. No. 33155.

1. **Husband and Wife: Appeal and Error.** Where the issues in an action for criminal conversation are presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside unless clearly wrong.
2. **Husband and Wife: Evidence.** Statements made by plaintiff's wife to plaintiff out of the presence of defendant are inadmissible in an action for criminal conversation to prove the alleged wrongful conduct of the defendant.
3. ———: ———. Such statements are only admissible in such cases where alienation of affections is pleaded by plaintiff as an issue or element of damages and then only when relevant and offered for the limited purpose of showing the wife's state of mind or feelings toward plaintiff.
4. **Evidence.** The exclusion of evidence of a fact or facts fully established by other competent and uncontradicted evidence is not reversible error.
5. ———. The admission of cumulative evidence is ordinarily within the discretion of the trial court and its ruling thereon will not be held erroneous unless it clearly appears that such discretion has been abused.
6. **Trial.** Where instructions are asked which are not applicable to any controverted issue presented by the pleadings and evidence, they should be refused.

APPEAL from the district court for Valley County: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

Davis & Vogeltanz, for appellant.

Harold A. Prince and *George A. Munn,* for appellee.

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

CHAPPELL, J.

Plaintiff brought this action at law to recover damages for criminal conversation without pleading any issue of alienation of his wife's affections as an element of damages. Concededly they were not alienated. The defense was a general denial.

The issues were submitted to a jury, whereupon it

returned a verdict for defendant and judgment was rendered thereon in his favor. Plaintiff's motion for new trial was overruled and he appealed, assigning substantially that: (1) The verdict and judgment were not sustained by sufficient evidence but were contrary thereto and contrary to law; (2) the court erred in exclusion of certain evidence; and (3) the court erred in refusing to give plaintiff's requested instruction No. 15. We conclude that the assignments should not be sustained.

The first assignment has no merit. It is elementary that in a law action where the issues are presented to a jury under proper instructions, a verdict based upon conflicting evidence will not be set aside unless clearly wrong. Cantin v. Howard, 131 Neb. 192, 267 N. W. 423. As stated in such opinion: "It is also quite evident that the conflicting evidence in the record before us invokes the application of the principle that in a suit of this character, where the evidence submitted tended to prove improper conduct and undue familiarity between the wife and defendant, which is met by opposing proof, the questions of the weight of the testimony of the witnesses, and the inferences to be drawn from all the evidence presented, are for the determination of the jury. Wheeler v. Abbott, 89 Neb. 455, 131 N. W. 942."

No complaint is here made that any of the instructions given by the trial court were erroneous. The issues presented and correctly submitted to the jury were simply whether or not defendant had adulterous relations with plaintiff's wife as alleged, and if he did, the amount of plaintiff's damages caused thereby.

To recite the salacious evidence appearing in the record would serve no useful purpose. As disclosed by the record, plaintiff's wife testified that defendant did clandestinely have such relations with her upon several specific occasions, all of which, as a witness in his own behalf, defendant positively and categorically denied. Other respectively supporting evidence, facts, and cir-

cumstances adduced by the parties were also more or less conflicting in character. Thus, a jury question was presented and we conclude that there was ample competent evidence in the record to sustain the verdict and judgment. Contrary to plaintiff's contentions, we find nothing in the record which could sustain a conclusion that the verdict was clearly wrong or the result of mistake, passion, or prejudice.

After certain pertinent questions had been asked plaintiff by his counsel and objection thereto had been sustained, an offer was made by plaintiff to prove that his wife subsequently on September 22, 1951, "told him of the various times of intercourse and we make this offer on the ground that this testimony is admissible in criminal conversation or alienation suits." Objection thereto was sustained and plaintiff in the second assignment argued that such ruling was erroneous. We conclude otherwise.

The only authority cited by plaintiff to sustain such contention was Larsen v. Larsen, 115 Neb. 601, 213 N. W. 971, an action brought by a wife against third persons to recover damages for alienation of her husband's affections. In that opinion it was said: "On the trial of the case the wife was permitted, over objections of the defendants, to detail in evidence conversations which she had had with her husband, in the absence of the defendants, for the purpose of showing, or tending to show, the condition of her husband's mind and his feelings toward her at such respective times. As we said in the course of our opinion in Stocker v. Stocker, 112 Neb. 565: 'While evidence of what the husband said out of the presence of the defendant would ordinarily be hearsay and incompetent to prove such wrongful conduct of defendant as would tend to cause the husband to lose his affection for his wife, such evidence may be properly received to show the state of the husband's feelings toward his wife, and in this case the court, by proper instruction, informed the jury that such evi-

dence was received only for such purpose.' Hence, error was not committed by the trial court in admitting this evidence for such purpose."

Plaintiff cited no authority and we have found none holding that such evidence would be admissible generally to prove the alleged wrongful conduct of defendant. In Cabana v. Olivo, 58 R. I. 252, 192 A. 302, after citing and quoting from numerous authorities, the court said: "In the instant case the alleged statements by the wife had no real bearing on the state of her mind at the time toward either of the parties, but were only relevant to the past conduct of the defendant. Therefore the husband's testimony to them was clearly inadmissible, being merely hearsay of the most objectionable character." Such statement has application here.

The statements in the case at bar would be admissible only in the event that this had been an alienation of affections suit or an action wherein such issue had been pleaded as an element of damages, and then only when relevant and offered for the limited purpose of showing the wife's state of mind. This was not an action involving any such issue or element. Therefore we conclude that the offer was properly refused.

In any event the evidence offered was merely cumulative. As a witness for plaintiff the wife had theretofore affirmatively testified both upon direct and cross-examination with regard to every prior alleged wrongful act of defendant and had also testified that subsequently on the involved specific date she had confessed thereto in statements made to her husband. The testimony that she had confessed was not and of course could not have been denied by defendant. In Barr v. City of Omaha, 42 Neb. 341, 60 N. W. 591, this court held: "The exclusion of evidence of a fact fully established by other competent and uncontradicted evidence is not reversible error." See, also, O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123, wherein this court held that: "The admission of cumulative evidence is ordinarily within the

discretion of the trial court and its ruling thereon will not be held erroneous unless it clearly appears that such discretion has been abused." Such rules have application here.

We turn then to the third assignment. Instruction No. 15 tendered by plaintiff and refused by the trial court read: "You are instructed that the consent of the wife of the plaintiff to the intercourse with the defendant does not defeat the plaintiffs right to recovery." In that connection plaintiff argued, without citing any authority, that such refusal was erroneous. We conclude otherwise.

The record affirmatively discloses that defendant claimed no such defense in mitigation of damages or otherwise. It was not in any manner by pleadings or evidence made an issue in the case. The recognized primary issue was simply whether or not defendant had adulterous relations with plaintiff's wife. Instructions Nos. 2, 4, 6, and 7, given by the court, so informed the jury in clear and unambiguous language. Plaintiff could not have been prejudiced by the court's refusal to give the instruction. In that regard, comparable situations were presented and disposed of in different kinds of cases but in like manner by Lau v. Grimes Dry Goods Co., 38 Neb. 215, 56 N. W. 954, and Hurlbut v. Hall, 39 Neb. 889, 58 N. W. 538, wherein it was held: "It is not error to refuse to give an instruction not applicable to the pleadings and evidence, although correct as an abstract proposition of law." Whether or not the tendered instruction was a complete statement of the law we need not discuss or decide.

In Lewis v. Miller, 119 Neb. 765, 230 N. W. 769, 70 A. L. R. 532, this court said, quoting from Koehn v. City of Hastings, 114 Neb. 106, 206 N. W. 19: " '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.' " As early

as Webster & Burr v. O'Shee, 13 Neb. 428, 14 N. W. 164, this court held: "Where instructions are asked which are not applicable to the issue made by the pleadings they should be refused." See, also, Trask v. Klein, 150 Neb. 316, 34 N. W. 2d 396; Cornell v. Haight, 87 Neb. 508, 127 N. W. 901.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

WANDA RACE, APPELLEE, V. FRANK MRSNY, APPELLANT.
53 N. W. 2d 88

Filed April 25, 1952. No. 33157.

Parent and Child: Children Born out of Wedlock. The amount, which a defendant in a proceeding had by virtue of the statute relating to children born out of wedlock will be required to pay for the support of his child, is in the discretion of the district court. Its award will not be disturbed unless discretion has been abused and it is manifestly excessive.

APPEAL from the district court for Madison County: LYLE E. JACKSON, JUDGE. *Affirmed as modified.*

Bernard A. Ptak, for appellant.

Hutton & Mueting, for appellee.

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

BOSLAUGH, J.

Appellee, an unmarried woman, gave birth to a child. Appellant was, in proceedings had by virtue of the statute relating to children born out of wedlock, found and adjudged to be the father of the child. Chapter 13, R. S. 1943. The trial court held a hearing, as the statute permits, to ascertain the facts from which to determine the amount appellant should be required to pay for the support of the child. The determination

and order were that appellant should pay to the clerk of the district court, on account of expenses incurred incident to its birth, the sum of $140.78, and for its support the sum of $4,320, or a total amount of $4,460.78. The amount was adjudged to become due and to be paid in installments of $20 each, the first on October 17, 1951, the second on November 1, 1951, and $20 on the first day of each month thereafter. The motion of appellant for a new trial was denied and an appeal taken by him to test the correctness of the order fixing the amount to be paid.

The court ordered appellant to pay "$140.78, for laying in expenses." He challenges this as not supported by evidence and contrary to law. The record sustains appellant. There is no evidence of any expense incurred or paid.

Appellant complains that the award made for the support of the child is excessive. The amount is $20 a month for 18 years. Appellant was employed as a truck driver for a net weekly wage of $43.02 or about $185 a month. There is no indication that he is not in good health and capable, or that his employment is not permanent. The primary objective of this proceeding is to secure the support and education of the child. Appellant emphasizes that he owes debts. This fact may properly be considered but his debt-paying record or capability is not a criterion by which the amount for the benefit of the child shall be determined. The most important and pertinent facts are the value of the property and the earning ability of the father. The child is entitled to support and education according to the standards and requirements of ordinary living in the community in which he is to be cared for and trained. A child handicapped socially and in other relations and activities by the stigma of parents without marriage ought not to be unduly restricted in its standard of living or education. It has a legal right to the benefits of ordinary care and training such as other children

usually receive to prepare and qualify them to meet the requirements of life. It is the responsibility and duty of appellant to provide these for his child. The amount which appellant should be adjudged to pay is committed by law to the discretion of the district court. Its award may not be disturbed unless discretion has been abused and the amount fixed is manifestly excessive. § 13-106, R. S. 1943; Clark v. Carey, 41 Neb. 780, 60 N. W. 78; Wurdeman v. Schultz, 54 Neb. 404, 74 N. W. 951; Gatzemeyer v. Peterson, 68 Neb. 832, 94 N. W. 974; Labertew v. Weeks, 111 Neb. 712, 197 N. W. 420.

The amount of an award in a case of this character should be in harmony with the circumstances shown by the proof giving due consideration to the means of the father, his ability to earn money, the means of the mother, her loss of opportunity to engage in income-producing activities because of the necessity of her attention to the child, and the health and condition of both parents.

The court after the adjudication of the paternity of the accused pursued the proper procedure. In every case of this nature the court after an adjudication that the accused is the father of the child should take evidence of the health, condition, property, and ability of the putative father to earn money; the health, condition, and means of the mother of the child; and all other pertinent facts and upon consideration thereof fix such amount as under all the circumstances is fair and just.

Discretion was not disregarded or misused in this case to the prejudice of appellant.

The judgment of the district court should be and it is reduced in the sum of $140.78 allowed for "laying in expenses." It should be and is in all other respects affirmed. The costs in this court should be and they are taxed to appellant.

AFFIRMED AS MODIFIED.

CHESTER A. SWANSON ET AL., APPELLEES, V. CITY OF FAIRFIELD, CLAY COUNTY, NEBRASKA, APPELLANT.
53 N. W. 2d 90

Filed May 2, 1952. No. 33131.

Municipal Corporations. Detachment of land from the corporate limits of a city may be denied where to detach would enhance the difficulties of city administration and would lessen the availability of contiguous urban areas for urban use.

APPEAL from the district court for Clay County: EDMUND P. NUSS, JUDGE. *Reversed and dismissed.*

D. B. Massie and *John A. Bottorf,* for appellant.

S. W. Moger, for appellees.

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

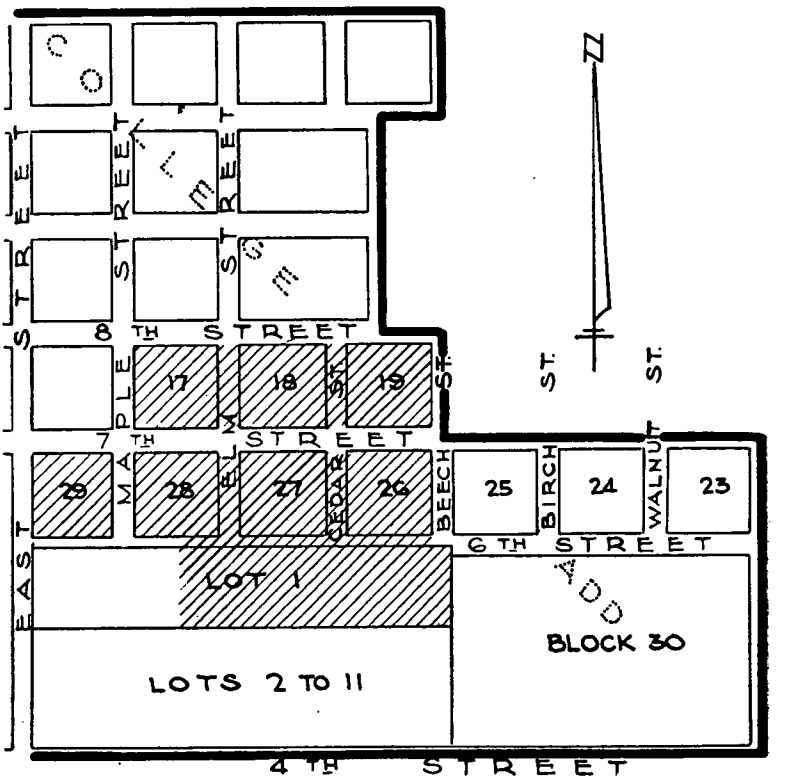
SIMMONS, C. J.

This is an action in equity to detach property from the corporate limits of defendant city. Issues were made and trial was had resulting in a decree detaching the property. After motion for a new trial was overruled, defendant appealed. We reverse the judgment of the district court and dismiss the action.

The cause is for trial de novo here. Kuebler v. City of Kearney, 151 Neb. 698, 39 N. W. 2d 415; Davidson v. City of Ravenna, 153 Neb. 652, 45 N. W. 2d 741; Runyan v. Village of Ong, 154 Neb. 127, 47 N. W. 2d 97.

For convenience we will refer to land within corporate limits as urban land, to land without such limits as rural land, and to the defendant as the city.

The land sought to be detached lies in the east area of the city. The boundaries of the city in that area and the land sought to be detached are shown on the following plat.



The boundaries of the city are shown by heavy lines. The land sought to be detached is the hatched area. The streets and areas shown on the above plat are those appearing on the plat of the city. Each block as platted contains 12 lots with a 20-foot alley. The land was so platted in 1884. It appears that land to the northeast of this area was originally platted and was within the city but has since been detached from its corporate limits.

The land in blocks 17, 18, and 19 is enclosed by a fence, so that the platted streets and alleys between and

in those blocks are not in fact open to public use. Plaintiffs' home, barn, and outbuildings are on the northwest corner of block 17. This area is used largely for pasture. Likewise, blocks 26, 27, and 28, and lot 1 are in one enclosure, contain no buildings, and are used for farm crops.

Seventh and Eight Streets and Maple Street are open, used streets. Sixth Street is open on the south side of blocks 23, 24, and 25.

There are residences to the north, west, south, and east, averaging one or more to the block. The business district of the city is some ten blocks to the west and south of plaintiffs' property. All the land in the area is comparatively level and usable for residential purposes.

Plaintiffs acquired this land four and five years before this action was commenced. Originally they purchased all of lot 1, but during the pendency of this action they sold the west portion of lot 1 for residential purposes. They amended their petition so as to exclude the land so sold from this action.

Plaintiffs alleged in their petition that the land sought to be detached was used for agricultural purposes exclusively, and that there was no demand for the land or any part of it for urban purposes. The evidence sustains their contention. Plaintiffs further allege that there is no reasonable possibility that the city will ever extend to or use the property by actual residence. The evidence is that there has been one new home built in the area here involved in recent years and several houses have been remodeled. There is no evidence of immediate probable city growth.

Plaintiffs allege that the property is not benefited by city water and that there is not adequate fire protection. The evidence is that there are a water main, a fire hydrant, and a city street light one block west of plaintiffs' home; that plaintiffs can secure water service by compliance with ordinance provisions, the same as other properties; and that the city is equipped, able, and ready

to furnish adequate fire protection to plaintiffs' property.

The evidence is that the city maintains round-the-clock police protection for its inhabitants and that on the only occasion plaintiffs called for such protection, they received it.

Plaintiffs' evidence is that the streets are not maintained. There is evidence that work is being and has been done on Seventh and Eighth Streets and that Fourth Street is a well-maintained and used highway. Plaintiffs asked for and received gravel on Maple Street west of their home. The evidence is that the streets in this area do not receive the maintenance that streets closer to the business section receive.

Plaintiffs, relying on section 17-414, R. S. Supp., 1951, contend that justice and equity require that the land be detached. That statute provides that territory within and adjacent to the corporate limits may be disconnected if justice and equity require.

In the determination of what constitutes justice and equity, the facts in each case, under well-recognized principles of law, must to a very large extent determine that question. In re Chief Consolidated Mining Co., 71 Utah 430, 266 P. 1044.

We are asked to apply the unity-of-interest rule last stated in Runyan v. Village of Ong, *supra.*

We are here presented with a paucity of facts regarding the city. We are not able to relate the facts shown as to this land to the city's general situation in such a way under that rule as to find that justice and equity require that the land be disconnected from the city.

Under the facts here there is a controlling reason why this land should not be detached. If we treat the land sought to be detached as separate tracts consisting of blocks or half blocks, as the city would have us do, then it is clear that only a small part thereof is adjacent to the corporate limits. Plaintiffs would have us treat it as one body of land separated into three tracts by

existing streets which are subject to vacation under the provisions of other statutes. So treated, it is a body of land adjacent to the corporate limits only on a part of one side and extending into the city, and which, if detached, would leave it bordered by urban property on the north, west, south, and over half of its east borders. Stated otherwise, it would leave the city with an area to the south in an "L" shape generally one to three blocks wide and seven blocks long—a boot of urban land projecting into rural land. Obviously it would enhance the difficulties of city administration, street maintenance, and the maintenance of other city services, and would lessen the availability of contiguous areas for urban use.

In Anaconda Mining Co. v. Town of Anaconda, 33 Colo. 70, 80 P. 144, the statute related to land "being upon or contiguous to the border" of a city. Petition was made to disconnect an irregular tract generally 600 feet wide and 1,500 feet long, 150 feet of which touched the border of the city. The court held that such land did not lie upon the border or contiguous thereto. It reasoned that "The clear intent of the legislature was to permit persons owning property lying upon the border to disconnect from the town. The disconnection of property so lying upon the border would not be injurious; the limits of the town would be changed, but the town would not be divided. If twenty acres or more of land can be disconnected from a town where but a small portion lies upon the border, it follows that a tract can be disconnected by the simple expedient of connecting the territory with the border by a narrow strip. This the legislature did not intend should be done." The Supreme Court of North Dakota followed this decision in Mogaard v. City of Garrison, 47 N. D. 468, 182 N. W. 758, where a 35-acre tract was sought to be excluded leaving it rural land surrounded on three sides by urban land. The statute referred to land "upon the border and within the limits" of the city.

In Lincoln Addition Improv. Co. v. Lenhart, 50 N. D. 25, 195 N. W. 14, the court was presented with a petition for detachment involving a tract similar to the tract here involved. The court followed the Mogaard case and held: "In a manner, the exclusion of such territory will serve, in many ways, to make the land south of the excluded territory and within the limits of the city noncontiguous for jurisdictional and transportation purposes."

In City of Colton v. Parks, 71 S. D. 401, 24 N. W. 2d 919, that court was presented with a petition to detach bordering land from the city that was agricultural in character and without improvements, aside from fencing. The court denied detachment for the reasons, also summarized in 2 McQuillin, Municipal Corporations (3d ed.), section 7.27, page 336, that detachment of land may be denied where the exclusion of the land would destroy the symmetry of the municipality, enhance the difficulties of administration and planning improvements, and lessen the availability of isolated areas for urban uses. In Ball v. Village of Parma, 49 Idaho 40, 286 P. 24, the court defined the elements entering into the symmetry of a municipality.

We conclude that justice and equity do not require that the land involved be detached.

In Lee v. City of Harvard, 146 Neb. 807, 21 N. W. 2d 696, we were presented with a somewhat similar factual situation where the land sought to be detached was bounded on three sides by urban property. The contention was there advanced that the property was not adjacent to the corporate limits of the city. The opinion did not discuss or turn on that question. The result was in accord with our decision here.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ROSEBUD LUMBER AND COAL COMPANY, A CORPORATION, APPELLANT, V. FRANK P. HOLMS ET AL., APPELLEES.
53 N. W. 2d 82

Filed May 2, 1952. No. 33104.

SUPPLEMENTAL OPINION

APPEAL from the district court for Cheyenne County: JOHN H. KUNS, JUDGE. See 155 Neb. 459, 52 N. W. 2d 313, for original opinion. *Motion for rehearing denied.*

Patrick J. Heaton and *Harold E. Connors*, for appellant.

Kepler & Knicely, and *Martin & Davis*, for appellees.

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

MESSMORE, J.

The defendants' motion for rehearing attacked that part of the opinion holding that the evidence introduced by the plaintiff showing the prices charged for the materials claimed to have been furnished established prima facie the reasonable cost of the materials alleged to have been furnished, for the reason that this in effect holds that evidence of prices charged establishes prima facie value of the materials claimed to have been furnished. With reference to the testimony on this phase of the case we call attention to the original opinion.

The cases of Byrd v. Cochran, 39 Neb. 109, 58 N. W. 127, Crowell Lumber & Grain Co. v. Ryan Co., 110 Neb. 225, 193 N. W. 609, and text authorities cited and relied upon by defendants in their motion for rehearing are distinguishable and cannot control the situation presented.

The original opinion did not cite authorities on the proposition complained of by defendants. We deem the following rule sustained by the authorities now cited sufficient to meet the objection of the defendants as set forth in their motion for rehearing.

Under Chapter 52, article 1, Mechanics' Liens, sec-

tions 52-101 to 52-120 inclusive, R. S. 1943, and more specifically sections 52-101, 52-102, and 52-103, R. S. 1943, relating to mechanics' liens, an owner may not be compelled to pay more than the reasonable value of labor or materials furnished, and is not bound by the agreed prices between the contractor and the lien claimant, but such agreed prices may be taken as prima facie correct.

The foregoing is the general rule sustained by the leading cases of Lanier v. Lovett, 25 Ariz. 54, 213 P. 391, cited in 40 C. J., Mechanics' Liens, § 317, p. 257, wherein cases are cited from Arizona, California, Colorado, Oregon, and Pennsylvania. In the cited text, it is said: "* * * under statutes conforming strictly to the direct lien or Pennsylvania system, (which is like our own), the lien of a person other than the principal contractor is limited to the reasonable value of what was done and furnished, regardless of the price agreed upon between claimant and the contractor; but this rule does not apply to a person contracting directly with the owner; and even where, under the statutes, the value or the reasonable value of the labor or materials is the measure of the amount of the lien, yet where a price has been agreed upon by contract, such agreed value is sometimes deemed to be, at least prima facie, the value or reasonable value."

In 40 C. J., Mechanics' Liens, § 651, p. 460, the following is stated: "Where under the statute the owner can be held only for the reasonable value of labor and material furnished to the contractor, the burden of proving such reasonable value when controverted rests upon the materialman or subcontractor. However, the contract price may be prima facie evidence of the reasonable value."

In 57 C. J. S., Mechanics' Liens, § 174, p. 725, it is said: "However, in jurisdictions where the measure and extent of the amount of the lien of a claimant other than the original contractor is the value or reasonable value

of the labor or material furnished, the price fixed in the contract between claimant and the contractor is not controlling in fixing the amount of the lien, although such contract price is sometimes deemed to be, at least prima facie, the value or reasonable value within the meaning of the rule obtaining in such jurisdictions, * * *." See, also, 40 C. J., Mechanics' Liens, § 319, p. 258; 57 C. J. S., Mechanics' Liens, § 173, p. 722; 36 Am. Jur., Mechanics' Liens, § 150, p. 103; Mitchell Planing Mill Co. v. Allison, 138 Mo. 50, 40 S. W. 118, 60 Am. S. R. 544.

In the afore-cited authorities we have announced the rule that is applicable in this state to the objection made by the defendants in their motion for rehearing.

Motion for rehearing is denied.

HENRY C. GLISSMANN ET AL., APPELLANTS, V. SERENA E. GRABOW ET AL., APPELLEES, IMPLEADED WITH HAROLD W. GLISSMANN, INTERVENER-APPELLANT.
CONSOLIDATED WITH O. M. CAMPBELL, APPELLEE, V. EMMA C. SCHLUTER ET AL., APPELLEES, HENRY C. GLISSMANN, APPELLANT.
53 N. W. 2d 94

Filed May 2, 1952. No. 33117.

1. **Evidence.** The doctrine that the court will take judicial notice of a final order made by it in another case which is so interwoven and interdependent with the pending case as to justify the application of it is an exception to the general rule recognized by the necessity of giving effect to a former holding which finally decided questions of fact and law.
2. **Judgments.** All matters in issue in a former action and judicially determined are conclusively put at rest by judgment therein and may not again be litigated in a subsequent action.
3. **Fraud.** In an original suit to annul a judgment, on the ground that it was fraudulently obtained, the plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision of the issues was not attributable to his own carelessness or inaction.

4. **Trial.** A party must, in preparing for trial, proceed on the assumption that his adversary will produce evidence to support his contention.
5. **Judgments.** If the evidence given on a former trial is not contained in the record under review, the court cannot determine whether the judgment rendered on such trial was the result of false testimony.

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

Henry C. Glissmann, pro se, *S. L. Winters,* and *Tesar & Tesar,* for appellants.

Gray & Brumbaugh, for appellees.

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

BOSLAUGH, J.

This is an action in equity by Henry C. Glissmann and Tena E. Glissmann against Serena E. Grabow and William H. Dorrance, sheriff of Douglas County, to vacate a judgment of the district court because as alleged it was obtained by fraud and false swearing of the judgment creditor, and to enjoin the enforcement and collection of the judgment. Harold W. Glissmann intervened in the case. The matters involved in the case last identified in the caption, not disposed of by agreement of the parties, will be concluded ipso facto by the decision of the appeal in the first case named in the caption. The contesting parties are Henry C. Glissmann, Tena E. Glissmann, and Harold W. Glissmann, appellants, and Serena E. Grabow, appellee.

The judgment sought to be set aside was rendered on the 6th day of October 1948. It was predicated on, and was required by, four opinions and decisions of this court in which the same parties interpleaded and the identical subject matter was involved. The opinions are reported in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617; 139 Neb. 362, 299 N. W. 225; 141 Neb. 288, 3 N. W. 2d 555; and 149 Neb. 131,

30 N. W. 2d 649. There have been three other cases in which the parties to this contest were concerned and in which some of the same subject matter was in controversy. These are Glissmann v. Orchard, 139 Neb. 344, 297 N. W. 612; 152 Neb. 500, 41 N. W. 2d 756; and State ex rel. Grabow v. Dineen, General No. 32572. The decision of this court in the first of these cases was made and became final before the judgment assailed in the present case was rendered. An extensive statement of the facts in the pending case is neither required nor justified because of the disclosure of the transactions of the parties affecting the subject matter to the minutest detail in the prior cases in this court.

The fraud charged against appellee as a basis for relief from the judgment is that she represented and testified in court that she was entitled to her share and also the share of her brother Henry C. Glissmann, appellant, in the estate of their father, Hans C. Glissmann, deceased; that appellant transferred his share to her by an instrument absolutely and unconditionally in consideration of appellee having negotiated for and secured a certain lease and option contract from a Mr. Orchard and his wife for the benefit of her brother; and that she secured the performance of the obligations thereof by pledging to Orchard and his wife the share of appellee in the estate of her father. Appellants allege that no contract or transaction in reference thereto by the appellant and appellee was made or was had and her claims, representations, and testimony in that regard were false and induced and resulted in the judgment in her favor. The district court found that appellants had not sustained their petition and it was by the court dismissed.

All of the claims made by the appellants in their favor in the petition in this case except the allegations thereof charging Serena E. Grabow with fraud and perjury had been, as shown by the decisions of this

court cited herein, adjudicated against appellants before this case was commenced.

The instrument dated January 24, 1929, executed by Henry C. Glissmann and Serena E. Grabow and approved and confirmed by Tena E. Glissmann evidences that Henry C. Glissmann for a recited consideration "hereby sells, assigns and sets over unto said Serena E. Grabow, her heirs or assigns, all right title and interest in and to estate or any share therein of the late Hans C. Glissmann, which he, Henry C. Glissmann, second party herein, may now have or hereafter may accrue to him as heir or creditor of the late Hans C. Glissmann, his father now deceased. And the said second party hereby grants to first party, her heirs or assigns, full right and authority to receive, receipt for or acknowledge any or all necessary papers or matters in connection with or rights accruing in and to said share * * * which share is by these presents assigned herein to said first party, and that said first party in the settlement of said estate or receiving of said share may do the same as second party may have done in the premises * * *."

The claim was made by appellee in a pleading filed by her on May 19, 1938, in the case of Glissmann v. Orchard, 139 Neb. 344, 297 N. W. 612, that her share in the estate of her father pledged by her to Orchard and his wife was her property and should be returned to her, and she asked the court to award it to her and require Orchard and his wife to surrender and deliver to her all property pledged by her and held by them as collateral on account of the option and the lease. In an answer and cross-petition made by appellee on November 9, 1938, in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, she alleged that she became the owner of the share of Henry C. Glissmann by the instrument dated January 24, 1929; that she was the owner thereof, and of any money realized or paid on account thereof; that she had served a copy of the instrument on each of the parties interested in the property con-

stituting the subject matter thereof or of the proceeds therefrom; and that she gave them each notice that she was such owner. She asked the court to adjudge that she was the owner and she was awarded a judgment to that effect. These cases were consolidated for trial, were heard and decided on the same evidence in the district court, and were appealed and decided on one record in this court. Appellants were parties to these cases and they knew that appellee was, when she made her pleadings therein in 1938, claiming to be not only the owner and entitled to the benefit of the share of her brother by virtue of his transfer of it to her but also of her share in the estate of her father.

The final order of the court in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, on the first appeal thereof, was made on July 3, 1941, and a mandate was issued on the 6th day of October 1941. Thereafter on the 4th day of November 1941, appellants made, in the district court, an "APPLICATION FOR STAY OF PROCEEDINGS" because they were going to file their appeal to this court that its decision be clarified and a petition to set aside the judgment rendered on the contention that it had been obtained on the fraud and misrepresentation of Serena E. Grabow; that it would be inequitable and unjust for her to retain her share and obtain the share of her brother which was the meaning and effect of the decision of this court; and that, if the judgment of the court meant the total one-eighth interest of appellee, it included the amount due on the Happy Hollow contract, the Shuler & Cary contract, the balance of the interest in said estate held during the lifetime of the widow of Hans C. Glissmann, deceased, and all payments made to appellee by the trustees since March 28, 1929. They sought a stay until an application for a new trial based on fraud and misrepresentation by appellee could be made and acted on in the district court, and until a petition was made in the

Supreme Court to set aside the judgment for fraud of the prevailing party.

The evidence produced on the trial of this case by appellants in support of their allegations of fraud on the part of appellee was known to them, or they were chargeable with knowledge thereof, and it could have been produced by reasonable alertness and diligence on their part as early as the time when they filed the application for a stay of proceedings in 1941. The explanation of appellants alleged in the petition that "some of the testimony which these defendants (appellants) wish to present was unknown to them * * * and was only discovered within the last few days" is a conclusion and constitutes no legal excuse for their delay in attempting to establish the fraudulent and illegal conduct attributed to appellee by them as early as the year 1941, more than seven years before this suit was brought. The justification for their silence and inaction in this regard, set forth in the petition in this case, is "that said testimony was not introduced in the proceeding before the Master, because that hearing was based upon the previous decision of the Supreme Court, that she (appellee) was only to get one (1) share * * *." The hearing before the master was within the period of May 1 and July 3, 1946. At any rate this part of the petition shows that appellants had "said testimony" before July 3, 1946, and that was more than two years before the time they assert in another part of their petition that it "was only discovered within the last few days" meaning a few days before November 8, 1948.

Appellants have not shown diligence or legal excuse for silence and inaction. In Barr v. Post, 59 Neb. 361, 80 N. W. 1041, 80 Am. S. R. 680, it is said: "In an original suit to annul a judgment, on the ground that it was fraudulently obtained, the plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision of the issues was not attributable to his own carelessness or

inaction. * * * A party must, in preparing for trial, proceed on the assumption that his adversary will produce evidence to support his contention. * * * Where all the evidence given on a former trial is not contained in the record under review, the court can not determine whether the judgment rendered on such trial was the result of false testimony." The appellants have in this case failed to meet each of these requirements. In the recent case of Davies v. De Lair, 148 Neb. 395, 27 N. W. 2d 628, this doctrine was again approved and applied: "It is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary, but he must go farther and show that the failure to obtain a just decision is not attributable to his own fault or negligence. * * * It is, as a rule, not sufficient to allege generally that due diligence has been used, but the facts constituting diligence must be set out." See, also, Scudder v. Evans, 105 Neb. 292, 180 N. W. 254; Gutru v. Johnson, 115 Neb. 309, 212 N. W. 622; Weber v. Allen, 121 Neb. 833, 238 N. W. 740; In re Guardianship of Protsman, 136 Neb. 192, 285 N. W. 494; County of Lincoln v. Provident Loan & Inv. Co., 147 Neb. 169, 22 N. W. 2d 609.

The right of appellee to recover the judgment sought to be vacated was determined not by oral testimony but primarily and basically on consideration of and conclusions drawn from a written instrument prepared by Henry C. Glissmann. After its execution by him, his wife, and Serena E. Grabow, it was by him filed for record. That instrument has not been impeached. Its validity was adjudicated years before the pending litigation was commenced. The charge of misconduct of appellee producing the judgment predicated on that instrument was first made by appellants in November 1941. It appears to have then been the product of desperation and the hopelessness of the situation has not lessened with the passing of time or the vicissitudes

of additional litigation. The refusal of the trial court to vacate the judgment is sustained by the record.

The intervention of Harold W. Glissmann concerned his claim that his rights to and ownership of the share of Henry C. Glissmann in the estate of his father were superior to any rights thereto of any other party to this case. The basis of his claimed ownership of the share of his father is an assignment by Henry C. Glissmann to his wife on October 15, 1928, an assignment by her to the intervener on November 3, 1930, the assignment to him of a judgment of the Bank of Benson against Henry C. Glissmann assigned by it to George Boland and by him to the intervener on June 10, 1938, a sale on an execution on the judgment of the one-eighth interest of the proceeds due Hans C. Glissmann at his death under the Happy Hollow Club contract and by him given by will to his son Henry C. Glissmann, and a deed issued to the intervener by the sheriff.

There had been a final adjudication against the intervener before his intervention in this case on November 9, 1950. He claimed the share of his father by the assignment from his mother and also a lien on the share of his father by virtue of the Bank of Benson judgment and its assignment to him in one of the earlier Glissmann cases. Appellee claimed therein that she owned the share of the estate of Hans C. Glissmann given to his son Henry. This court found against Harold W. Glissmann, in favor of Serena E. Grabow, and awarded her judgment for the whole of the property in controversy. Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, on rehearing, 139 Neb. 362, 299 N. W. 225. That this is a correct appraisal of that decision is confirmed in the opinion of this court nearly seven years later on another appeal of the case by this assertion therein: "The effect of this at this time is to say that Serena E. Grabow's assignment was adjudicated to be and was an absolute conveyance to her of the interest of Henry C. Glissmann in the estate of his deceased father which

adjudication is final and conclusive; that Serena E. Grabow obtained a judgment for the unpaid portion of this interest which judgment is final and conclusive; and that Serena E. Grabow also obtained an adjudication that the portion of the interest paid to the three Glissmanns after March 28, 1929, belonged to her which adjudication was also conclusive and final. The opinion left nothing for later determination except the determination of the amount or amounts which had been received by the three Glissmanns and directed that judgment be rendered for this or these amounts. * * * We must say therefore that Serena E. Grabow is, by valid and now conclusive judgment of this court, entitled to the entire Henry C. Glissmann interest in the estate of Hans C. Glissmann * * *." Glissmann v. Bauermeister, 149 Neb. 131, 30 N. W. 2d 649.

The contention of intervener that because the case of Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, was dismissed as to him that therefore this court made no adjudication against him is, as shown by the quotation last made, wholly without foundation. See, also, Anderson v. Anderson, *ante* p. 1, 50 N. W. 2d 224.

The judgments of the district court in the cases involved in this appeal should be and they are affirmed.

AFFIRMED.

WILLIAM E. HOWELL, APPELLANT, V. HERBERT H. HANN, WARDEN NEBRASKA STATE PENITENTIARY, APPELLEE.
53 N. W. 2d 81

Filed May 2, 1952. No. 33158.

1. **Habeas Corpus.** It is the duty of the court on presentation of a petition for a writ of habeas corpus to examine it and if it fails to state a cause of action to enter an order denying the writ.
2. **Criminal Law.** Where a person accused of crime is found within the territorial jurisdiction where he is so charged, the right to put him on trial for the offense charged is not impaired by the

fact that he was brought from another jurisdiction by illegal means such as unlawful force or fraud.

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

William E. Howell, pro se, for appellant.

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyer,* for appellee.

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

CARTER, J.

Appellant filed his petition for a writ of habeas corpus in the district court for Lancaster County directed to Herbert H. Hann, warden of the penitentiary of the State of Nebraska. The trial court found that the petition did not allege sufficient facts to constitute a cause of action and entered an order of dismissal.

It is shown by the petition and the records incorporated therein that appellant on October 11, 1947, while confined in the county jail of Thayer County awaiting trial on a charge of burglary, feloniously broke such custody and escaped. He was thereafter apprehended in the city of Delehant, Texas, where, it is alleged, that "he was beaten with a rubber hose and forced to sign a waiver of extradition back to the State of Nebraska." The information charging the crime of jail breaking alleges in addition thereto that the appellant had previously been convicted of crime on three separate occasions, three times sentenced and three times committed to prison for terms of not less than one year, all of which constituted the appellant an habitual criminal under the laws of this state. Appellant, after being advised by counsel of his own choosing, entered a plea of guilty to the charge of jail breaking. The state thereupon offered duly authenticated copies of the judgments and commitments sentencing and committing appellant to the penitentiary for one year or more in each of the

three previous convictions alleged. The trial court thereupon adjudged appellant to be an habitual criminal and sentenced him to serve ten years in the State Penitentiary.

Appellant's petition for a writ of habeas corpus is based on allegations that he was returned to Nebraska from Texas by the use of force and fraud, and that his conviction thereafter was therefore a nullity. For the purposes of this appeal we must assume that the allegations of force and fraud are true as pleaded.

This court has held many times that a petition for a writ of habeas corpus must state a cause of action or the court will be required to enter an order denying the writ. Stapleman v. Hann, *ante* p. 410, 51 N. W. 2d 891; Goedert v. Jones, 150 Neb. 783, 36 N. W. 2d 119. The only question presented by this appeal is whether or not the allegations of force and fraud in procuring the return of the appellant to this state to stand trial on the charge of jail breaking lodged against him are sufficient to require the issuance of the writ.

It is not disputed that the district court for Thayer County had jurisdiction of the offense, jurisdiction of the person of the appellant, and that the sentence was within the power of the court to impose. Under such circumstances, does the use of force and fraud in procuring the return of one to the state to answer a criminal charge have the effect of invalidating the sentence and commitment and require the issuance of a writ of habeas corpus, for the reason that it is violative of state or federal constitutional guarantees?

This court and the Supreme Court of the United States have answered this question in the negative on many occasions. In Frisbie v. Collins, 342 U. S. 519, 72 S. Ct. 509, 96 L. Ed. 396, it was stated: "This court has never departed from the rule announced in Ker v. Illinois, 119 U. S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by

reasons of a 'forcible abduction.'" It is a general rule that where a person accused of a crime is found within the territorial jurisdiction where he is so charged, the right to put him on trial for the offense charged is not impaired by the fact that he was brought from another jurisdiction by illegal means such as kidnaping, unlawful force, fraud, or the like. Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, 165 A. L. R. 932; Lascelles v. Georgia, 148 U. S. 537, 13 S. Ct. 687, 37 L. Ed. 549; In re Johnson, 167 U. S. 120, 17 S. Ct. 735, 42 L. Ed. 103. The district court therefore correctly held that appellant's petition did not state a cause of action. The petition was properly dismissed.

AFFIRMED.

JOHN J. JURGENSEN ET AL., APPELLANTS, V. JAMES S. AINSCOW ET AL., APPELLEES.
53 N. W. 2d 196

Filed May 9, 1952. No. 33144.

1. **Easements.** The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate.
2. ———. The use must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period.
3. ———. To prove a prescriptive right to an easement all of the elements to a prescriptive use must be generally established by clear, convincing, and satisfactory evidence.
4. ———. Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid acquisition of easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive.

5. ———. Acquiescence on the part of the owner which is necessary to acquisition of a prescriptive easement means passive assent or submission, quiescence, consent by silence.
6. ———. If the use of an easement has been open, adverse, notorious, peaceable, and uninterrupted, the owner of the servient tenement is charged with knowledge of such use, and acquiescence in it is implied.
7. ———. The extent and nature of an easement is determined from the use actually made of the property during the running of the prescriptive period.
8. ———. The term "exclusive use" does not mean that no one has used the driveway except the claimant of the easement. It simply means that his right to do so does not depend upon a similar right in others.
9. **Adverse Possession: Easements.** "Actual possession" means the corporeal detention of the property when used in relation to adverse possession.

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

O'Sullivan & Schrempp, and *David S. Lathrop,* for appellants.

Burbridge & Burbridge, Schall, Robinson, Hruska & Garvey, and *William Comstock,* for appellees.

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

MESSMORE, J.

The plaintiffs, John J. Jurgensen and Nellie C. Jurgensen, husband and wife, are the owners of Lot 15 in Block 5, Hanscom Place, an addition to the city of Omaha, Douglas County, Nebraska. They brought this action in equity in the district court for Douglas County against James S. Ainscow and Betty S. Ainscow, husband and wife, the owners of Lots 13 and 14 in Block 5 of the same addition, defendants, to enjoin the defendants from interfering with the plaintiffs' use of plaintiffs' claimed prescriptive easements over defendants' property. Trial was had to the court. The court

entered judgment finding generally in favor of the defendants, and dismissed the plaintiffs' petition at plaintiffs' costs. The court further made a finding that the evidence failed to establish that the easements claimed by the plaintiffs were acquired through adverse use, but that the evidence did show that the use of the passageways in question by the plaintiffs and their predecessors in title was permissive only and not under claim of right. The plaintiffs filed a motion for new trial which was overruled. From this order plaintiffs appeal.

For convenience we will refer to the parties as they were designated in the district court, and as occasion requires by their first or last names. In referring to the description of the real estate of the plaintiffs and the prescriptive easements involved claimed to be over defendants' land, the plaintiffs' property will be designated Lot 15, and the defendants' property Lots 13 and 14.

The record shows that plaintiffs John J. Jurgensen and his wife Nellie C. Jurgensen acquired title to Lot 15 by warranty deed on April 1, 1935. They moved into said premises either on April 3 or April 4, 1935, and have remained owners of said real estate since that time. By exhibit No. 4, a chart appearing in the record, the plaintiffs' house is located on the west end of Lot 15 facing on Thirty-first Street, and is 100 feet north of Poppleton Avenue. The plaintiffs' garage is in the northeast corner of Lot 15. At the time plaintiffs entered into possession there were driveways leading from their property to the south and to the west. The claimed easement driveways are described as follows: A strip of ground 9 feet in width running from east to west over the south 9 feet of the north 15 feet of Lot 14, which said strip and easement runs for a distance of approximately 140 feet in an east-west direction, the west end of the easement being the curb line of Thirty-first Street and the east end of the easement being a point where said easement and the driveway join a second driveway

easement, which runs north and south, more specifically described as a strip of ground running north and south over the west 6 feet of the east 9 feet of Lots 13 and 14, which said strip constitutes a driveway easement approximately 100 feet in length, the south end of said driveway easement being the north curb line of Poppleton Avenue and the north end of the said easement being the south property line of Lot 15. There were curb cut-outs to both driveways present at the time plaintiffs acquired the property, which are now in the same condition.

The plaintiff testified that he has owned an automobile during the time he has resided on Lot 15, and has used the driveways continually, both in the daytime and nighttime. He had no agreement with the owners of Lots 13 and 14 to use the property. He was told by an agent of the realty company from whom he purchased the property that these driveways could never be closed, and that he had the right to use them. He paid nothing for their use, and paid no taxes on Lots 13 and 14. Plaintiff further testified that during the period of time the plaintiffs used the driveways, from April 3, 1935, to sometime in October 1950, he put cinders and ashes on the driveways, kept the grass mowed with a mower and on occasions used a scythe, and that in the use of the driveways he used the one that was most convenient for his purposes. With respect to the north-south driveway, the plaintiff testified that it is a strip approximately 6 feet wide and is 3 feet from the east boundary line of Lots 13 and 14. It tapers or angles a little to the west from the tree line on the east property line of the lots and forms a bottleneck with the east-west driveway in a cement drive in front of the plaintiffs' garage on Lot 15. This testimony indicates that the north-south driveway is not in a straight line. This undoubtedly is due to the trees on the north-south drive and the position of the same as the testimony will show later.

The defendants became the owners of Lots 13 and 14 on May 6, 1950, and in October 1950, began construction of two six-plex apartments on Lots 13 and 14, and two-car garages to accommodate each apartment. The construction of the apartment houses was completed and they were tenanted at the time of trial. The garages were not constructed. By virtue of the construction of the garages the driveway easements claimed by the plaintiffs were blocked for ingress and egress by automobile to their premises. This was done by grading up the dirt on the east-west driveway and pushing it past the driveway to the entrance of plaintiffs' garage. Plaintiff John J. Jurgensen requested the contractor in charge of the work to open a driveway and was informed it would be open in a few days. Plaintiff Nellie C. Jurgensen made similar requests of the contractor and was informed that the driveways would be open in a few days. It appears that the plaintiffs' house is located on the west end of Lot 15 and the property then drops to a lower level, or is terraced down to the garage.

The defendant James S. Ainscow, engaged in the management department of a real estate firm, testified that at the time the lots were purchased by him and his wife they were covered with weeds and he paid an assessment to the city for cutting the weeds for that year. When he purchased the lots he saw no evidence of travel by automobile over the strip of ground 9 feet in width running from east to west over the northern portion of Lot 14. He further testified that it would have been practically impossible to travel that strip of ground on account of the weeds and an automobile body lying in a portion of the claimed easement which he had removed, and on account of a big drop-off running east toward the plaintiffs' garage; and that in the wintertime it would be slippery and hard driving because of the fall of the ground. There is a cut 6 feet in width in the curb on Thirty-first Street which is an old carriage driveway. He then identified certain trees on the

north-south driveway with reference to the eastern boundary of Lots 13 and 14. The first tree is 8 feet west of this boundary, the second tree 4 feet, the third tree 5 feet, and the fourth tree 8 feet west of the eastern boundary. These trees are about 40 feet in height. The circumference of the first tree is 3 feet, the second tree 2½ feet, the third tree 2½ feet, and the fourth tree 3 feet. He testified that it would be impossible to drive a car over that approximate territory avoiding the trees. In other words, it would only be possible to go across that line and get into the plaintiffs' garage by swerving around the trees. From the time the defendants purchased the property he was on it at least twice a month, and when the construction started he was on it several times during each day and observed no one using the driveways. He further testified that he had been acquainted with the premises for 52 years, and that the cut in the curb on the north-south driveway on Poppleton Avenue had been there for that period of time.

The witness James Ward testified that he put in a victory garden on Lots 13 and 14 in 1943 and 1944, and was present on the lots two or three times each week. He remembered that cars would drive into the east-west driveway and park, but to the best of his recollection the north-south driveway was not used while he was there.

Mrs. Ainscow corroborated her husband's testimony to the effect that it would be impossible to drive an automobile over their property to the plaintiffs' garage.

Merritt W. Kevan testified to the ownership of Lots 13 and 14 in the spring of 1947, and that he deeded the same to the defendants; that he is familiar with the property; that he was over it once a week during the time he owned it; and that he never granted permission to anyone to use the driveways and no one did during the time he owned the same. The driveway on the north was overgrown with weeds, and it would have

been impossible for any car to get through on account of the overgrowth of brush and trees which were at least 10 years old. He had been requested to cut the weeds on the driveway to the east, and there was no evidence of either driveway being used, as the weeds thereon were 5 or 6 feet high. He further testified that no cinders were placed on the driveways when he owned the lots up until May 1950; that there were some indentations in the ground which were too narrow for car tracks; and that since Ainscow purchased the property he had gone by it once every two weeks and there was no evidence of plaintiffs' garage being used.

The plaintiff John J. Jurgensen, in rebuttal, testified that he hauled six or eight loads of cinders which he placed on the driveways; that he kept the grass cut in the driveways with a mower; that the grocery boy and the trash man used the drives; that he cut the weeds every year; that he had noticed the city cutting weeds on occasions; and that he used the driveways constantly as occasion required, sometimes three or four times a day.

Plaintiff Nellie C. Jurgensen testified to a telephone conversation with Mrs. Ainscow wherein she identified herself and where she lived, and told Mrs. Ainscow that she wanted the drive cleared. She wanted to talk to Mr. Ainscow. Mrs. Ainscow testified that a woman called her one evening before dinner, identified herself, asked when they were going to clear the driveway of the obstructions, and named two individuals who had let plaintiffs use the driveway. What interest these individuals may have had in the property is not shown. This conversation was either in the latter part of May or the first part of June 1951.

The witness Anna Kuder testified that she purchased the house at 3008 Poppleton Avenue 25 years ago and has lived there for 12 years. This house is located 2 or 3 feet east of the north-south driveway. From the time she lived there up to the time the driveways were

blocked, the plaintiff always used the north-south driveway. Once in a while plaintiff went the other way, but defendants wanted to close that driveway off. The plaintiff cindered the driveway, and she knew that he did because the cinders would run onto her sidewalk and she would have to sweep them off. There never were any weeds on the driveway because the plaintiff cut them with the lawn mower. This driveway had never been closed before. The grocery boy used to deliver groceries and would drive in on Poppleton Avenue and out on Thirty-first Street. She further testified that the plaintiff shoveled snow off the driveway on occasions.

Jeanette Kevan testified that she was familiar with the lots and planned to build on them about three years ago; that she would often drive by the property; that she never noticed the plaintiff John J. Jurgensen shovel any snow at the time they owned the property; that there were no signs or markings to indicate any use of the property as a driveway; and that there were weeds and grass growing on both driveways during the time she and her husband owned the property.

There is evidence from a witness who occupied the premises in which the plaintiffs now live from 1908 to 1925. She testified that they had permission to use these premises during that period of time. However, it will be noted that this was 10 years prior to the time the plaintiffs acquired the property.

The plaintiffs assign as error (1) that the judgment and decree of the trial court are not sustained by the evidence; and (2) that there was no competent evidence before the court that the use by the plaintiffs of the easements in question was permissive in character and not under claim of right.

The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse,

under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, for the full prescriptive period. See, Stubblefield v. Osborn, 149 Neb. 566, 31 N. W. 2d 547. See, also, 28 C. J. S., Easements, § 10, p. 645.

To prove a prescriptive right to an easement, all the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence. See, 28 C. J. S., Easements, § 70, p. 743, cases cited under note 2; 19 C. J., Easements, § 197, p. 964, note 33; 17 Am. Jur., Easements, § 73, p. 982; Beckley Nat. Exch. Bank v. Lilly, 116 W. Va. 608, 182 S. E. 767, 102 A. L. R. 462.

The prevailing rule is that where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid the acquisition of the easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive. See, 17 Am. Jur., Easements, § 72, p. 981, and cases cited under note 12. See, also, Majerus v. Barton, 92 Neb. 685, 139 N. W. 208; Moll v. Hagerbaumer, 98 Neb. 555, 153 N. W. 560; Dormer v. Dreith, 145 Neb. 742, 18 N. W. 2d 94; Stubblefield v. Osborn, *supra*. In the instant case there is no competent evidence appearing in the record to show the plaintiffs' use of the claimed easement was by permission of the owners of the servient estate.

It is presumed, however, that every man knows the condition and status of his land; and if anyone enters into open and notorious possession of an easement therein under a claim of right, the owner is charged with knowledge thereof. See, 17 Am. Jur., Easements, § 65, p. 976.

Acquiescence on the part of the owner which is necessary to acquisition of a prescriptive easement means pas-

sive assent or submission, quiescence, consent by silence. See, Dartnell v. Bidwell, 115 Me. 227, 98 A. 743, 5 A. L. R. 1320; Davis v. Wilkinson, 140 Va. 672, 125 S. E. 700.

If such user has been for the requisite time open, notorious, visible, uninterrupted, and undisputed under claim of right adverse to such owner, he is charged with knowledge of such user and his acquiescence in it is implied. See, 2 Thompson on Real Property, § 512, p. 94, cases under note 18, also § 510, p. 89; Hester v. Sawyers, 41 N. Mex. 497, 71 P. 2d 646, 112 A. L. R. 536.

The extent of an easement, however, is determined from the use actually made of the property during the running of the prescriptive period. It in fact determines the nature of the easement acquired. A trial court may determine the extent of an easement arising by prescription in an injunction action and restrain interference with rights found to exist by virtue of the finding so made. The servient owner of land subject to an easement may make such use of it as he sees fit, subject only to the right of the dominant owner of the easement to use it for the purposes out of which the right arose. See, Paloucek v. Adams, 153 Neb. 744, 45 N. W. 2d 895. See, also, 17 Am. Jur., Easements, § 59, p. 971; Dunbar v. O'Brien, 117 Neb. 245, 220 N. W. 278, 58 A. L. R. 1033.

Defendants in their brief contend that plaintiffs' use was not exclusive for the reason that a grocery delivery boy and a trash man used the driveways in question. The term "exclusive use," however, does not mean that no one has used the driveway except the claimant of the easement. It simply means that his right to do so does not depend upon a similar right in others. See, 17 Am. Jur., Easements, § 64, p. 976; Thompson v. Bowes, 115 Me. 6, 97 A. 1, 1 A. L. R. 1365; Annotation, 111 A. L. R. pp. 223, 224.

The evidence with reference to the plaintiffs' claimed easement by prescription east and west over the defendants' land is insufficient to meet the requirements

of proof in such respect. In view of the evidence and the afore-cited authorities we conclude the evidence is sufficient to sustain the plaintiffs' claim to an easement by prescription and adverse use over the defendants' land for a driveway running north and south to permit ingress and egress to and from their garage.

This brings us to the following proposition raised in the defendants' answer. The defendants' answer alleges in substance that their title and the title of their immediate and remote grantors was acquired by sheriff's deed dated November 16, 1944, recorded December 5, 1944; and that said deed was delivered pursuant to proceedings valid and regular in the case of County of Douglas, plaintiff, v. James E. Allen et al., in the district court of Douglas County, Nebraska. This was a tax foreclosure action. Defendants plead that the effect of the action estopped any person or persons having or claiming any interest whatsoever in and to said real estate. The defendants' answer also alleges that at the time the instant case was filed sections 77-1934 and 77-1935, R. S. Supp., 1949, were in full force and effect and plaintiffs failed to comply with said sections and also failed to comply with sections 25-2001 and 25-2008, R. S. 1943, therefore plaintiffs should be estopped and enjoined further in the instant case.

A stipulation appears in the record showing the chain of title to Lots 13 and 14, Block 5, Hanscom Place as the same appears in the office of the register of deeds, and also shows the tax foreclosure action and proceedings in connection therewith mentioned in the defendants' answer. The plaintiffs stated they would object to the materiality of the stipulation in the event it would be claimed the tax foreclosure proceedings were binding on them. It was agreed by defendants' counsel that the stipulation reflected only what the abstract shows with reference to the title, no legal conclusion to be drawn therefrom. To set out the stipulation would unnecessarily lengthen this opinion.

Basically, the question is whether or not service was had on these resident plaintiffs by publication, as provided for by law. The sections of the statute with reference to this kind of service were not pleaded by the defendants in their answer and do not appear in the record.

Sections 25-321 and 25-517, R. R. S. 1943, and section 25-518, R. S. Supp., 1949, define the manner in which service by publication may be had on resident defendants whose names are unknown and whose place of residence cannot be ascertained by diligent investigation, and who claim or might claim a right, title, or interest in and to the real estate involved.

We make reference to that part of section 25-321, R. R. S. 1943, as follows: "Judgments and decrees against persons so designated and made defendants and served by publication as herein provided shall be conclusive as against all persons *who are not in actual possession of such property* and whose ownership of, interest in, rights or title to, or lien upon such property does not appear of record in or by their respective names in the county wherein such property is situated." (Emphasis supplied.)

It appears from the record that the plaintiffs were in actual possession of the easement in question running north and south over the defendants' land prior to and at the time of the tax foreclosure proceedings. For actual possession, no particular act is required. What is sufficient to meet the requirements depends upon the character of the land and all of the circumstances of the case. See, Hallowell v. Borchers, 150 Neb. 322, 34 N. W. 2d 404. The plaintiffs' use of the east portion of the defendants' land as a driveway north and south to permit ingress and egress to their garage for the full prescriptive period of time was visible, and it is apparent the plaintiffs intended to appropriate such portion of the defendants' land to that useful purpose.

In Cutting v. Patterson, 82 Minn. 375, 85 N. W. 172, it was said that actual possession means possession in

fact, effected by actual entry upon the premises and actual occupancy. As used in the statute the word "actual" is in opposition to the word "virtual" or "constructive," and calls for an open, visible occupancy.

In Wallace v. Sache, 106 Minn. 123, 118 N. W. 360, the court said: "The cases in which the exact meaning of the term 'actual possession' is considered are to be found principally in the law of adverse possession. * * * 'Actual possession' is a tangible fact. 'Actual possession' means the corporeal detention of the property when used in relation to adverse possession." See, also, Carey v. Cagney, 109 La. 77, 33 So. 89; Churchill v. Onderdonk, 59 N. Y. 134; Cleveland v. Crawford, 7 Hun 616; Newcome v. Crews, 98 Ky. 339, 32 S. W. 947; Lillianskyoldt v. Goss, 2 Utah 292; Moulton v. Sidle, 52 F. 616; Green v. Cumberland Coal & Coke Co., 110 Tenn. 35, 72 S. W. 459; 2 Words and Phrases (Perm. Ed.), p. 295; Hallowell v. Borchers, *supra*.

In the light of the afore-cited authorities defining actual possession as it applies to adverse possession, we conclude that the plaintiffs were in actual possession of an easement by prescription running north and south over the defendants' land as contended for by them. Therefore, any judgment or decree that may have been rendered against the plaintiffs as defendants in the tax foreclosure proceedings by virtue of service by publication, if such be the fact, would in no event be conclusive as against these plaintiffs.

The sections of the statute heretofore mentioned as appearing in the defendants' answer, wherein it is alleged the plaintiffs failed to comply therewith, are not applicable to the instant case, nor is the authority cited in defendants' brief on the same proposition applicable.

We conclude that the plaintiffs are entitled to a driveway easement running north and south over the west 6 feet of the east 9 feet of Lots 13 and 14 of the defendants' property, 100 feet in length, as shown by the evidence, to permit ingress and egress to and from the

plaintiffs' garage. The judgment of the trial court is reversed and the cause remanded with directions to the trial court to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

ROMAN P. MYSZKOWSKI, APPELLANT, V. WILSON AND COMPANY, INC., APPELLEE.
53 N. W. 2d 203

Filed May 9, 1952. No. 33173.

1. **Workmen's Compensation: Appeal and Error.** On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record.
2. **Workmen's Compensation.** An employee is entitled to recover compensation under the provisions of the workmen's compensation law when he suffers injury as the result of an accident arising out of and in the course of his employment.
3. ———. The burden is upon him to establish that fact by a preponderance of the evidence.
4. ———. There must be a causal connection between the employment and the injury before recovery can be allowed.
5. ———. Whether an accident arises out of and in the course of employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved.
6. ———. Under the Workmen's Compensation Act the words "arising in the course of the employment" relate to the time, place, and circumstances under which an accidental injury occurs, and the term "arising out of the employment" refers to the origin or cause of the accidental injury.
7. ———. An assault is an "accident" within the meaning of the Workmen's Compensation Act when from the point of view of the workman who suffers from it it is unexpected and without design on his part, although intentionally caused by another.
8. ———. Where the nature of the employment is such as to expose a worker to a wrongful act by another worker, which may reasonably be said to have been induced by the peculiar conditions of the employment, the manner in which it was carried on, and the appliances required, such an act may reasonably be said to "arise out of the employment."
9. ———. Where the disagreement arises out of the employer's

work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Reversed and remanded with directions.*

August Ross and *Theodore L. Kowalski,* for appellant.

Floersch & Floersch, for appellee.

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

WENKE, J.

This is an appeal from an order of the district court for Douglas County denying a workmen's compensation claim made by Roman P. Myszkowski against his employer, Wilson and Company, Inc.

"On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record." Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212.

An employee is entitled to recover compensation under the provisions of the workmen's compensation law when he suffers injury as the result of an accident arising out of and in the course of his employment (see section 48-109, R. S. 1943), but the burden is upon him to establish that fact by a preponderance of the evidence. See, Solheim v. Hastings Housing Co., *supra;* Beam v. Goodyear Tire & Rubber Co., 152 Neb. 663, 42 N. W. 2d 293.

"There must be a causal connection between the employment and the injury before recovery can be allowed, * * *." Bell v. Denton, 136 Neb. 23, 284 N. W. 751.

"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." Simon v. Standard Oil Co., 150 Neb. 799, 36 N. W. 2d 102.

"* * * under the Workmen's Compensation Act the words 'arising in the course of the employment' relate to the time, place, and circumstances under which an accidental injury occurs, and the term 'arising out of the employment' refers to the origin or cause of the accidental injury." Withers v. Black, 230 N. C. 428, 53 S. E. 2d 668. See, also, Scholl v. Industrial Comm., 366 Ill. 588, 10 N. E. 2d 360, 112 A. L. R. 1254.

The record shows that on May 9, 1950, claimant was employed by appellee as an electric-lift-tractor operator. Among appellee's employees on that date was a meat puller by the name of Johnnie Price. Prior to May 9, 1950, these two, while employees of appellee, had had some difficulties arising out of their work relations. About six months before an argument occurred between the two as a result of which Price put claimant in a tank of meat. Again, about a month and a half before, difficulty arose about some work and Price became angry when claimant told the boss about it. Admittedly Price is quick tempered and claimant knew this. However, both testified these difficulties had left no hard feelings between them.

The incident out of which claimant received his injuries occurred about 3:30 p. m. on May 9, 1950, in the eviscerating room in the sweet pickle department of appellee's plant. At that time claimant was operating an unloaded electric-lift tractor. He was proceeding south down a 6 to 6½-foot aisle located in this eviscerating room, which aisle was bordered on both sides by leacher vats. The tractor part of this electric-lift tractor is about 6 feet long and 3 feet wide. It has a 4½-foot fork lift attached to the front end. The operator rides on the front end of the tractor. At that time Price, while performing his duties as an employee, was walking south in this aisle. He was walking on the left-hand or east side. As claimant approached Price with the electric-lift tractor he honked the horn but Price kept right on walking. As the electric-lift tractor passed

Price the fork hit Price's right boot just below the ankle. Price thereupon became angered and struck claimant with his fist, hitting his left shoulder. Claimant then proceeded to use the tractor in an endeavor to pin Price against the leacher vats. However, the vats were about 18 inches apart and Price managed to get into one of these openings. There was a meat paddle lying on top of one of the vats Price was between so he reached up and got it. He then used it to strike at claimant. Claimant raised his left arm to ward off the blow. The paddle hit his left arm and resulted in the injury on which this claim is based, which is a compound comminuted fracture of the ulna of the left forearm.

"* * * an assault is an 'accident' within the meaning of the Workmen's Compensation Act 'when from the point of view of the workman who suffers from it it is unexpected and without design on his part, although intentionally caused by another.' Schneider's Workmen's Compensation Text (Perm. Ed.), section 1560; Brown v. Aluminum Co., 224 N. C. 766, 32 S. E. 2d 320; Conrad v. Foundry Co., supra." Withers v. Black, *supra.*

"Work-assaults should not be confused with injuries resulting from purely personal quarrels. An assault necessarily involves emotional make-up and disturbance and in a broad sense could be regarded as personal. But work causes quarrels and fights, and though interwoven with emotional disturbance, work-induced assaults are not a departure from the work. It is sufficient that the work brings the claimant within the range of peril. Personal animosities, created by 'working together on the assembly line, or in traffic,' accumulate and explode; and if attributable in substantial part to the working environment, the resulting injuries arise out of the employment." 4 NACCA Law Journal 53.

"Where the nature of the employment is such as to expose a worker to a wrongful act by another worker, which may reasonably be said to have been induced by

the peculiar conditions of the employment, the manner in which it was carried on, and the appliances required, such an act may reasonably be said to 'arise out of the employment.'" Socha v. Cudahy Packing Co., 105 Neb. 691, 181 N. W. 706, 13 A. L. R. 513. See, also, Miller v. Reisch Co., 132 Neb. 338, 271 N. W. 853.

"Arguments, altercations and assaults are as inevitable as they are undesirable. Where they arise out of the employment, they may be properly regarded as an employment hazard." Newell v. Moreau, on rehearing, 94 N. H. 443, 55 A. 2d 476.

This is well stated in Pekin Cooperage Co. v. Industrial Commission, 285 Ill. 31, 120 N. E. 530, as follows: "All concur in the rule that the accident, to be within the Compensation act, must have had its origin in some risk of the employment. No fixed rule to determine what is a risk of the employment has been established. Where men are working together at the same work disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. Where the disagreement arises out of the employer's work in which two men are engaged and as a result of it one injures the other, it may be inferred that the injury arose out of the employment."

While there seem to be some cases which hold contrary to this view, we think the following from 58 Am. Jur., Workmen's Compensation, § 266, p. 767, fairly summarizes the holdings in general: "While there is some lack of harmony among the decisions, it may be stated that in most instances an injury to an employee as a result of an assault by a coemployee, committed in the course of the employment and growing out of some incident or condition thereof, and not done solely for the gratification of personal ill will, is held to be compensable as arising out of the employment." A careful study

of the cases indicates that what lack of harmony there is flows more from determining what principles are applicable, in view of the facts involved, than it does to any difference in the principles themselves.

The facts in the present case, under the principles hereinbefore set forth, establish that the altercation between claimant and Price arose out of the working conditions of their employment and therefore we find claimant's injuries were caused by an accident arising out of and in the course of his employment with appellee. See, Miller v. Reisch Co., *supra;* Newell v. Moreau, *supra;* Withers v. Black, *supra;* Scholl v. Industrial Comm., *supra;* Pekin Cooperage Co. v. Industrial Comm., *supra;* Globe Indemnity Co. v. Industrial Accident Comm., 2 Cal. 2d 8, 37 P. 2d 1039; Schultz v. Chevrolet Motor Co., 256 Mich. 393, 239 N. W. 894; Keithley v. Stone & Webster Engineering Corp., 226 Mo. App. 1122, 49 S. W. 2d 296; Travelers' Ins. Co. v. Culpepper (Tex. Civ. App.), 82 S. W. 2d 1054; Hartford Accident & Indemnity Co. v. Cardillo, 112 F. 2d 11.

As stated in Keithley v. Stone & Webster Engineering Corp., *supra:* "* * * the rule generally applied is that where a controversy leading to an assault is connected with or pertains to the employment or is incidental to the work of the employee, the resulting injury arises out of the employment."

Of course, if this was solely a personal quarrel, which we find it was not, a different rule would apply for, as stated in 58 Am. Jur., Workmen's Compensation, § 266, p. 768: "* * * it is generally held that an injury from an assault on an employee committed by one solely to gratify his personal ill will, anger, or hatred does not arise out of the employment within the meaning of the workmen's compensation acts, * * *."

"Practically all authority holds that an assault by one employee upon another for personal reasons, not growing out of the relation as fellow employees, or out of acts in the performance of their work, cannot be held to

arise out of the employment." Schultz v. Chevrolet Motor Co., *supra.*

"We understand it to be the rule that where an employee, for reasons personal to himself and not in furtherance of any duty owed his master, invites a personal encounter and willingly engages in it and is injured as a result thereof, he cannot recover. In such case it is apparent that the injury does not arise out of the employment but has its origin in matters lying wholly outside of the duties owed by the employee to the master." Travelers' Ins. Co. v. Culpepper, *supra.* See, also, Armour & Co. v. Industrial Comm., 397 Ill. 433, 74 N. E. 2d 704; Urak v. Morris & Co., 107 Neb. 411, 186 N. W. 345.

Appellee contends that at the time claimant was injured he was using the tractor for his own purpose and therefore not acting in the course of his employment.

It is true that when an employee actually deviates from his employment and is injured while engaged in his own business or enjoyment the injury is not compensable because it does not arise out of and in the course of his employment. See, Sheets v. Glenwood Telephone Co., 135 Neb. 56, 280 N. W. 238; Simon v. Standard Oil Co., *supra.*

As stated in Simon v. Standard Oil Co., *supra:* "An injury is not compensable where an employee on his own initiative leaves the line of duty under his employment for a purpose of his own and pursues it to his injury."

This principle is not here applicable as claimant did not leave his line of duty under his employment for purposes of his own but engaged in an altercation arising out of an incident in connection with the working conditions of his employment. On principle almost all cases hold if he is injured as a consequence thereof such injury is compensable as arising out of and in the course of his employment. See authorities already cited.

Appellee further cites cases involving altercations where the original altercation had ceased and thereafter

claimant, on his own initiative, renewed it to his injury. Also cases are cited where the employee left his place of duty to go elsewhere on the property to engage a fellow employee in an altercation. In such cases courts have, for various reasons, denied recovery. Some hold it is a deviation from the line of duty. While we think these cases correctly denied compensation they have no application here where the altercation, arising out of an incident connected with the working conditions of these employees, was continuous. See, Vollmer v. Industrial Comm., 254 Wis. 162, 35 N. W. 2d 304; Feda v. Cudahy Packing Co., 102 Neb. 110, 166 N. W. 190; Gray's Case, 123 Me. 86, 121 A. 556; Griffin v. A. Roberson & Son, 162 N. Y. S. 313.

Suggestion is also made that claimant was the aggressor. We do not so find. But even if such were true it would not necessarily defeat recovery. As stated in 58 Am. Jur., Workmen's Compensation, § 266, p. 768: "The fact that the assault was provoked by the employee, or that he was the aggressor in the affray, does not necessarily render the injury noncompensable, although it may do so where such provocation or aggression amounted to wilful misconduct."

As stated in 4 NACCA Law Journal 53: "Where the assault is directly connected with the work, and arises out of work-quarrels, as distinguished from personal quarrels, the assault is compensable without determining questions of aggressors or innocent parties. Courts are not justified in making exceptions for 'aggressors' where the legislature has not done so by express provisions. An assault that arises out of work-arguments as distinguished from personal grudges, is clearly causally related to the employment, regardless of who strikes the first blow, and hence 'arises out of' the employment. Furthermore, to make a distinction between aggressors and innocent victims adds further complications as to what constitutes an aggressor, and is judicial legislation in a remedial act intended to widen, not narrow, the

rights of workers. In tort law, who strikes the first blow may be material on assumption of risk, contributory negligence, intervening cause, and on other questions. But in compensation law, the question of 'arising out of' depends simply on the causal relation to the work, in which the question of 'aggressors' is a court made, not legislative, exception."

These principles find support in the following cases where they are fully discussed. Hartford Accident & Indemnity Co. v. Cardillo, *supra;* Dillon's Case, 324 Mass. 102, 85 N. E. 2d 69; Travelers' Insurance Co. v. Culpepper, *supra.*

This brings us to the question of whether claimant was willfully negligent at the time of receiving his injuries within the meaning of section 48-127, R. S. 1943, so as to defeat his right to recover compensation. The burden of establishing willful negligence on the part of claimant is on appellee. Section 48-110, R. S. 1943. The act defines "willful negligence" as "such conduct as evidences reckless indifference to safety." Section 48-151, R. S. Supp., 1949.

We do not find claimant's conduct to be of this character.

Having come to the conclusion that the claimant is entitled to recover, the question arises as to the amount of compensation he is entitled to receive. He was temporarily totally disabled from May 9, 1950, until July 20, 1950. Thereafter he made complete recovery. At the time of the injury he was earning $69 per week. He had, as a result of his injuries, hospital bills in the total of $71.80 and doctor bills totalling $87. Claimant is therefore entitled to recover compensation for total temporary disability from May 9, 1950, to July 20, 1950, at the rate of $22 per week (see section 48-121, R. S. Supp., 1949) and for medical and hospital services the sum of $158.80.

The action of the district court is therefore reversed and the cause remanded with directions that it enter a

decree in accordance herewith, all costs to be taxed to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION, APPELLANT, V. WINTERS CREEK CANAL COMPANY, A CORPORATION, ET AL., APPELLEES.
53 N. W. 2d 543

May 16, 1952. No. 33154.

1. **Municipal Corporations.** The exercise of police power delegated to a municipal corporation cannot be invoked by it on purely aesthetic grounds.
2. ———. In the exercise of police power delegated to a city it is generally for the municipal authorities to determine what ordinances are required for the health, safety, and welfare of the people, but their action is not final and is subject to scrutiny of courts.
3. ———. The test in such cases is whether the ordinance in question is a bona fide exercise of police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation.
4. ———. A legal presumption exists in favor of validity, and unless the contrary appears upon the face of an ordinance the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence that the regulation imposed is so arbitrary, unreasonable, or confiscatory as to amount to depriving such party of property without due process of law.
5. ———. A municipal ordinance enacted in the exercise of police power is not necessarily invalid because it infringes on private rights or property, but such infringement should not be arbitrary, unreasonable, or confiscatory.
6. ———. In passing upon the reasonableness of municipal ordinances, courts may consider the character of the regulation, the object to be accomplished, the means for its accomplishment, and all the relevant facts and circumstances of each particular case.
7. ———. The exercise of police power by municipal corporations must be directed toward and have a rational relation to protection of a basic interest of society rather than the mere advantage of particular individuals, and must be reasonable and free from arbitrariness.

8. **Municipal Corporations: Nuisances.** An ordinance which declares to be a nuisance that which is not but which may become such under certain circumstances should be directed against the circumstances which are harmful, and not against a particular type of property which, in itself and aside from the harmful circumstances, is not harmful.
9. ———: ———. The general power of a city to declare, prevent, or abate nuisances does not include the power to declare anything a nuisance which is not one in fact or per se.
10. **Waters: Nuisances.** Where an irrigation canal or ditch has been authoritatively constructed and operated in conformity with law, it is not a nuisance in fact or per se, and can only become one by reason of the manner in which it is maintained and operated; and the mere fact that a municipality subsequently includes the same within its city limits does not convert such canal or ditch into a nuisance.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, VIRGIL FALLOON, AND EDMUND P. NUSS, JUDGES. *Affirmed.*

Jack Lyman, and *Neighbors & Danielson,* for appellant.

Mothersead, Wright & Simmons, for appellees.

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

CHAPPELL, J.

Plaintiff, a city of the first class, brought this action against defendants, Winters Creek Canal Company, a Nebraska irrigation corporation, and its directors, to obtain a mandatory injunction requiring them to comply with the provisions of a city ordinance. Concededly defendants had not complied therewith, and they defended upon the ground that the ordinance was arbitrary, unreasonable, and confiscatory. Thus as an attempted exercise of police power, it was alleged to be unconstitutional and unenforceable as to them. After a hearing upon the merits the trial court rendered a judgment dismissing plaintiff's action with prejudice, and decreeing that the ordinance was unconstitutional and null and void as applied to defendants' canal and laterals.

Plaintiff's motion for new trial was subsequently overruled and it appealed, assigning substantially that: (1) The judgment was not sustained by the evidence but was contrary thereto and contrary to law; and (2) the trial court erred in rejecting or refusing to take judicial notice of certain evidence offered by plaintiff. We conclude that the assignments should not be sustained.

The ordinance, passed and approved June 3, 1947, provided in substance that all open ditches and canals extending through any part of the city which are in excess of 3 feet in width at the natural surface of the ground and 12 inches deep below such surface, in which water 6 inches or more deep is permitted to flow during any period of any year, are dangerous to health, life, and property of inhabitants of the city and the public generally, and are public nuisances. It then provided that on or before November 1, 1947, the owner or owners of any such ditch or canal should abandon and fill it to the level of the natural surface, or in the alternative should construct a pipe or conduit therein "of sufficient size and capacity to carry or conduct into and through such pipe or conduit all of the water which may be permitted to flow through such ditch or canal; * * *." The top of such pipe or conduit was required to be placed not less than 12 inches below the natural surface of the adjacent ground and be covered with earth to the level thereof. Such owners were also required to construct in a good and substantial manner a screen at the head of such pipe or conduit and were permitted to construct necessary manholes which were required to be kept securely covered except as necessarily in use, when they must be guarded. All of such pipes, conduits, screens, and manholes were required to be maintained and kept in good order and repair by the owners at their expense. It was made unlawful for any such owners to fail or neglect to comply with any of such provisions, the daily violation of which was each made a misdemeanor punishable by fine and commitment to the city jail until such fine and

costs were paid, secured, or otherwise discharged according to law.

The pertinent facts are not in dispute. Winters Creek Canal Company is a Nebraska corporation organized and operated as a common carrier under the provisions of Chapter 46, article 2, R. S. 1943, for the purpose of furnishing and delivering water for irrigation at reasonable rates to be fixed by the Nebraska State Railway Commission. It was required to keep its works, canals, and laterals in reasonable and proper repair for the delivery and diversion of water to appropriators therefrom, under the control and direction of such commission. It is the owner of an appropriative right to the water of the North Platte River, with a priority date of October 18, 1888. Its canal, 12 miles in length, passes through certain described lands, and, according to its appropriation, "covers and reclaims" described lands "amounting in all to about 8700 acres."

As provided in the articles of incorporation, its capital stock is $100,000, divided into 1,000 shares of the par value of $100 each, to be paid for in cash or its equivalent. The highest amount of its indebtedness is thereby limited to two-thirds of such capital stock. Approximately two-thirds of such stock is owned by landowners under the canal, and one-third thereof by others.

The company's sources of revenue are an annual acre assessment against the land, plus water turn-out charges not based on acreage but on each turn-out, which sums, responsive to estimated expenses, are ordinarily fixed by the stockholders at their annual meeting. The 1951 assessment was $2.50 an acre, with a turn-out charge of $2.50. Some of the lands do not ordinarily require irrigation. Therefore, its average annual acreage irrigated under the canal was approximately 3,800 acres, of which a small portion, 386 acres, lies west of the city's corporate limits. Some of the land is undesirable, some of it is just fair in quality, and the best is now valued at perhaps $200 an acre.

Construction of the company's canal was authoritatively begun in November 1888, and by the next year 10 miles of it had been completed. In 1890 it was enlarged and extended to its present length. The city of Scottsbluff was organized in 1900, at which time all land north and south of the canal was agricultural. No part of the canal or its laterals was enveloped within the corporate limits of the growing city until in 1920, some 30 years after it had been constructed. In 1946, some 56 years after construction of the canal, and again in 1950, since the commencement of this action, other tracts through which the canal and its laterals were constructed became a part of the city. The record also discloses that if the growth of the city continues as it has in the past, additional portions of the canal and its laterals will eventually be included within the corporate limits.

A concededly competent civil engineer, who had been personally and professionally cognizant of the canal and its laterals for many years, made a recent survey and plat of that portion of the canal and laterals within and adjacent to the city. They are all a foot or more deep and three feet or more in width at the top, and carry in excess of six inches of water during some period of each year. Such engineer estimated and it is not disputed that the then cost of compliance with the ordinance would be $138,632.46 if a 72-inch pipe of "sufficient size to carry all water which may be permitted to flow through" such canal and laterals was installed, with smaller ones in the laterals, and that subsequent maintenance costs would also be increased. The installation of an inadequate 60-inch pipe in the main canal would reduce the cost to $117,197.06. The cost under the first figure of $138,632.46 would be $36.48 an acre upon the basis of 3,800 acres, the average annually irrigated, or $21.60 an acre upon the basis of 6,400 acres which could be irrigated. The cost under the second figure of $117,197.06, upon the basis of a 60-inch pipe

claimed by plaintiff to be adequate for 3,800 acres, would be $30.82 an acre. All such computations, however, clearly overlook the fact that as the city grows in the future and envelops the canal and laterals, the cost would mount proportionately for future compliance.

Officers of the company testified, and it is undisputed, that the company has never paid a dividend, has no surplus or property except its irrigation works plus $794.21 cash on hand, and that there was no possible way for the company to finance such a project and comply with the ordinance. The ultimate result would thus be abandonment of the irrigation project as provided in the ordinance, and confiscation of the company's property without due process or payment of just compensation therefor.

Six witnesses who lived near the canal testified for the city in an attempt to establish that the canal was dangerous for children. One such witness was a renter of property near the canal. The others had built or purchased their homes there, well knowing about the canal. They did so because proximity of the canal made their lots or properties cheaper. Naturally the city and such witnesses as well wanted the ordinance complied with because it would not only beautify the city but also enhance the value of their property. In that connection, however, the exercise of police power delegated to a municipal corporation cannot be invoked by it on purely aesthetic grounds. Baker v. Somerville, 138 Neb. 466, 293 N. W. 326; Standard Oil Co. v. City of Kearney, 106 Neb. 558, 184 N. W. 109, 18 A. L. R. 95; 37 Am. Jur., Municipal Corporations, § 289, p. 930.

Each of such witnesses detailed an incident whereat a child fell into or was found in the canal and either got out himself or was removed therefrom by others. Three such witnesses and another who was a witness for defendants, testified that culverts built by plaintiff city in the canal were too small and too high above the bottom of the canal to carry the water. Thus it was

forced back up therein, making the water deeper.

It appears that but one such incident surely happened before the ordinance was passed. That incident happened seven years previously. Therefore, none of such incidents could have been any inducement to passage of the ordinance. It also appears that but one person testified concerning any incident relating to his or her own children, and that no child ever lost its life or was seriously injured.

Generally, irrigation water runs in the canal and laterals from May to October. However, at various other times there has been some water therein. Photographs taken in December 1949 and April 1950 and 1951 respectively appear in the record, showing some grass and weeds in and along the sides of the canal or laterals, with a small amount of standing or slowly moving debris-laden water lying therein.

It will be noted, however, that this is not an action to abate any such alleged nuisance resulting from the manner or method of operating the canal, but rather is one to require defendants to abandon its property or reconstruct it in a particular manner, because as originally and lawfully constructed it is of itself an alleged legislative nuisance in which the court is called upon to scrutinize validity of an attempted legislative exercise of police power.

Another photograph taken in May 1950, evidently after a rain, shows mud in the alley, disconnected water in the street, and running water in the canal a foot or less from the top. The water in the canal and laterals does not flow with rapidity or in great volume, and could not possibly be a danger to any person except very small, unattended children, whose parents established homes nearby, well knowing the situation.

In Standard Oil Co. v. City of Kearney, *supra*, this court held: "In the exercise of police power delegated to a city, it is generally for the municipal authorities to determine what rules, regulations and ordinances

are required for the health, comfort and safety of the people, but their action is not final and is subject to the scrutiny of the courts."

As stated in Union Pacific R. R. Co. v. State, 88 Neb. 247, 129 N. W. 290, quoting from In re Anderson, 69 Neb. 686, 96 N. W. 149: " 'The test in such cases is whether the regulation in question is a bona fide exercise of the police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation.' "

A legal presumption exists in favor of validity, and unless the contrary appears upon the face of the ordinance, the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence that the regulation imposed by it is so arbitrary, unreasonable, or confiscatory as to amount to depriving such party of property without due process of law. State ex rel. Andruss v. Mayor, 120 Neb. 413, 233 N. W. 4; Council Bluffs Transit Co. v. City of Omaha, 154 Neb. 717, 49 N. W. 2d 453.

In 62 C. J. S., Municipal Corporations, § 204, p. 381, it is said: "In passing on the reasonableness of municipal ordinances and regulations, the courts may consider the object to be accomplished, the means for its accomplishment, and all the surrounding facts and circumstances."

In Enterprise Irrigation Dist. v. Willis, 135 Neb. 827, 284 N. W. 326, this court said, citing numerous authorities: "That an appropriator of public water, who has complied with existing statutory requirements, obtains a vested property right has been announced by this court on many occasions." In the opinion this court quoted with approval from Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607, as follows: " 'It may be conceded that the phrase "police power of the state" has, as to its scope and meaning been subjected to a quite severe strain of recent years in the endeavor to so expand it as to cover all sorts of legislation sought to be enacted in the asserted interest of modern progress;

but we have yet to be referred to a case wherein it has been judicially so far expanded as to invest the legislative department of this state with arbitrary power to destroy vested rights in private property when such rights are being exercised and such property is being employed in the useful and in nowise harmful production of wealth, and when such use and the product thereof cannot be said or shown to be inimical to public health or morals or to the general welfare; but, on the contrary, must be conceded to be beneficial to each and all of these.' "

As stated in 62 C. J. S., Municipal Corporations, § 146, p. 301: "Municipal powers and regulations, including police powers, are subject to the limitations of both the federal and state constitutions. In general, whatever the state itself is prohibited from doing is equally prohibited to its municipal corporations." As stated in 62 C. J. S., Municipal Corporations, § 149, p. 306: "A municipal regulation, particularly one enacted in the exercise of the police power, is not necessarily invalid because it infringes on private rights; but such infringement should not be arbitrary or unreasonable."

In Webber v. City of Scottsbluff, 141 Neb. 363, 3 N. W. 2d 635, this court said: "In this connection we are not unmindful of the rule already stated that municipal corporations are prima facie the judges respecting the necessity and reasonableness of their regulatory ordinances, but this rule cannot be carried to the extreme of requiring us to hold on the face of the ordinance that restrictions upon a lawful business having no inherent, generally recognized, or legislatively declared vices are regulations proper under the police power."

Also, as held in Jewel Tea Co. v. City of Geneva, 137 Neb. 768, 291 N. W. 664: " 'The exercise of the police power by a municipal corporation must be directed towards and have a rational relation to protection of a basic interest of society rather than the mere advantage of particular individuals and must be reasonable and

free from arbitrariness.' N. J. Good Humor, Inc., v. Board of Commissioners, 11 Atl. (2d) 113."

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. R. R. Co. v. Drainage Commissioners, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596, as follows: " 'And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. 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.' "

In Chicago, B. & Q. R. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 53 Am. S. R. 557, 41 L. R. A. 481, this court said: "It will not, of course, be contended that the power of the legislature is, in that respect, absolute, or that it may at will impose upon property burdens so unreasonable as to work a practical confiscation. There is, as all admit, a limit beyond which it cannot go and within which it will be confined by the judicial power of the state."

In Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322, 28 A. L. R. 1321, the court said: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain

magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power. * * * The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree —and therefore cannot be disposed of by general propositions."

In Commonwealth v. Reed, 34 Pa. 275, 75 Am. Dec. 661, it is said: "It would, indeed, be strange, that any legal proceeding could be instituted in a county through which a great public work passes, by which the whole purposes of the improvement might be destroyed, upon the singular allegation, that what has been constructed under the express authority of the legislature, is a great public nuisance."

In 37 Am. Jur., Municipal Corporations, § 286, p. 923, it is said: "In the same way, property rights may not be arbitrarily interfered with or destroyed, or property taken without compensation, under the guise of municipal police regulations. An ordinance which permanently so restricts the use of property that it cannot be employed for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of property." As stated in 37 Am. Jur., Municipal Corporations, § 292, p. 935: "An ordinance which declares to be a nuisance that which is not a nuisance, but which may become such under certain circumstances, should be directed against circumstances which are harmful, and not against a particular type of property which, in itself

and aside from the harmful circumstances, is not harmful. A distinction must be taken between a structure itself and the use to which it has been put." See, also, 37 Am. Jur., Municipal Corporations, § 293, p. 935, citing authorities from almost every jurisdiction.

Plaintiff, in support of its contentions, relied primarily upon Platte & Denver C. & M. Co. v. Dowell, 17 Colo. 376, 30 P. 68, decided in 1892. On the other hand, defendants relied primarily upon City of Twin Falls v. Harlan, 27 Idaho 769, 151 P. 1191, decided in 1915 and subsequently affirmed in Hendrix v. City of Twin Falls, 54 Idaho 130, 29 P. 2d 352, decided in 1934, and again cited with approval in State v. Finney, 65 Idaho 630, 150 P. 2d 130, decided in 1944.

In that connection, the afore-cited case relied upon by plaintiff is clearly distinguishable from that at bar not only upon the facts but also upon the issues presented for decision. It was an action to recover damages for the death of a boy by drowning because defendant was allegedly guilty of negligence per se in failing to comply with a state statute containing provisions comparable in some respects with the ordinance at bar, which statute applied to all cities of the first class or their equivalent, and preserved the right of recovery in such cases. Defendant, appellant therein, a milling corporation, owned and operated a large uncovered and unprotected canal for milling purposes, as distiguished from irrigation, which conveyed a large volume of water a distance of several miles through a thickly populated district of Denver. The incline was such that the large volume of water necessarily flowed with great rapidity; as the court said, "a constant menace to life and property" which the corporation "has no constitutional right to perpetuate * * *." It was concluded that the statute was not the imposition of an unreasonable precaution, and under the particular circumstances appearing did not unlawfully deprive appellant of its property or the

enjoyment thereof. We do not have such a situation presented here.

On the other hand, the afore-cited case relied upon by defendants is directly in point, and, we conclude, of controlling force in the case at bar. Here in fact we have a stronger case in defendants' favor, because compliance with the unreasonable ordinance would also be confiscatory and take from or deprive defendants of their property without due process of law or payment of just compensation therefor, and in the future would continue to do so as the city, benefiting therefrom, grew and enveloped defendants' property.

Briefly, in that cited case the facts were that during the months of September and October 1904, the irrigation canal involved was authoritatively constructed. The lands through which it was constructed were then unclaimed sagebrush territory. In December 1904 such lands were platted as town lots. Following its construction the land became settled, and in 1905 first a village government and later the city government of Twin Falls was established, which subsequently passed an ordinance comparable in material respects with that here involved. Concededly it was not complied with and the manager of the irrigation company was convicted and fined for failure to comply. He appealed and, as stated in the opinion, under facts comparable with those here involved: "No unusual conditions exist. Nothing is harmful or dangerous aside from the fact that the people live near it and may fall into it. * * * The general power of a city to declare, prevent and abate a nuisance does not include the power to declare anything a nuisance which is not one in fact nor one per se."

Significantly, the court also said: "A ditch or canal that was constructed prior to the time that a town or city was located along it occupies substantially the same position with reference to the city and its inhabitants as would a natural stream. If the water of a natural stream is used for the irrigation of lands along its course,

it would not be just or right to compel such users to cover the stream where it ran through a village or city; it would develop upon the municipality to place such barriers along such stream as would be necessary to protect its people. A canal company is under the obligation to keep its canal in proper repair and proper condition to furnish the water users with water, and if this is properly done, the municipality would have no more right to complain than it would if it were a natural stream. The users of water from a natural stream would have the right to have the water of such stream, if they had appropriated it prior to the time that the village or city was laid out or established upon its borders, kept within its banks in order to give them the full benefit of their prior appropriations. The rule of law applicable to such a case would be the same whether the channel through which the water was conducted was artificial or natural." In the situation presented here we conclude, as the court did in that case, "such ordinance held invalid when applied to the ditch in question." Whether or not it would be valid in other incomparable situations we do not discuss or decide.

Counsel for plaintiff asked certain witnesses whether or not they had seen dead animals in the canal near their home. Thereto defendants objected substantially upon the ground that no time had been fixed, no foundation laid, and that the evidence was incompetent, irrelevant, immaterial, and not within the issues of the case, the question presented being whether or not the ditch itself is a nuisance as defined by the ordinance, and not whether or not it was operated as a nuisance. The objections were sustained, whereupon plaintiff offered to prove that the witnesses had observed dead animals in the canal and that the odor therefrom was offensive. Like objections were made to the offer and were severally sustained. Plaintiff, without citing any authority except section 28-1014, R. R. S. 1943, argued that the trial court erred in so ruling. We conclude otherwise.

In that connection it will be noted at the outset that no foundation was laid, and that the offer was broader than the question. Also, as stated by plaintiff in its brief: "It is significant that the court is called upon to scrutinize the exercise of legislative power, and that judicial abatement of an alleged nuisance is not sought. * * * If Scottsbluff sought the judicial abatement of an alleged nuisance, the scope of judicial inquiry would be infinitely greater." Such statements answer plaintiff's contention. We are not here considering an ordinance which provided that any irrigation canal in which dead animals or other debris is permitted to accumulate shall be a nuisance.

In Standard Oil Co. v. City of Kearney, *supra,* this court said: "It is also claimed that the noise of the honking of horns and the running of the engines would be a nuisance to the other users of the street. The noise, however, is only incidental to and not a necessary part of the proposed business. If the protection of the public from noise was the purpose sought to be attained, it would seem that it could be easily controlled by proper ordinances going directly to that subject." See, also, City of Omaha v. Hugh Murphy Construction Co., 114 Neb. 573, 208 N. W. 667; Stuhr v. City of Grand Island, 120 Neb. 491, 233 N. W. 886. Likewise, if protection of the public from dead animals or debris in the canal and laterals is a purpose sought to be obtained, the city of Scottsbluff has a like remedy, or, under proper circumstances, it may turn for relief to section 28-1014, R. R. S. 1943.

Plaintiff offered to prove by the introduction of parts of official hydrographic reports of the Department of Roads and Irrigation that defendants over a period of years had satisfied a part of their water requirements by diversions from a drainage ditch which intersects the canal after it has passed through the city. They made such offer purportedly in order to show that the water carriage capacity of defendants' canal and laterals within

the city equal to its maximum permitted appropriation or diversion was not required, thus reducing its burden of compliance with the ordinance. The trial court sustained objections thereto, and plaintiff contended that it erred in so doing, or that in any event judicial notice should have been taken of the facts disclosed thereby.

We conclude that plaintiff's contention in that regard has no merit because the facts disclosed by such evidence could not in any manner affect ultimate decision in this case. In that connection the very ordinance which plaintiff is attempting to enforce provides that such pipe or conduits should be "of sufficient size and capacity to carry or conduct into and through such pipe or conduit all of the water which may be permitted to flow through such ditch or canal."

The important point, however, is that Winters Creek Canal Company has no appropriation to divert waters from Winters Creek drainage ditch. Its appropriation is from the North Platte River. It is true that for a number of years state officials have, as a matter of grace, tolerated the taking of some water by defendant company from such drain, but concededly it has no appropriation therefrom. Whether or not it could obtain such an appropriation we are not required to discuss or decide. It is sufficient for us to cite Drainage District No. 1 v. Suburban Irrigation Dist., 139 Neb. 460, 298 N. W. 131. On the other hand, even if such waters were subject to appropriation, defendant company could not be required by plaintiff to surrender its 1888 appropriation for a different appropriation. Contrary to plaintiff's contention, the opinion in Nebraska v. Wyoming, 325 U. S. 589, 65 S. Ct. 1332, 89 L. Ed. 1815, is not controlling because it did not and obviously could not change the Constitution and statutes of this state. It simply made an "equitable apportionment between the States of the water of the North Platte River." We therefore conclude that the trial court did not err in refusing to admit or take judicial notice of such official reports.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

HERMAN F. NACKE ET AL., APPELLEES, V. THE CITY OF HEBRON, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
53 N. W. 2d 564

Filed May 16, 1952. No. 33170.

1. **Municipal Corporations.** Under the provisions of section 70-503, R. R. S. 1943, and 18-412, R. S. 1943, without an authorizing election, a city may not issue revenue bonds to secure funds to pay for the construction of a complete electric light and power plant when it does not own such a plant and has not for many years owned or operated such a plant, but does own transmission lines and a distribution system.
2. **Statutes.** In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account, in order to determine the legislative will.
3. **Muncipal Corporations: Injunctions.** When bonds or other evidences of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue, equity has jurisdiction to grant an injunction. Where the law requires that the question shall be submitted to popular vote, an issue of bonds without such a vote will be enjoined.

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

Johnston, Thompson, Raymond & Mayer, Perry & Perry, Albert Pike II, and *H. W. Hess,* for appellants.

W. O. Baldwin, for appellees.

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

SIMMONS, C. J.

This is an action to enjoin the defendants from entering into a contract for the construction of an electric power plant and from issuing revenue bonds of the city to secure funds to pay for said power plant. Issues were made and trial was had resulting in a decree enjoining the defendants as prayed. The defendants, hereinafter called the city, appeal. We affirm the judgment of the trial court.

We recite the facts appearing in the record, so far as necessary to a determination of the question presented here.

Prior to 1910, a private company generated and sold electricity to the city and its inhabitants. During that year an election was held which authorized the city to issue bonds for the purpose of "establishing and maintaining a system of Electric Lights." As a result of that election the city purchased and thereafter operated the plant theretofore in the city which consisted of a generating plant, transmission lines, and distribution system. That condition continued until 1921.

Beginning in 1921, as a result of a favorable election on the question of purchasing electric power, the city purchased its electric current from a third party or parties under a 10-year contract. That method of securing electric current continued uninterrupted to the time of the trial in this action. The contract for the purchase of power contained a provision whereby the city leased its generating plant to the supplier of current to be used as an auxiliary plant. Whether or not the city's plant was thereafter operated is not shown.

In 1928 or 1929, "boys" broke into the plant and removed brass and copper parts from the machinery. Thereafter it was not in an operating condition and, although it could have been repaired, that was not done.

In the early 1930's, the city sold the machinery and boilers, excepting the switchboard, and they were re-

moved from the building. Thereafter the city leased the building for various purposes.

In 1946, the city sold the building and ground on which it was located and delivered possession to the purchaser. The city, by brief here and without more, assures us that that sale was void. It does not appear that the sale has been otherwise challenged. The city here challenges the legality of its own act in order to aid in the defeat of this action. We need consider that contention no further than to point out that the city at the opening of the trial stipulated that it did not then own a generating plant, contending only that it had transmission lines and a distribution system.

It thus appears that from 1921 to the time of trial in 1951, the city has not generated electricity; from 1928 or 1929 to the time of trial it has had no operable generating plant; from sometime in 1930, it has had no machinery for the production of power; and from 1946 on, it has not owned the building formerly used for that purpose.

In 1950, the city council took steps looking to the construction and operation of a power plant. It employed an engineer, had plans and specifications prepared, published notice to bidders, and received bids. Preliminary steps were being taken to issue and sell revenue bonds to secure funds to pay for the same when this action was commenced. An authorizing election was not had.

It is the city's contention that as a result of the 1910 election it was given the power to acquire and operate an electric light and power plant, and that that is a continuing power.

The record here does not show the particular statutes under which the 1910 proceedings were authorized. The Legislature in 1889 passed an act to authorize a city of the second class "to establish and maintain, a system of electric lights." Laws 1889, c. 19, p. 350. That act with amendments is found in Annotated Statutes 1909, sections 8994 to 8997. Because of the particular

language of the statute and the use of that same language in the proceedings in 1910, we assume that the proceedings were under that act. Possibly for the reasons suggested by State v. Searle, 76 Neb. 272, 107 N. W. 588, these sections were omitted from the 1913 revision. See Rev. St. 1913, p. 2515.

In Carr v. Fenstermacher, 119 Neb. 172, 228 N. W. 114, the city was proceeding to buy a Diesel engine and other equipment for the improvement of an electric light and power plant that it was then operating, the new equipment being needed to make the plant efficient. The statute there construed and applied was section 4396, Comp. St. 1922. It authorized the city "to purchase, construct, maintain and improve heating lighting systems." This act stems back to chapter 22, Laws 1901, page 326, which authorized cities of the first and second class "to establish and maintain a heating or lighting system." As it now is, with amendments, see sections 19-1401 to 19-1405, R. S. 1943. Sections 18-101 to 18-105, Comp. St. 1929, are discussed in Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649.

Granting the original power, as a result of the 1910 election, nevertheless the city does not attempt to bring its acts here within either the statutes involved in the 1910 election or in the Carr case. It now claims the authority for its acts under the provisions of sections 70-503, R. R. S. 1943, and 18-412, R. S. 1943, as construed by our decisions.

It is a matter of common knowledge that the electric industry was in its infancy in this state at the time the act on which the city based its 1910 election was passed, and likewise when the original act construed and applied in the Carr case was passed. Generally at that time electric plants, by whatever name they were described, consisted of one unit under one ownership and were operated independently of other plants. The one unit had as its three component parts a generating

system, some transmission lines, and a distribution system. There was no particular occasion to distinguish between the three component parts in legislation at that time. The Carr case must be read in the light of those facts and the statute there construed.

However, by 1930, that situation had changed. The industry had developed, as had the uses of electricity. Electrical energy was being produced in large central plants and distributed by far-flung networks of transmission lines, so that one plant served many communities through local distribution systems. In some instances all three component parts were owned and operated by one party; in other instances power was sold at the plant and delivered to transmission lines; and in still other instances, power was produced, transmitted, and sold to independent distributing parties. In short, what had been one industry became in some instances two, and in others three, industries—each often independent in ownership and operation of the other.

At the November election in 1930, the people of this state enacted Initiated Law No. 324 (now, as amended, sections 70-501 to 70-515, R. R. S. 1943). There they legislated not as to electric light and power systems but throughout the act referred to electric light and power plants—distribution systems—transmission lines. Throughout the act it is recognized that while the component parts might be integrated, yet they were separable and could be and were treated as independent units. Section 3 of the Initiated Law, as amended, now appears as section 70-503, R. R. S. 1943. This section is as follows: "In lieu of the issuance of bonds or the levy of taxes as otherwise by law provided, and in lieu of any other lawful methods or means of providing for the payment of indebtedness, any city, village, or public electric light and power district within this state shall have the power and authority, by and through its governing body or board of directors, to provide for or to secure the payment of the cost or expenses of purchasing, con-

structing, or otherwise acquiring, extending and improving any real or personal property necessary or useful in its operation of any electric light and power plant, distribution system or (and/or) transmission lines, by pledging, assigning, or otherwise hypothecating, the net earnings or profits of such electric light and power district, city or village, derived, or to be derived, from the operation of such electric light and power plant, distribution system or (and/or) transmission lines, and to that end, to enter into such contracts and to issue such warrants or debentures as may be proper to carry out the provisions of this section." The act originally provided "and/or" where shown in parentheses. The 1943 revision changed the act to the language above quoted.

In Interstate Power Co. v. City of Ainsworth, *supra,* the city had neither power plant, transmission lines, nor distribution system. We there held that neither express nor implied power was conferred by Initiated Law No. 324 "to acquire an electric light and power plant and pay for it by pledge of future earnings." Language used in that opinion must be read in the light of facts which obviously did not call for a clear distinction to be drawn between the three units.

In Southern Nebraska Power Co. v. Village of Deshler, 130 Neb. 598, 265 N. W. 880, the village had a "complete plant and distribution system" in operation. There the proposal was for the purpose of enlarging the light plant and distribution system already constructed. There Initiated Law No. 324 was relied upon. It was held that the village had the power under the act. But there again, because of the factual situation, we were not called upon to distinguish between the several units.

The decision in Interstate Power Co. v. City of Ainsworth, *supra,* was filed October 20, 1933. The 1935 Legislature enacted chapter 38, section 1, Laws 1935, page 153. As amended, it now appears as section 18-412, R. S. 1943, and, so far as material here, is as follows: "Supplemental to any existing law on the subject, and

in lieu of the issuance of general obligation bonds, or the levy of taxes upon property, as by law provided, any city or village within the state of Nebraska may construct, purchase, or otherwise acquire, an electric light and power plant, distribution system, and (and/or) transmission lines, and real and personal property needed or useful in connection therewith, and pay the cost thereof by pledging and hypothecating the revenue and earnings of any electric light and power plant, distribution system, and (and/or) transmission lines, owned or to be owned by such city or village. In the exercise of the authority granted in this section, any such city or village may issue and sell revenue bonds or debentures and enter into such contracts in connection therewith as may be proper and necessary. Such revenue bonds or debentures shall be a lien only upon the revenues and earnings of the electric light and power plant, distribution system, and (and/or) transmission lines owned or to be owned by such city or village. No city or village shall pledge or hypothecate the revenue and earnings of any electric light and power plant, distribution system, or (and/or) transmission lines, nor issue revenue bonds or debentures, as authorized by this section, until the proposition relating thereto has been submitted in the usual manner to the qualified electors of such city or village at a general or special election and approved by a majority of the electors voting on the proposition submitted; * * *. The requirement herein of a vote of the electors, however, shall not apply when a city or village seeks to pledge or hypothecate such revenue and earnings, or issue revenue bonds or debentures, *solely* for the maintenance, extension or enlargement of any electric light and power plant, distribution system, or (and/or) transmission lines *owned by such city* or village." (Emphasis supplied.) The original act provided "and/or" where shown in parentheses. The 1943 revision changed the act to the language above quoted, and

made other minor changes in language not material and not set out here.

In Slepicka v. City of Wilber, 150 Neb. 376, 34 N. W. 2d 646, we construed and applied the same statutes that are here involved. There we were careful to point out that the city of Wilber retained at all times one of its generating units which "was kept for stand-by service only," and although it was old and inefficient, it was operable. It was "inadequate for the city's needs." We carefully pointed out that the city "temporarily" bought a part of and subsequently all its electrical energy. In the light of the fact situation there was no occasion to particularly distinguish between the specific units. There they were enlarging an existing power plant which the city then owned.

We did have occasion to point out in Drummond v. City of Columbus, 136 Neb. 87, 285 N. W. 109, on rehearing, 136 Neb. 99, 286 N. W. 779, that the powers granted and limited by the 1935 act related to not one system but to separate units, to wit, power plant, transmission lines, and distribution system. See, also, Munch v. Tusa, 140 Neb. 457, 300 N. W. 385; Inslee v. City of Bridgeport, 153 Neb. 559, 45 N. W. 2d 590.

These decisions do not directly determine the specific question here involved, which is, may a city issue revenue bonds without an authorizing election to pay for the construction of a complete electric power plant when it does not own, and has not owned or operated for many years, such a plant, but does own transmission lines and a distribution system.

As we said in City of Curtis v. Maywood Light Co., 137 Neb. 119, 288 N. W. 503, the intention of the Legislature is here to be obtained primarily from the language used in the enactment, which must be given effect according to its plain, obvious meaning.

" 'In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or super-

fluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will.'" In re Estate of Edwards, 138 Neb. 671, 294 N. W. 422.

We have recently restated the rule that "In construing a statute, effect must be given, if possible, to every word, clause, and sentence, so that no part of its provisions will be inoperative, superfluous, void, or insignificant." Safeway Cabs, Inc. v. Honer, *ante,* p. 418, 52 N. W. 2d 266.

The first sentence of section 70-501, R. R. S. 1943, relates to ownership or operation not of a light and power plant or system but to the three specific units repeatedly referred to in the act.

The first sentence of section 18-412, R. S. 1943, quoted above, provides that a city "may construct, purchase, or otherwise acquire * * *." Obviously such a proposition requires an authorizing election. The last sentence of section 18-412, R. S. 1943, quoted above, provides that the requirement of a vote shall not apply where the city proposes to pledge or hypothecate the revenues or earnings or issue revenue bonds "solely for the maintenance, extension or enlargement of any electric light and power plant * * * owned by such city* * *." Obviously what the city proposes to do here is to "construct" a power plant. It is not undertaking "solely" to maintain, extend, or enlarge that plant, nor does it "own" it. It does not exist.

The effect of these acts is to say, these things you may do to that which you own without a vote of the people, whether it be a light and power plant, or distribution system, or transmission lines, but as to what you do not own, you must have an authorizing vote.

To sustain the city's position would be to read out of the statutes the oft-repeated specific references to the three component units of an electric system. It would have us read the act as though the people in the initia-

tive act, and the Legislature in the 1935 act, used "electric light and power plant" as inclusive of distribution systems and transmission lines. It would have us render the repeated reference to distribution systems and transmission lines as surplusage. Obviously they were used for a purpose and must be given effect.

The city at one time owned a power plant, a transmission line, and a distribution system. Suppose it then dismantled and sold not only the power plant, as it did here, but also sold its distribution system—retaining ownership only of a transmission line. If the city's contention here is correct, then it could, on the foundation of having a transmission line, construct both a power plant and a distribution system, and issue revenue bonds to secure money to pay therefor without an authorizing vote of the people. We find nothing in this act, or in our legislative history, of any purpose to waive the requirement that the people shall first approve or disapprove such a course of action. The city's acts are not within the exceptions of the last sentence of section 18-412, R. S. 1943. The statute requires an election and approval of the proposal by the electors.

We conclude that the city does not have the power to do that which it here undertook to do. The rule is: "* * * 'When bonds or other evidences of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue, equity has jurisdiction to grant an injunction, * * *. Where the law requires that the question shall be submitted to popular vote, an issue of bonds without such a vote will be enjoined.' " May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448.

The judgment of the district court is affirmed.

AFFIRMED.

WINFRED SCARBOROUGH, APPELLEE, V. AEROSERVICE, INC., A CORPORATION, ET AL., APPELLANTS.
53 N. W. 2d 902

Filed June 6, 1952. No. 33130.

1. **Trial.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can be reasonably deduced from the facts in evidence.
2. **Carriers.** A private carrier is one that is not bound to carry for any reason unless the obligation to do so is voluntarily assumed by virtue of a special contract, and such carrier is liable only for such loss or injury as results from a failure to exercise ordinary care.
3. **Negligence: Aerial Navigation.** In the absence of statute, the ordinary rules of negligence and due care obtain in respect to the maintenance and inspection of aircraft before flight by a private carrier when under agreement to carry a fare-paying passenger.
4. **Negligence.** Ordinary care is such care as the danger of the situation and the consequences that may follow an accident demand and may be a high degree of care under some circumstances and a slight degree of care under other circumstances.
5. ———. Inattention to the duty to exercise care in a situation which reasonably may be regarded as hazardous is negligence, notwithstanding the act or omission involved would not in all cases, or even ordinarily, be productive of injurious consequences.
6. ———. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care.
7. **Trial.** Circumstantial evidence can be sufficient to sustain a verdict depending solely thereon for support if the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom.
8. **Negligence.** A plaintiff is not bound to exclude the possibility that the accident might have happened in some other way, but is only required to satisfy the jury, by a preponderance of the evidence, that the injury occurred in the manner claimed.
9. **Evidence.** The declarations and admissions of a party to an

action against his own interest, upon a material matter, are admissible against him as original evidence.

10. **Trial: Appeal and Error.** The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear.

11. ———: ———. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions, and the true meaning thereof will be determined not from the sentence or phrase alone but by a consideration of all that is said on the subject.

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

Morsman, Maxwell, Fike & Sawtell, for appellants.

Wear & Boland, Davis & Pittman, and *Robert D. Mullin,* for appellee.

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

MESSMORE, J.

This is a law action brought by Winfred Scarborough as plaintiff against Aeroservice, Inc., a corporation, and Harold H. Honeywell, defendants, in the district court for Douglas County to recover damages for injuries sustained by the plaintiff when the airplane in which he was riding as a fare-paying passenger crashed. The airplane was owned by Aeroservice, Inc., and piloted by Harold H. Honeywell, an employee of Aeroservice, Inc.

It is apparent from the record that the trial court did not submit to the jury the question of negligence on the part of the defendant Harold H. Honeywell in the actual operation and handling of the plane in the air.

The cause was tried to a jury, resulting in a verdict in favor of the plaintiff and against both defendants, and determining the amount of damages to be awarded to the plaintiff. Judgment was entered on the verdict.

The defendants filed a motion for new trial and motion to have the verdict and judgment entered thereon set aside and to have judgment entered in accordance with the defendants' separate motions for directed verdict one of which was made at the conclusion of the plaintiff's evidence and the other at the conclusion of all of the evidence. The trial court overruled these motions. Defendants appealed.

For convenience we will refer to Winfred Scarborough as plaintiff, to the defendant Aeroservice, Inc., as Aeroservice, and to defendant Harold H. Honeywell as Honeywell or pilot.

The plaintiff's petition, insofar as need be considered here, in substance alleges the accident was proximately caused and brought about through the recklessness and negligence of the defendants Aeroservice and Honeywell in the following particulars to wit: (1) In failing to ascertain the airworthiness or lack of airworthiness of the aircraft; (2) in permitting the aircraft to stand in open weather without sheltering the same and permitting the tail section thereof to become filled with water, thereby creating weight which defendants knew or should have known would cause the airplane to crash; and (3) in failing to inspect the aircraft before flight was attempted.

The answers of the defendant Aeroservice and defendant Honeywell in effect deny generally the allegations of negligence alleged in the plaintiff's petition.

The defendants assign as error: (1) The trial court erred in overruling defendants' separate motions for a directed verdict. (2) The trial court erred in giving instructions Nos. 3, 4, 5, and 6. (3) The trial court erred in refusing to admit exhibits Nos. 26 and 27 into evidence. (4) The trial court erred in admitting all testimony of witness Esmond Avery, president of Aeroservice, relative to his report of the accident made to the Civil Aeronautics Board.

A motion for a directed verdict must for the purpose

of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can be reasonably deduced from the facts in evidence. See, Dickman v. Hackney, 149 Neb. 367, 31 N. W. 2d 232; Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21.

The defendants' first assignment of error challenges the sufficiency of the evidence to warrant submission to the jury. This requires an analysis of the evidence, and we set forth that part of the same deemed necessary to determine this assignment of error.

It appears from the record that plaintiff enrolled in a school for airplane mechanics operated by Aeroservice, located at the municipal airport near Omaha. He attended day classes from 7 a. m. to 3 p. m., from January 1949, until the occurrence of the accident on June 23, 1949. Just before 3 p. m., on that date he talked to Mr. Evans, secretary of Aeroservice, about renting an airplane to take a ride after school. It was agreed that he would pay $10 for a 45-minute flight, which he did. Honeywell was chief instructor in the mechanics' school, held a commercial pilot's license, and on occasions flew for Aeroservice. He agreed to fly the plaintiff.

The airplane in question is described as a Fairchild aircraft, model M-62-A-3, a low-winged monoplane, the wing being under the fuselage. This is a two-seated plane with dual controls. There is a canopy cover made of plexiglass which fits over the cockpit in a loose manner. This plane was designed as an army training plane and commonly referred to as a PT-26. After World War II these planes were sold as army surplus for civilian use, and Aeroservice purchased this plane.

Throughout the course of the evidence certain features of this plane are referred to, for instance, grommets. A grommet is described as a little celluloid or

plastic washer which is put on the fabric of the airplane merely as a reinforcement ring. The purpose of the grommets is to let water drain out of the interior of the plane. A bulkhead is an annular reinforcement ring made of plywood three-eighths to one and one-half inches thick which runs around the fuselage shell from the back of the cockpit to the tail and gradually gets smaller, tapering off, to give it the shape. In the part of the plane where the tail-wheel assembly joins the fuselage there is a hole approximately 5 inches in diameter. Inside the fuselage where the tail wheel joins the plane, the tail-wheel assembly is built around this hole to a thickness of approximately three-fourths of an inch. This hole is covered with a heavy duck or light leather boot. Its purpose is to keep the dust out of the actuating hydraulic unit.

The plane had not been moved since June 20, 1949. On June 22, 1949, 24 hours prior to the time of the flight, 1.24 inches of rain fell in one hour between 4 p. m. and 5 p. m. This rain was measured at the municipal airport where the plane was parked in the open, and is shown by the records of the United States Weather Bureau. A weather expert testified that 1.24 inches of rain falling within one hour is more than four times the amount classified as "heavy" rain.

There is a conflict in the testimony as to whether the canopy on this plane was closed or open prior to the time of flight.

The plaintiff testified that after obtaining a pilot to fly the plane they procured parachutes. The oil was checked and the plane filled with gasoline. The plaintiff got into the front seat and the pilot in the rear seat from which seat he operated the plane. They taxied to the proper place to await a clearance signal. The pilot "revved" the engine, tested the two magnetos, got a green light from the tower, and proceeded to take off. The plaintiff watched the instruments and paid no attention to what the pilot was doing because he did

not know anything about flying and had never flown by himself. He remembered that after the take-off the pilot banked the plane to the east to miss the Illinois Central Railroad bridge which crosses the Missouri River. The plane crashed on the Iowa side of the river. The plaintiff remembered nothing after the crash.

Honeywell testified that he was the chief instructor at the aircraft mechanics' school and also held a commercial pilot's license. He had flown a PT-26 on many occasions prior to June 23, 1949, when he flew the plane in which the plaintiff was injured. He testified that when he went out to the plane it was tied down. He untied it and opened the canopy. He made a visual check of the plane. He did not examine the grommets, which are in the belly of the plane and run through the fabric ahead of each bulkhead, to ascertain if there was any water in the tail of the plane, nor did he examine the tail-wheel assembly to see whether or not it was clogged. He further testified that there is no set rule or regulation required by the Civil Aeronautics Administration, hereafter referred to as the C. A. A., to ascertain whether or not there is water in the tail of a plane. Before taking off he made an inspection of the various parts of the plane consisting of the stick, engine, the ailerons, rudder controls, and the trim tabs as far as the control in the cockpit is concerned. He also checked the magnetos. After receiving the green light to take off and the plane had gained altitude of 100 feet or more, he noticed it was not climbing as fast as it should. The climb was unusually slow. The plane was not functioning correctly. When he obtained altitude of 225 feet he observed the tail being heavy, which is caused by excessive weight in the tail. There was no indication of a stall. The plane lost altitude. The tail seemed to be pushed down, and this created more drag. He looked for a place to make a forced landing. Later the plane crashed on the Iowa side of the Missouri

River. He estimated that they were in the air about 3 minutes.

Honeywell further testified that it was not raining on that particular day, but it had rained the night before and there had been intermittent flash rains for two or three days previous to the flight. He did not examine the plane two or three days prior to the flight to ascertain if there was any water in any part of it. Water could possibly drip through the looseness of the canopy into the fuselage of the plane. The only way water could get into the tail of the plane would be if the drain grommets were clogged so the water could not drain out. He explained that a tail-heavy condition can be caused otherwise than by water in the tail. It appears from the evidence that none of the other causes existed in this case.

On April 5, 1949, Honeywell conducted a 100-hour inspection of this plane, required by the C. A. A. He was assisted by four mechanics under his direction. His evidence is to the effect that the grommets were not examined to ascertain whether or not they were plugged, or what their condition was. In a deposition taken previous to trial he testified that this plane remained out in the weather at all times and was not hangared; that the weight in the tail was due to the rain accumulating in the tail; and that it was the only logical source he could think of to cause this condition.

The president of Aeroservice testified that he listed the facts as to how the plane crashed on a form required by the C. A. A., which would show his opinion of the cause of the crash and recommendations to prevent recurrence of such a crash. In this report he gave as his opinion, after summarizing the pertinent parts, that it was his belief that this airplane developed a horizontal stabilizer stall due to excessive weight in the rear end, and that as soon as the water had a chance to surge to the tail end, the stabilizer went out due to this excessive weight. In the report to the Safety Bureau of the Civil

Aeronautics Board where he was asked for suggestions for the prevention of recurrences of this or similar failures, he gave the following answer: "I believe all PT-26 and PT-19s should be inspected before flight when they have been setting out following a heavy rain. Also, drain grommets should be put in the belly of the aircraft in front of every stringer."

He testified on cross-examination that his report was not based on actual knowledge because he was not familiar with the construction of a PT-26. After the accident he looked a PT-26 over and found that they had drain grommets in front of every stringer. In his opinion a fire hose could be put in the interior of the plane, and the water would run back out just as fast as it was put in and would not accumulate in the tail section of the fuselage.

The plaintiff offered certain testimony of this witness given by him in a deposition prior to trial as admissions against interest. This evidence is to the effect that the secretary of Aeroservice had a right to authorize the trip; that a PT-26 is a poor airplane, is marginal and bordering on dangerous; that it is too heavy for the horsepower to make it an airplane with a good margin of safety; and that this plane was not in active use for fare-paying passengers but was in dead storage. He did not remember how much it rained the day before the flight but it rained very hard. He ordered no inspection of the plane to ascertain whether any water got into the fuselage or body of the plane. It appears that this plane was used on occasions preceding this flight.

A witness who was in the Army Air Force during World War II and received his primary training in a PT-19, testified that the PT-19 is very similar to the PT-26, the primary difference being that the PT-19 does not have a canopy cover and the PT-26 does, and also, the PT-26 has a 25 horsepower greater engine than the PT-19. This witness, after explaining the position of the bulkheads, the grommets for drainage in the bottom

of the plane, and the construction of the plane, testified that if water got into the fuselage it would drain to the back or tail part of the plane. If the plane had sat out three days or more, taking into consideration the rain as it appears in this case, he testified he would look into the belly of the plane to see if there was water, or anything loose, or any excessive dirt. He testified that you could kneel down and check the drain grommets. This could not be ascertained by looking at the plane from the outside, nor by sitting in the cockpit and looking around.

A major on active duty with the Strategic Air Command, who qualified as a flight test engineer and commercial pilot during World War II, testified that he ferried PT-26s for the Royal Canadian Air Force as a staff pilot and had approximately 200 hours flight time in this type of plane. After World War II he processed or modified ten such planes for civilian use and personally owned such a plane. He is acquainted with the PT-26 with reference to the tail section of the fuselage which begins behind the cockpit and ends down near the rudder. There is a hole in the tail end of the fuselage area approximately 18 inches long to permit the attachment of the tail-wheel assembly. This hole is covered by sheet metal which forms the contour of the airplane and there is a gap approximately that large in the area of the tail-wheel assembly. Assuming that there was 1.23 inches of rainfall in the 18 hours prior to the accident and that some water got into the tail section of the fuselage, he testified that the water would remain there for a period of one to three hours, and the plane being in an idle position water would be forced to run down the fuselage and out the tail area of the plane. There are no grommets in the belly of the plane, but there are six or eight the length of each spar in the trailing edge of the wing. There are drain holes in the tail section, but he did not believe these were grommets. He further testified that the final obstruction in the tail is only three-fourths of an inch in thickness, and the cut-away sections for the

former strips would allow the water to drain that far anyway. If the plane was properly cared for there would be no occasion for anything there to obstruct it.

An airplane mechanic and shop supervisor for an aircraft company which makes all kinds of repairs on planes, and who had previously been in the employ of Aeroservice, was designated an inspector for the Civil Aeronautics Administration. In this capacity he inspected planes for airworthiness. He testified that once a year, regardless of the number of hours flown, a certificate is required by the C. A. A. as to the inspection. This is tantamount to relicensing the plane. When PT-26s were sold as army surplus, they were required to be certified by the C. A. A. for airworthiness. He inspected approximately 100 such planes with the purpose of converting them to civilian use. He described a PT-26 and identified marks made on an exhibit for demonstration purposes, and mathematically determined the center of gravity of this plane and planes of this type. He then testified that in his opinion 2½ gallons of water could not accumulate in the tail section of a PT-26. Further, assuming 1.26 inches of rain had fallen between the hours of 4 p. m. and 7 p. m. the day before the accident and there was no rain for 20 hours prior to that time, and the canopy of the plane was open, enough water could not accumulate to disturb the center of gravity beyond tolerances as prescribed by the C. A. A., or, in other words, that enough water could not accumulate to disturb the flight characteristics of the plane. He further testified that this plane was designed to be hangared outdoors.

A witness who had been an instructor in the Army Air Force and a commercial pilot testified with reference to a PT-19 used for training purposes in the military service which is similar in construction to a PT-26 and with which he is familiar, and that on the field where he instructed these planes stood out in the weather and were taken in only for 20-hour or 100-hour inspections. In the event anything appeared to be wrong with the

plane mechanics would work on it. The ground crews were charged with seeing that the planes were gassed and oiled; that it was not customary to inspect the interior or tail fuselage for the accumulation of water before flight; and that no instructions were given to cadets to make such inspection nor did the instructor inspect the planes for such purpose.

In this case the defendant Aeroservice is a private carrier, that is, not bound to carry for any reason unless the obligation to do so is voluntarily assumed by virtue of a special contract, and liable for only such loss or injury as results from a failure to exercise ordinary care. See, 9 Am. Jur., Carriers, § 10, p. 435; 6 Am. Jur., Aviation, § 60, p. 36.

This court, in In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526, had before it negligence involved in the operation of an airplane. We applied the rule: " 'In the absence of statutes covering the operation and management of airplanes at the time and place of an accident, * * * the rules of law applicable to torts—the ordinary rules of negligence and due care—obtain. Thus, the rule of the common law that every person shall use ordinary care not to injure another, that is, such care as the great mass of mankind would use under the same or similar circumstances or such care as the ordinarily prudent person would use under the same or similar circumstances, applies. * * * The care must be commensurate with dangerous consequences to be reasonably apprehended; it may be of a very high degree under some circumstances and of a slight degree under others.' " See, also, 6 Am. Jur., Aviation, § 60, p. 36; 2 C. J. S., Aerial Navigation, § 19, p. 907; Greunke v. North American Airways Co., 201 Wis. 565, 230 N. W. 618, 69 A. L. R. 295; Kasanof v. Embry-Riddle Co., 157 Fla. 677, 26 S. 2d 889.

The rules of law above announced would be no different in the instant case where negligence is involved in the maintenance and inspection of an airplane before

flight carrying a fare-paying passenger. The defendants were under no duty to use the highest degree of care, but to use that degree of care that men of reasonable diligence and foresight would ordinarily exercise. This case was tried in accordance with the foregoing rules of law.

The defendants argue that the plaintiff must prove by a preponderance of the evidence that water got into the tail or fuselage of this airplane causing excessive weight in that part of the plane which constituted the proximate cause of the accident. In this connection, a PT-26 was designed to be left out in the open in any type of weather, was so constructed that water would drain out of the tail and the fuselage, and a sufficient quantity of water would not accumulate so as to disturb the flight characteristics of the plane. Defendants further argue that there is no C. A. A. regulation requiring such inspection, therefore, as a matter of law, there was no duty on the part of the defendants under the facts in this case to inspect the plane to ascertain whether or not there was water in the tail or fuselage; and that this is made clear by the testimony of defendants' experts, Major Miller, Mr. Miller, and Mr. Stuenkel.

The evidence discloses that this plane was in the open with the canopy possibly open; and that there was a downpour of rain approximately 19 hours before time of flight equal in intensity to four times "heavy" rain. This investigation for the accumulation of water in the tail or fuselage would be a simple matter. It could be accomplished by kneeling down to insert a pointed object through the drain holes to ascertain if they were clogged or free from obstructions, and examining the fabric around the lower portion of the fuselage and the tail of the plane. The dangerous consequences to be reasonably apprehended would be initially the accumulation of water in the plane which would affect the weight and balance of the plane, which is an important matter to be considered before any flight. The

evidence disclosed a tail-heavy condition in this plane which could and did result in a serious accident. This type of inspection is just as important as ascertaining the sufficiency of the fuel and oil, and the operation of the engine.

We believe the following language in 38 Am. Jur., Negligence, § 24, p. 668, is applicable: "Liability for negligence may be predicated upon the lack of foresight or of forethought which is exhibited where one remains in voluntary ignorance of facts respecting the danger inherent in the particular act or instrumentality involved, concerning which a reasonably prudent person would become advised, on the theory that such ignorance is the equivalent of negligence. Inattention to the duty to exercise care in a situation which reasonably may be regarded as hazardous is negligence, notwithstanding the act or omission involved would not in all cases, or even ordinarily, be productive of injurious consequences."

In 38 Am. Jur., Negligence, § 24, p. 670, it is said: "The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care."

The rules of law relating to the operation of aircraft, in the absence of statute, in general are rules relating to negligence and nuisance, and are not distinguishable from those which relate to the operation of vehicles, perhaps, more closely to motor vehicles on land. It is assumed that the pilot of an airplane, like the driver of an automobile, is charged with a duty toward a passenger for hire in such plane commensurate with the nature of the instrument employed and with the duty imposed on him by law. See, Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N. E. 212, 83 A. L. R. 329; Greunke v. North American Airways Co., *supra;* Read v. New York City Airport, Inc., 145 Misc. 294, 259 N. Y. S.

245; Annotation, 12 A. L. R. 2d 677-679.

In applying the rules of negligence governing in tort cases to land-operated vehicles which fall under the same rules of negligence, the owner or driver of a motor vehicle must exercise reasonable care, in the inspection of his machine, to discover any defects that may prevent its proper operation, and is chargeable with knowledge of any defects which such inspection would disclose. See 2 Blashfield, Cyclopedia of Automobile Law and Practice, § 821, p. 1.

In Boele v. Colonial Western Airways, Inc., 110 N. J. L. 76, 164 A. 436, a case wherein an airplane accident occurred because of defective parts of an engine and at least two passengers were killed, the trial court instructed the jury to the effect that the defendant was required to make a proper inspection of the plane before flight, which is in effect the same as the rule above stated with reference to the inspection of an automobile.

The defendants assert that negligence is never presumed and not to be inferred from the mere fact that an accident happened. If the cause of the accident is not ascertained except as a matter of guess, conjecture, or surmise, the defendant would then be entitled to prevail. An abundance of authorities support the above proposition.

In addition to direct evidence, or in the absence of the same, circumstantial evidence can be sufficient to sustain a verdict depending solely thereon for support if the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom. See, Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614; Bixby v. Ayers, 139 Neb. 652, 298 N. W. 533; Anderson v. Interstate Transit Lines, 129 Neb. 612, 262 N. W. 445; Zimmer v. Brandon, 134 Neb. 311, 278 N. W. 502.

A plaintiff is not bound to exclude the possibility that

the accident might have happened in some other way, but is only required to satisfy the jury, by a fair preponderance of the evidence, that the injury occurred in the manner claimed. See, Fonda v. Northwestern Public Service Co., 138 Neb. 262, 292 N. W. 712; Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367; English v. Miller (Tex. Civ. App.), 43 S. W. 2d 642. See, also, Boele v. Colonial Airways, *supra.*

We conclude, in the light of the authorities cited and from an analysis of the evidence, that the evidence was sufficient to warrant submission to the jury of the question of negligence on the part of the defendants. The defendants' assignment of error cannot be sustained.

The defendants contend the trial court erred in admitting all of the testimony of the witness Esmond Avery, president of Aeroservice, relative to his report of the accident made to the C. A. A.

In the instant case the witnesses Avery, president of Aeroservice, and Honeywell in depositions qualified as experts in their field. Avery also made a report to the C. A. A. We deem it unnecessary to repeat this evidence. The admissions of these witnesses related to a material issue—the theory as to how the accident happened—and were clearly admissible when it appears from the evidence that these witnesses subsequently, at the trial, changed their positions wherein it was urged the crash was caused by forces other than the rain and water accumulation.

The declarations and admissions of a party to an action, against his own interest, upon a material matter, are admissible against him as original evidence. See, Havlik v. Anderson, 130 Neb. 94, 264 N. W. 146; McDaniel v. Farlow, 132 Neb. 273, 271 N. W. 905; Brown v. Hyslop, 153 Neb. 669, 45 N. W. 2d 743; O'Hare v. Peterson, 150 Neb. 151, 33 N. W. 2d 566.

We conclude the defendants' assignment of error cannot be sustained.

The defendants predicate error on the refusal by the

trial court to receive exhibits Nos. 26 and 27 in evidence. Exhibit No. 26 was identified as the airworthiness certificate issued by the C. A. A. on April 5, 1949, belonging to the plane involved herein. Exhibit No. 27 was a periodic aircraft inspection report on the plane involved, signed by Honeywell as mechanic. This was an inspection required by the C. A. A. to be done every 100 hours of flight, or once a year regardless of the hours flown, for a relicensing of the plane by the C. A. A. The purpose for which these exhibits were offered was to show the airworthiness of the PT-26 involved in the accident and that the regulations in regard to maintenance and safety with respect thereto had been complied with.

It appears from the record that all facts relating to the exhibits were testified to in detail by various witnesses at the trial. The trial court has a wide discretion in determining the relevancy and materiality of exhibits such as these, and in determining whether or not they are so remote in time as to have any bearing upon the issues. In any event, the failure to admit these exhibits does not constitute reversible error, and the defendants were not prejudiced thereby.

The defendants predicate error on the giving by the trial court of instructions Nos. 3, 4, 5, and 6.

Instruction No. 3, insofar as necessary to consider, is in substance as follows: (1) It places the burden of proof on the plaintiff to establish by a preponderance of the evidence that the defendants were negligent in failing to adequately inspect the airplane before flight was attempted; and (2) that such negligence was the proximate cause of the injury and damages sustained by the plaintiff.

The contention is that this instruction indicates that the plaintiff is not obligated to carry the burden of proof which he must do to prove that water got into the plane, stayed there, and caused the tail-heavy condition which resulted in the crash; and that the jury is not entitled

to speculate or surmise as to other reasons.

In instruction No. 1 given by the trial court, the jury was advised of specific negligence claimed by the plaintiff in the following language: "* * * negligence on the part of the defendants in failing adequately to inspect the aircraft before flight, and * * * that the aircraft was permitted to stand in the open weather without shelter, and that the tail section thereof became filled with water and created a weight which such inspection would have disclosed and which weight made the airplane unmanageable; * * *." In addition, in instruction No. 5, the jury was instructed: "If whatever caused the plane to have a tail-low position or tail-heavy position, the burden of which is upon the plaintiff to establish by a preponderance of the evidence, could, in the exercise of ordinary care, have been discovered by reasonable inspection of the plane before use, the defendants would be negligent in failing to make such inspection."

When instruction No. 3 is considered in connection with instructions Nos. 1 and 5, it is obvious that the court adequately instructed on the burden of proof required of the plaintiff.

We have examined the other instructions complained of by the defendants and find no prejudicial error therein. The following authorities are applicable.

In Brown v. Hyslop, *supra*, the court said: "The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear. If different instructions are given on the same subject they should be considered together, and if they fairly submit the case, it will not be reversed for indefiniteness or ambiguity in one of the instructions." See, also, In re Estate of Kinsey, *supra*.

For the reasons given herein, the judgment entered on the verdict by the trial court should be, and the same is hereby, affirmed.

AFFIRMED.

L. S. "BOB" CORNETT, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

53 N. W. 2d 747

Filed June 6, 1952. No. 33137.

1. **Contempt: Attorney and Client.** The Supreme Court of the state has the sole power to punish for contempt a person assuming to practice law within the state without having been licensed to do so.
2. **Contempt.** In determining the sufficiency of an information, the test is whether or not enough remains after rejecting all unnecessary averments thereof to satisfy the requirements of a sufficient information.
3. ———. If the conduct charged is contemptuous of the district court and of the Supreme Court at the same time, the wrongdoer may be proceeded against in the district court for so much of the conduct that constitutes a constructive contempt of that court.
4. ———. If the facts pleaded in an information in contempt clearly show that the act complained of was willful, the information is not fatally defective for failure to use the word "willful."
5. ———. The issuance of an order to show cause as a means of obtaining jurisdiction of the person of the defendant does not have the effect of shifting the burden of proof from the state to the defendant.
6. ———. A proceeding for a constructive contempt must be instituted in the court toward which the contempt is directed.
7. ———. When the facts pleaded in an information charging a constructive criminal contempt show that the contempt was directed toward the court in which the proceeding was filed, the information is sufficient to confer jurisdiction upon that court.
8. ———. Where a person, for the purpose of securing money for himself, falsely pretends or insinuates to another who is interested in pending litigation that he can corruptly influence the course of the suit by approaching officers of the court with money, his conduct is contemptuous of the court toward which it is directed.
9. ———. Where the purpose of an act is to create in the mind of another a belief that courts or their officers are dishonest and that justice can be bought, it constitutes a hindrance to the due administration of justice which the court toward which it is directed may punish to vindicate the dignity and majesty of the court and to preserve its authority and integrity.
10. **Constitutional Law.** The judgment and the proceedings upon which it is based are not violative of Article 1, sections 3 and 11,

Constitution of Nebraska, nor of Article 14, section 1, Constitution of the United States, commonly referred to as the due process provisions of the state and federal Constitutions.

ERROR to the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

Eugene D. O'Sullivan, Eugene D. O'Sullivan, Jr., Warren C. Schrempp, David S. Lathrop, and *Ernest S. Priesman,* for plaintiff in error.

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

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

CARTER, J.

Defendant was proceeded against for a constructive criminal contempt. The trial court found the defendant guilty and sentenced him to serve 60 days in the Douglas County jail and pay a fine of $1,000 and costs. Defendant seeks a review in this court by petition in error.

Defendant is a professional bondsman at Omaha, Nebraska. This proceeding grew out of the following state of facts: One Dwight Miller, Jr., a resident of Council Bluffs, Iowa, was charged with the commission of the crime of grand larceny in Douglas County, Nebraska. He was arrested in Council Bluffs on August 29, 1951, and immediately admitted his guilt. He waived extradition and was removed to Douglas County, Nebraska, where he expressed a desire to plead guilty. An information was thereupon filed in the district court for Douglas County on August 30, 1951, but defendant, being apprised of his rights by the assistant public defender of Douglas County and after consultation with his wife and parents, decided not to plead guilty immediately and sought his release on bond. The parents of Dwight Miller, Jr., Mr. and Mrs. Dwight Miller, Sr., also being residents of the State of Iowa and owning no property within the State of Nebraska, were advised

that the defendant, Bob Cornett, would be the "best bet" for obtaining an appearance bond. They, together with the wife of Dwight Miller, Jr., thereupon contacted the defendant and entered into negotiations and agreements with him out of which the present charge of constructive criminal contempt arose.

The evidence shows that Mr. and Mrs. Dwight Miller, Sr., called at defendant's office on the same day but were advised that defendant was out and would not return until the next morning. They had learned that the appearance bond had been fixed at $5,000 and that defendant charged $10 per $100 for furnishing an appearance bond. They offered to leave $500 with one George Vanous with whom they talked at defendant's office. He refused to accept it and advised them to see the defendant at 8:30 a. m. the next day. The wife and parents of Dwight Miller, Jr., came to defendant's office the next morning. Defendant inquired about the case, whether or not Miller had pleaded guilty, and impressed them with the seriousness of the situation. He advised them that he would see what could be done and that they should return to his office at 11:30 a. m. On their return to the office they were advised by defendant that he could "take care of the case," that the expense would be "about a thousand dollars," and that he could get Dwight Miller, Jr., out of jail "with no strings attached" for the above-named sum. Dwight Miller, Sr., thereupon paid defendant $500 in cash and agreed to pay a further sum of $500 within a few days. Defendant then advised the Millers to keep quiet about the transaction and to talk to no one. He advised them also to inform Dwight Miller, Jr., that he should "keep his mouth shut and just tell only his name." The record shows also that defendant visited Dwight Miller, Jr., in the city jail, discussed the case and informed him that "it would cost a lot of money," and that he was not to talk to anybody unless he sent them up to see him. Defendant thereupon engaged one Philip Abboud, an attorney, to

represent Dwight Miller, Jr. On September 1, 1951, Dwight Miller, Jr., upon the advice of Abboud, entered a plea of guilty to the charge of grand larceny. Sentence was deferred. The parole officer investigated the case and reported to the court. On September 12, 1951, the district court for Douglas County suspended sentence and paroled Dwight Miller, Jr. After meticulously pleading the foregoing facts in Count One of the information, the concluding paragraph thereof states: "That the said defendant, L. S. 'BOB' CORNETT, is not licensed or authorized to practice law in the State of Nebraska; that such conduct by the said defendant, L. S. 'BOB' CORNETT, constitutes the practice of law in the State of Nebraska and is illegal and was and is a hindrance to the administration of justice in proceedings had or proceedings pending before the courts of this state; and that by reason of the foregoing the said defendant, L. S. 'BOB' CORNETT, is in contempt of court." The second count of the information was dismissed by the State and consequently presents no issue here.

The defendant has set out numerous alleged errors in bringing the case here for review. We think, however, that they involve essentially three questions. Did the court have jurisdiction of the action? Is the information sufficient to state a cause of action against the defendant? Is the evidence sufficient to sustain the judgment of the trial court?

It is the contention of the defendant that the information charges him with a constructive criminal contempt in that he was practicing law without a license to do so and that such an offense is within the exclusive jurisdiction of the Supreme Court of this state. It cannot be questioned that the Supreme Court has the exclusive power to determine the qualifications of persons who may be permitted to practice law in this state and possesses the exclusive power to disbar licensed attorneys who have violated the trust reposed in them as such. It also has the inherent power to punish by

contempt proceedings those persons who engage in the practice of law without a license to do so. Where the Legislature has not made the unauthorized practice of law a statutory crime, the Supreme Court has the exclusive power to punish those who practice law without a license. This is so because the contempt is directed at the court having the exclusive power to define the practice of law, to determine the qualifications of persons to be admitted to the practice of law, and to disbar those admitted to the practice of law who have violated their trust. These conclusions are supported by the following cases: State ex rel. Wright v. Barlow, 131 Neb. 294, 268 N. W. 95; State ex rel. Wright v. Barlow, 132 Neb. 166, 271 N. W. 282; In re Integration of Nebraska State Bar Assn., 133 Neb. 283, 275 N. W. 265, 114 A. L. R. 151; State ex rel. Wright v. Hinckle, 137 Neb. 735, 291 N. W. 68; State ex rel. Johnson v. Childe, 139 Neb. 91, 295 N. W. 381; State ex rel. Johnson v. Childe, 147 Neb. 527, 23 N. W. 2d 720. In the last case cited this court specifically held: "The power to define what constitutes the practice of law is lodged with this court. The sole power to punish any person assuming to practice law within this state without having been licensed to do so also rests with this court."

We necessarily hold that the district court for Douglas County was without jurisdiction to try the defendant on the charge of committing a constructive criminal contempt by engaging in the practice of law without having been licensed to do so.

The Attorney General insists, however, that the information before us charged not only that defendant was practicing law without a license, but that, in addition thereto, defendant's conduct "was and is a hindrance to the administration of justice in proceedings had or proceedings pending before the courts of this state." It will be noted from the paragraph of the information from which this allegation is taken, which paragraph is hereinbefore quoted, that the contempt charged is

practicing law without a license and the hindrance of the administration of justice. The two allegations alleged to constitute criminal contempt are in the conjunctive, and either, if established, under the circumstances here shown is sufficient to sustain the charge if made in a court having jurisdiction. The fact that the district court may not have had jurisdiction to try the one does not deprive it of its jurisdiction to try the other. If the conduct charged is contemptuous of the district court and of the Supreme Court at the same time, the wrongdoer may be proceeded against in the district court for so much of the conduct that constitutes a constructive contempt of the district court. This is so even if both contempts are charged. The information may be subject to a proper motion or plea, but otherwise the allegations or conclusions charging a constructive contempt over which the Supreme Court has exclusive jurisdiction will be treated as surplusage when no prejudice results. This whole question, we think, is controlled by the reasoning in Blodgett v. State, 50 Neb. 121, 69 N. W. 751, wherein it is said: "Much has been said in argument respecting the joinder of the proceeding for disbarment with the prosecution for contempt. We are, however, unable to perceive any substantial objection to the practice complained of. There was, it should be observed, no motion or request for an order requiring the county attorney to elect between the two counts of the information. Where two or more distinct felonies, arising out of different transactions, are charged in the same indictment or information, the prosecutor will, on motion of the accused, be required to elect upon which he will proceed. * * * But the information in this case is, we think, free from the vice imputed to it. Where different criminal acts constitute parts of the same transaction, they may be joined in the same indictment or count thereof. * * * But, in general, unnecessary averments in an indictment or information 'may be treated as mere waste material,

to pass unnoticed, and having no legal effect whatever.' (1 Bishop, Criminal Procedure, sec. 478.) The test by which to determine the sufficiency of an indictment is 'whether enough remains after the rejection of all redundant matter to satisfy the requirement of the law.' And the remedy of the accused is, in every such case, by plea, and not by motion to strike the unnecessary averments."

The record does not disclose that any prejudice resulted to the defendant. In the oral arguments of defendant's motion to quash the information, which were made a part of the record at the instance of the defendant, the prosecution contended that a charge of criminal contempt, in that defendant's conduct was and is a hindrance to the administration of justice, was included in Count One of the information. The court, in ruling on the motion to quash, made it clear as shown by the record that such charge was included. Defendant was fully advised of this fact before the case went to trial. He filed an answer. At the close of the State's evidence defendant moved for a dismissal of the case, which was denied. Defendant elected not to offer evidence, and stood upon the record. The motion to dismiss and the motion to quash were thereupon renewed and overruled. The record thus made fails to show affirmatively that defendant was prejudiced; in fact it shows affirmatively that he was not.

It is urged that the information is fatally defective in failing to allege that the conduct complained of was willful. A contempt proceeding is sui generis and, while it partakes of the nature of a criminal proceeding, it is neither criminal nor civil. A contempt should be charged with the particularity of a criminal complaint. In the instant case the facts are meticulously pleaded in detail. The word "willful" is not used, but the recitals of the information show clearly that it was willful. This is all that is required in a constructive criminal contempt. Nebraska Children's Home Society v. State,

57 Neb. 765, 78 N. W. 267; Kammer v. State, 105 Neb. 224, 180 N. W. 39.

It is contended that the court, in issuing an order to show cause, thereby shifted the burden of proof to the defendant. There is no merit to this contention. Whatever method may have been used in obtaining jurisdiction of the person of the defendant, the burden of proof was upon the State to prove its case beyond a reasonable doubt. The trial court recognized and applied this rule.

Defendant argues that the information is fatally deficient in that it fails to specify the court toward which the contemptuous conduct was directed by using the words "was and is a hindrance to the administration of justice in proceedings had or proceedings pending before the courts of this state." There can be no doubt that a proceeding for a constructive contempt must be instituted in the court toward which the contempt is directed. The quoted allegation of the information, standing alone, would not be within the rule. But other portions of the information clearly show that Dwight Miller, Jr., was charged with the crime of grand larceny in the district court for Douglas County. He was arraigned, pleaded guilty, and was paroled by that court according to the information itself. Every act of the defendant had to do with the disposition of the case by the district court for Douglas County and the information so shows. That the alleged contempt was directed toward the district court for Douglas County is sufficiently pleaded in the information, although the conclusion drawn in the last paragraph of Count One is somewhat deficient in that respect. The irregularity, if it may be classed as one, appears to be controlled by the provisions of section 29-1501, R. R. S. 1943. The record clearly shows that no prejudice resulted from the claimed error. Kirchman v. State, 122 Neb. 624, 241 N. W. 100.

The charge contained in the information over which the district court for Douglas County had jurisdiction

was that the conduct of the defendant was and is a hindrance to the administration of justice in proceedings had or proceedings pending before the courts of this state. This is almost identical with subdivision (4) of section 25-2121, R. R. S. 1943, whereby the Legislature defined and enumerated contempts of court which could be punished in courts of record. While this statute is merely declaratory of powers that inhere in the courts and which exist irrespective of statute, nevertheless it is a clear indication that the Legislature as well as the courts consider the hindrance of the due administration of justice as contemptuous. Defendant argues, however, that he did not hinder justice. He claims his acts, if anything, speeded up justice; that in a matter of four days Dwight Miller, Jr., pleaded guilty and within two weeks thereafter he was paroled. The argument completely overlooks the real meaning of the term to "hinder the due administration of justice" which a court of record may properly punish.

The evidence in this case shows that the Millers called at the office of the defendant to procure an appearance bond for Dwight Miller, Jr., which they had learned would cost $500. They had $500 with them. Defendant was not in and they were required to return early the next morning. Defendant made inquiry about the case, the past record of Dwight Miller, Jr., and advised that he would investigate and give his answer at a later hour that morning. At the appointed time defendant stated that he could take over the case, that the expense would be about $1,000, and that he would get Dwight Miller, Jr., out of jail with no strings attached. He accepted $500 in cash, and the Millers agreed to pay another $500 within a few days. Defendant admonished the Millers to keep quiet about the whole transaction and to advise Dwight Miller, Jr., to do likewise. No discussion about an appearance bond appears to have been had on the latter occasion and the defendant never at any time furnished an appearance

bond. The defendant did not tell the Millers how he would get Dwight Miller, Jr., out of jail with no strings attached. The record clearly shows that he led the Millers to believe that he had influence with the right persons, or that in some mysterious manner he could use the $1,000 to pay expenses in securing the release of Dwight Miller, Jr., with no strings attached. The information in the present case was filed on September 11, 1951. On September 12, 1951, defendant returned the $500 to the Millers. The defendant contends that this evidence, even if true, does not hinder the administration of justice. We think it does.

The rule is that one who, for the purpose of securing money for himself, falsely pretends or insinuates to another who is interested in the litigation that he can corruptly influence the course of the suit by approaching officers of the court with money or anything of value, is guilty of a contempt of the court toward which it is directed. Its deliberate purpose is to create in the mind of the hearer a belief that courts or the officers thereof are dishonest and that justice can be bought if the right contacts are made. Such conduct is calculated to hinder and obstruct the due administration of justice and its effect is to lessen the authority, dignity, and integrity of courts generally, and particularly the one toward which it is directed. Little v. State, 90 Ind. 338, 46 Am. R. 224; Ex Parte John D. Crews, 127 Fla. 381, 173 S. 275. In the rehearing of the latter case it was said: "The alleged conduct was calculated to destroy all respect for the court and whether or not it actually impeded justice is immaterial." 127 Fla. 391, 173 S. 279. See, also, Sinclair v. United States, 279 U. S. 749, 49 S. Ct. 471, 73 L. Ed. 938, 63 A. L. R. 1258; Toledo Newspaper Co. v. United States, 247 U. S. 402, 38 S. Ct. 560, 62 L. Ed. 1186.

The evidence is sufficient to sustain the findings and judgment of the court under the required quantum of proof. The contempt is a most pernicious one and the

trial court was justified in imposing the judgment it did to vindicate the dignity and majesty of the court and to preserve its authority and integrity.

Lastly, the defendant asserts that the proceedings had in the district court are violative of defendant's rights under Article 1, section 3, and Article 1, section 11, of the Constitution of Nebraska, and Article 14, section 1, of the Constitution of the United States. The foregoing are generally referred to as the due process provisions of the state and federal Constitutions. On this subject the facts are: An information was filed in a court having jurisdiction to hear it. It properly charged the defendant with a constructive criminal contempt which was within the power of the court to hear. The defendant was served with process and he procured the assistance of able counsel. Defendant filed an answer. All of the evidence was by witnesses who personally appeared and testified. They were cross-examined at length. The defendant elected to adduce no evidence as he had a right to do. The evidence sustains the findings and judgment of the trial court. To us this is due process, not the want of it.

AFFIRMED.

MILDRED JACOBSEN ET AL., APPELLANTS, V. STELLA FARNHAM ET AL., APPELLEES.
53 N. W. 2d 917

Filed June 6, 1952. No. 33149.

1. **Quieting Title: Wills.** In actions to quiet title and to enforce legacies, the district court has jurisdiction to construe a will in determining the rights of the parties to the lands or legacies under the will.
2. **Wills.** In construing a will a court is required to give effect to the true intent of the testator insofar as it can be collected from the whole instrument, if such intent is consistent with applicable rules of law.

3. ———. In determining a testator's intention, the court must examine a will in its entirety, giving consideration to its every provision, giving words used their commonly and generally accepted literal and grammatical meaning, and indulge the presumption that testator understood the meaning of the words used.
4. Wills: Evidence. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. Such evidence is not admissible to determine the intent of the testator where the ambiguity is patent and not latent.
5. Wills. A patent ambiguity is one which appears upon the face of the instrument, which must be removed by construction according to settled legal principles and not by evidence, and the intention of the testator is to be determined from the four corners of the will itself.
6. ———. When an instrument consists partly of written form, whether in script or typewriting, and partly of printed form, the former controls the latter where the two are inconsistent.
7. ———. Any technical distinction between the words "devise" and "bequeath" will not be permitted to defeat the purpose of a testator, since they may be construed interchangeably or applied indifferently to either real or personal property if the context shows that such was the intent of the testator.
8. Wills: Property. The word "possessions" may include real estate if so intended, although such is not its technical meaning.
9. ———: ———. The words "all my worldly possessions" are ordinarily sufficient, if not qualified, to mean real estate; but it is otherwise if it appears from the context that personal estate only was in contemplation of the testator.
10. Wills. It is a natural presumption that a testator making his will intended to dispose of his whole estate and not to die intestate as to any part of it, and in construing doubtful expressions this presumption has weight, but it cannot supply the actual intent of the testator to be derived from the language of the will.
11. ———. The presumption that a testator intended by his will to fully dispose of his estate will not overcome the rule requiring express provision or necessary implication to disinherit an heir.
12. Wills: Descent and Distribution. Real estate not disposed of by will becomes intestate property and descends to the heirs at law of the testator.

APPEAL from the district court for Sarpy County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

Mathews, Kelley, Fitzgerald, Mathews & Delehant, and *McGinn & McGinn,* for appellants.

Collins & Collins, for appellees.

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

CHAPPELL, J.

Plaintiffs, as legatees and claimed devisees named in paragraph second of the last will and testament of Nettie C. Griffin, deceased, brought this action against defendants, heirs at law of deceased and others interested in her estate, to quiet title in plaintiffs to Lot 7 in Butterfield's Subdivision in the northeast quarter of the northeast quarter of Section 10, in Township 13 North, Range 13 East of the 6th P. M., in Sarpy County, Nebraska.

The primary issue involved in the trial court was construction of the will to determine whether such real estate owned by decedent at the time of her death was thereby devised to plaintiffs as claimed by them, or whether it bequeathed only personal property to plaintiffs and the real estate descended to her heirs at law under the intestate laws of this state, as claimed by defendants. The trial court, after hearing upon the merits, construed the will, finding and adjudging that the will bequeathed only decedent's personal property to plaintiffs, and that the real estate descended as intestate property to certain named persons who, as stipulated by the parties, were the sole heirs at law of testatrix at the time of her death.

Plaintiffs' motion for new trial was overruled and they appealed, assigning that the judgment was not sustained by the evidence, but was contrary thereto and contrary to law. We conclude that the assignments should not be sustained.

The pertinent facts are not in dispute. They are as follows: The will was executed by testatrix on February 23, 1949. It was prepared on a "Short Will" printed form by a former grocer then engaged in the

insurance business and unauthorized to practice law, who also acted as one of the witnesses. Testatrix died on June 19, 1949, and the will was subsequently duly probated. Her sole surviving heirs at law were James P. Smith, Stella Farnham, Viola Cozad, Mildred Jacobsen, Nora Hammerstrom, Morris Smith, and Floyd Smith. James P. Smith and Stella Farnham were subsequently deceased. Mildred Jacobsen is the only plaintiff here who was an heir at law of testatrix.

At the time of her death testatrix owned the real property here involved. It was her home in Fort Crook, Nebraska. Its value is not shown but there is evidence that she had lived in such property since at least 1906. She also owned the household goods and furniture therein; a balance of money due on a contract for sale of another parcel of real estate, deed to which had been placed in escrow pending settlement which has since been completed; and an unspecified amount of money allegedly on deposit in a bank but subsequently withdrawn and not yet accounted for by a former discharged administrator with the will annexed. An application citing such prior administrator to account therefor has not yet been adjudicated. The household goods and furniture were sold and together with money otherwise collected, the present administrator with the will annexed had in excess of $1,000 in his hands at time of trial.

Insofar as important here, the second provision of the will provides: "SECOND, After the payment of such funeral expenses and debts, I give, devise, and bequeath To my beloved Niece Mildred Jacobson, My beloved Nephew Earl Rodman and my boloved (beloved) Great Nephew Robert E. Bergstrum *all of my worldly posessions* (possessions) *both personal and moneys which I now have may die posessed* (possessed) *of or may be entitled to.* They to each share equally and share alike." (Italics supplied). There was no residuary clause.

The words "SECOND, After the payment of such funeral expenses and debts, I give, devise, and bequeath"

were a part of the printed form and the rest of the paragraph was a typewritten expression of testatrix. The persons named in the will are plaintiffs in this action. They argued that, in the light of the language used and the alleged presumption that testatrix intended to dispose of her entire estate, the will should be construed as not only bequeathing all of decedent's personal property to them but also as devising all of her real property to them. We conclude otherwise.

As stated in Hahn v. Verret, 143 Neb. 820, 11 N. W. 2d 551, citing cases from this jurisdiction: "We are also committed to the view that in actions to quiet title, * * * and to enforce legacies, * * * the district court has jurisdiction to construe a will in determining the rights of the parties to the land or legacy under the will."

In Dumond v. Dumond, *ante* p. 204, 51 N. W. 2d 374, this court said: "In construing a will a court is required to give effect to the true intent of the testator insofar as it can be collected from the whole instrument, if such intent is consistent with applicable rules of law. Bodeman v. Cary, 152 Neb. 506, 41 N. W. 2d 797; Dennis v. Omaha National Bank, 153 Neb. 865, 46 N. W. 2d 606. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. Borah v. Lincoln Hospital Assn., 153 Neb. 846, 46 N. W. 2d 166. Such evidence is not admissible to determine the intent of the testator where the ambiguity is patent and not latent. In re Estate of Pfost, 139 Neb. 784, 298 N. W. 739. A patent ambiguity is one which appears upon the face of the instrument. It must be removed by construction according to settled legal principles and not by evidence, and the intention of the testator is to be determined from the four corners of the will itself. The controverted provision of the will in the case here presented is one appearing upon the face of the instrument and is there-

fore a patent ambiguity." Such statement is applicable and controlling here.

Also, as held in Olson v. Lisco, 149 Neb. 314, 30 N. W. 2d 910: "In determining a testator's intention, the court must examine a will in its entirety, giving consideration to its every provision, giving words used their commonly and generally accepted meaning, and indulge the presumption that testator understood the meaning of the words used." See, also, Brandeis v. Brandeis, 150 Neb. 222, 34 N. W. 2d 159; and Roberts v. Roberts, 147 Neb. 494, 23 N. W. 2d 774, wherein it was held that: "Where in a will there is a patent ambiguity resulting from the use of words, and nothing appears within its four corners to resolve or clarify the ambiguity, the words must be given their generally accepted literal and grammatical meaning."

It will be noted that the word "devise" appears in the will as a part of the printed form. In that regard, this court, applying section 25-1216, R. R. S. 1943, held in Mack Investment Co. v. Dominy, 140 Neb. 709, 1 N. W. 2d 295: " 'When an instrument consists partly of written and partly of printed form, the former controls the latter, where the two are inconsistent.' * * * Typewriting is writing within the contemplation of the statute, providing that, when an instrument consists partly of written and partly of printed form, the written controls the printed form, where the two are inconsistent." Therefore, the typewritten part, with which "devise" is apparently inconsistent, will control in construing the will. In any event, as stated in Black's Law Dictionary (3d ed.), p. 573, citing numerous cases: "The term 'devise' is properly restricted to real property, and is not applicable to testamentary dispositions of personal property, which are properly called 'bequests' or 'legacies.' But this distinction will not be allowed in law to defeat the purpose of a testator; and all of these terms may be construed interchangeably or applied indifferently to either real or personal property, if the context

shows that such was the intention of the testator."

We are concerned then with the construction of "all of my worldly posessions (possessions) both personal and moneys which I now have may die posessed (possessed) of or may be entitled to."

As stated in 57 Am. Jur., Wills, § 1338, p. 887: "The word 'possessions' may include real estate if so intended, although this is not its technical meaning." In 2 Schouler on Wills (6th ed.), § 1126, p. 1284, it is said: "Where one gives his 'possessions' by will, the word seems applicable prima facie to both real and personal property, as it certainly is where associated words and the context imply such an intention. But the word 'possessions' is seldom used by a professional draftsman; and whenever used, its scope must yield to the testator's probable meaning, * * *." In 33 Words and Phrases, p. 108, it is said: "That the words 'property, possessions, or estates' are sufficient if not qualified to carry real estate, is well settled by many decisions, but it is otherwise if it appears from the context that personal estate only was in contemplation of the parties."

In 72 C. J. S., Possession, p. 234, it is said: "The word 'possession' is also defined as meaning the thing possessed; that which anyone occupies, owns, or controls; and in this sense, as applied to the thing possessed, the word is frequently employed in the plural, denoting property in the aggregate; wealth; and it may include real estate where such is the intention, although this is not the technical signification."

As stated in 49 C. J., Possession, § 7, p. 1096: "As applied to the thing possessed, usually in the plural, the word is used in some of the books in the sense of property, and may, no doubt, include real estate if so intended, although such would not be its technical signification, in its primary meaning a possession being a hereditament or chattel." See, also, Black's Law Dictionary (3d ed.), p. 1383.

In Blaisdell v. Hight, 69 Me. 306, 31 Am. R. 278, a

leading case, it is said: "The word 'possessions' may, no doubt, include real estate, if so intended, though such would not be its technical signification. Bouvier so declares in his law dictionary. The words 'all I may die possessed of,' may include real estate * * * or may not * * * just according to the context with which the words are associated. * * * Had the testator intended to include real estate in the word 'possessions,' it strikes us forcibly that he would not have used the prefix 'personal' at all, * * *. The word 'personal' was manifestly used to qualify and describe both estate and possessions. Accomplished draughtsmen often use words somewhat tautologically in the effort to embrace every description of personal estate."

As stated in 1 Underhill, Law of Wills, § 308, p. 414: "The testator's personal property will include all his property of which he has absolute control, other than real estate, and of which he has power to dispose. * * * This is the primary sense of the words which they have in a will, unless it is clearly apparent that the testator used them in a restricted sense."

In Farish v. Cook, 78 Mo. 212, 47 Am. R. 107, the court held: "It is a natural presumption that a testator, in making his will, intended to dispose of his whole estate and not to die intestate as to any part of it, and in construing doubtful expressions this presumption ought to have weight, but it cannot supply the actual intent of the testator to be derived from the language of the will. When the clause to be construed cannot be connected with some other part of the will disclosing such intent, it cannot prevail, nor even where the intent is disclosed, in the absence of language sufficient to carry everything." See, also, Allison v. Hitchcock, 309 Mo. 488, 274 S. W. 798; Goodrich v. Bonham, 142 Neb. 489, 6 N. W. 2d 788.

Also, as stated in Hunter v. Miller, 109 Neb. 219, 190 N. W. 583: "It is further true that there is a presumption that the testator intended to devise all of his prop-

erty, and did not intend to die intestate as to any part of it, but that presumption is not stronger than the other presumption, which is, that a testator will not be held to have disinherited an heir except where that conclusion is impelled by the express provisions or by necessary implication from provisions specifically set forth. Watson v. Martin, 228 Pa. St. 248." Therein the court specifically held: "The presumption that a testator intended to fully cover the disposition of his estate by his will will not overcome the rule requiring express provision, or necessary implication, to disinherit an heir."

Farish v. Cook, *supra,* involved the language "all my worldly goods, consisting of household furniture, clothing, beds and bedding, money and cattle; also whatever debts may be due me; * * *." In that connection the court said in the opinion: "In prefixing it with the words 'all my worldly,' he makes use of a phrase, which if used alone with the word 'goods,' might be reasonably supposed to embrace his lands; and this meaning of the phrase has in some instances been sustained. But the subsequent language indicates by its enumeration, that he did not intend it should include real estate, for he continued, 'consisting of household furniture, clothing, beds and bedding, money and cattle.' He wills her his worldly goods, and tells what they are, thus restricting the meaning to personal property." See, also, Annotation 54 A. L. R. 97.

It will be observed here that the words "both personal and moneys" modified or qualified by enumeration, explanation, and limitation "all my worldly posessions (possessions) * * *." Thus we do not have the question of whether or not the latter words standing alone would devise real estate because they were clearly qualified by subsequent description. Therefore, we conclude that from all of the context, personal estate only was in contemplation of testatrix when the will was executed. To hold otherwise would not give any effect to the qualifying portion of the language used, and would rewrite

the will, which courts have no authority to do.

Further, the word "moneys" was followed by "which I now have may die posessed (possessed) of or may be entitled to." Testatrix doubtless used such words not only as synonymous with "personal" but also to make sure that plaintiffs received such money as she had or possessed, together with that which she would be entitled to in the future, such as that due on the property settlement heretofore described, which was not completed until after her death.

Cases relied upon by plaintiffs are distinguishable. The wills therein either used all-inclusive language without qualification limiting their meaning, or used limited language followed by unlimited all-inclusive qualifications. They are not controlling here. Under the language here employed, the word "personal" does not mean "the property of or pertaining to myself," or "in the sense of own—my own property," or "the property I own personally" as argued by plaintiffs. Here the words "both personal and moneys" qualified "possessions" defining the kind of possessions bequeathed, a word which may include real estate if so intended, although such would not ordinarily be its technical meaning.

It is elementary that real estate not disposed of by will becomes intestate property and descends to the heirs at law of the testatrix. Hunter v. Miller, *supra;* Heilman v. Reitz, 89 Neb. 422, 131 N. W. 909.

For the reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

EARL MAY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
54 N. W. 2d 62

Filed June 6, 1952. No. 33152.

1. **Juries.** If the voir dire examination of a juror considered as a whole does not show incompetency, a challenge upon that ground is properly overruled, although during his examination statements are made which, if unexplained, might be ground for challenge.
2. **Witnesses:** The credibility of witnesses and the weight of their testimony are for the jury to determine.
3. **Trial.** It is not error to refuse requested instructions when the substance of them is given by the court in its instructions to the jury.
4. ———. Generally in the initial instructions it is not necessary to instruct the jurors as to their right to disagree.
5. ———. It is not error to refuse an instruction which has the effect to withdraw from the consideration of the jury competent material evidence in the case.

ERROR to the district court for Adams County: FRANK J. MUNDAY, JUDGE. *Affirmed.*

J. E. Willits, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer L. Kyle,* for defendant in error.

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

SIMMONS, C. J.

The plaintiff in error will hereinafter be referred to as the defendant. By information it was charged that on January 16, 1950, he, with intent to convert the same to his own use, unlawfully stole and took away the sum of $171 from the Home Oil Company in Hastings, Nebraska, which money was the property of said company. He entered a plea of not guilty. Trial was had to a jury resulting in a verdict of guilty and a finding that the amount of the money stolen was $116. A motion for new trial was filed and overruled. Defendant was sen-

tenced to a term in the penitentiary. He brings the cause here by petition in error. We affirm the judgment of the trial court.

In brief summary, the State produced evidence showing that the Home Oil Company operated a gasoline sales and service station in Hastings, Nebraska. It used a cash register for the purpose of handling its cash sales. At 4 p. m. on January 16, 1950, all money except $250 was taken from the cash register. The money left in the cash register consisted of about $50 or $60 in silver and the balance in currency in $1 and $5 denominations in three "packs" held together by paper clips. Additional cash sales were registered and the receipts placed in the money compartment thereafter. The cash register totaled these sales as made and also recorded them on a tape. In the regular course of business, charge sales were not entered on the register.

The business operated in a building consisting of four rooms, the cash register being in one of them and the bookkeeping work being done in another.

About 6:20 p. m., the defendant and two others entered the building and asked permission to use the telephone to call for and did call a cab. The manager was alone in the station. One of the men engaged the manager in conversation in the bookkeeping room, while defendant and the other man were in the room where the cash register was located. They left in about 15 minutes, going eventually to a cafe in another part of the city.

Within minutes after their departure the manager noted that a "charge" sale had been rung up on the cash register. Upon examination it was found that all currency had been removed from the register and was missing. By calculation it was determined that the cash was short $171.10.

The three men were arrested that evening shortly after 8 o'clock. When arrested one of the men had twenty-four $1 bills folded and "with a paper clip" in

his shirt pocket and seven $5 bills in his billfold. Another of the men had fifteen $1 bills in his socks. The defendant had twenty-seven $1 bills and six $5 bills in his billfold.

We determine the appeal under the rule that "* * * consideration of the cause will be limited to errors assigned and discussed." Rule 8 a 2 (4).

The first assignment is that the court erred in overruling challenge for cause made to a prospective juror. On voir dire examination she was asked if she would follow an instruction as to the burden of proof beyond a reasonable doubt. She answered, "I would have to hear the case and hear him testify." Later she said, "I would like to" hear him testify, and, still later, she "would have to hear him testify." The defendant challenged for cause. The court then stated, "* * * the defendant is presumed innocent * * * the defendant does not need to take the witness stand. I do not think the juror understood the question." The defendant stood on his challenge. The court then advised the juror that "The defendant is not required to testify," and asked "If the Court would instruct you that you would have to find beyond a reasonable doubt the defendant was guilty even though the defendant did not testify, would you follow that instruction?" The answer was, "Yes, sir." The objection for cause was overruled. Substantially this same situation arose in Keeler v. State, 73 Neb. 441, 103 N. W. 64, wherein we held: "If the voir dire examination of a juror considered as a whole does not show incompetency, a challenge upon that ground is properly overruled, although during his examination statements are made which, if unexplained, might be ground for challenge." The assignment is without merit.

Defendant's next assignment goes to the admission of evidence over objection.

It appears from the evidence that the cash register had an open window on which appeared the nature and the amount of each sale. It also had a "totalizer" which

registered all the cash sales that had been rung up, and a tape recording of those entries was made by the operation of the register.

A State's witness testified as to the "charge sale" rung up on the register "on this window" and as to checking the total of the cash sales shown on the register plus the change left in the register at 4 p. m., and subtracting from it the amount of money in the register to determine the shortage. To this evidence the defendant objected and here urges that the tape recording was the best evidence. The witness was testifying here to things which he saw and things which he did. He was not testifying that he examined the tape at that time or knew what, if anything, it showed, nor was he testifying with reference to it. We do not find error in this assignment. See Gross v. Scheel, 67 Neb. 223, 93 N. W. 418.

The next assignment is that the court erred in failing to instruct the jury to return a verdict of not quilty. Defendant merely asserts that the evidence is insufficient to support a finding of guilt beyond a reasonable doubt. The credibility of witnesses and the weight of their testimony are for the jury to determine. Smith v. State, 153 Neb. 308, 44 N. W. 2d 497. The assignment is not sustained.

Defendant does not assign error as to the accuracy or sufficiency of any instructions given. He assigns error as to the refusal to give certain instructions.

The rule is: "It is not error to refuse requested instructions when the substance of them is given by the court in its instructions to the jury." Smith v. State, *supra*.

Under this rule the assignment of error as to the refusal to give requested instruction No. 3 is without merit as the substance of the requested instruction is found in instructions Nos. 1, 2, and 11 given by the court. The substance of requested instruction No. 6 is included in instruction No. 5 given by the court. The same is true as to requested instructions Nos. 12 and 13, which are covered by instruction No. 7 given by the court.

Requested instruction No. 11 is a somewhat long discussion of the duties of each juror and concludes with the proposition that the court was giving the jury two forms of verdict—one finding not guilty, one finding guilty, "and a report that an agreement is impossible." The trial court refused to give the instruction. Defendant claims error. The contention here is that the jurors should have been instructed that they had a right to disagree. "* * * it is hardly necessary to instruct an American jury touching their right to disagree, for this is universally understood." State v. Rogers, 56 Kan. 362, 43 P. 256. "* * * as everybody knows, the jury may either convict or acquit or disagree * * *." State v. Wimer, 97 Kan. 353, 155 P. 7. See, also, Wilder v. People, 86 Colo. 35, 278 P. 594, 65 A. L. R. 1260. The assignment is without merit.

The defendant testified as a witness in his own behalf. On direct examination he was asked where he was living at the time and he answered, "County jail." On cross-examination he was asked where he had lived prior to that time, and he answered, "The State Penitentiary * * *." Later he was asked, "* * * have you ever been convicted of a felony?" He answered, "I have or I wouldn't have been in the State Penitentiary." Defendant requested an instruction that "The Jury are instructed that a former conviction of another offense cannot be considered by you as any evidence of the charge contained in the Information filed herein." The trial court refused the instruction. The defendant assigns the refusal to give this instruction as error.

Section 25-1214, R. R. S. 1943, provides: "A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof."

It is not contended here that the evidence was not competent. A fault of the requested instruction is that it is misleading. In People v. Jacobs, 73 Cal. App. 334, 238 P. 770, the defendant admitted a plea of guilty to

a felony. He requested an instruction that "'* * * in your deliberations on the guilt or innocence of the charges for which he is now on trial, you are to totally disregard such testimony and to confine yourself to just such evidence as has been introduced * * * relative to the crime alleged in the information * * *.'" The court in holding the instruction properly refused said: "It was sought by the proposed instruction to have the court tell the jury that its members were not to consider appellant's plea of guilty to the felony charge in deliberating upon the issue of his guilt or innocence. It is practically certain that this language would have been understood by the jury to mean that the plea of guilty was not to be considered for any purpose. In this respect, then, it was misleading."

The applicable rule is: "It is not error to refuse an instruction which has the effect to withdraw from the consideration of the jury competent material evidence in the case." Chezem v. State, 56 Neb. 496, 76 N. W. 1056.

During the period of its deliberations the jury sent a written communication by the bailiff to the court containing a series of questions, some of which were apparently directed to the State and some to the defendant. The court received the communication, the county attorney, the defendant, and his counsel being present. The court answered in writing that it had no further communications to give and to "Please study the Instructions * * *." The defendant requested that the court add, "The Exhibits and the evidence and the testimony introduced in the trial." The court refused to add the requested words. Defendant assigns the refusal as error. He does not advance any basis for the assignment, save that above recited. The assignment is not argued. Obviously the instructions required that the jury consider the evidence. We see no merit in the assignment.

The judgment of the trial court is affirmed.

AFFIRMED.

IN RE GUARDIANSHIP OF CLARA M. CASS. CLARA M. CASS, APPELLEE, V. FORREST PENSE ET AL., APPELLANTS.
54 N. W. 2d 68

Filed June 6, 1952. No. 33167.

1. **Appeal and Error.** Appeals in probate matters from the county court to the district court, except from the probate or denial of probate of wills and from the allowance or disallowance of claims filed against an estate, are tried in district court as cases in equity are conducted.
2. ———. Appeals to this court in such matters are heard and determined de novo.
3. **Guardian and Ward.** A proceeding for the appointment of a guardian is in this state a probate matter.
4. ———. The authority to appoint a guardian for an adult person depends upon statute and unless the requisites thereof are shown to exist the court is without power to make an appointment.
5. ———. The examination at the trial of an application for the appointment of a guardian for an adult person should be directed to such inquiries as have for their object the finding and determination of the mental condition of the person alleged to be mentally ill or mentally incompetent.
6. **Insane Persons.** Mentally incompetent as used in section 38-201, R. S. Supp., 1951, means that the mind is so affected as to have lost control of itself to such a degree as to deprive the person affected of sane and normal action.
7. ———. Mental incompetency exists when there is definite privation of reasoning faculties to the extent that the person affected is incapable of understanding and acting with reasonable discretion in the ordinary affairs of life.
8. **Guardian and Ward.** In statutory requisites for the appointment of a guardian for an adult person mentally ill is one cause and mentally incompetent by reason of old age or other cause, to have charge and management of his property, is another.
9. ———. Chapter 38, article 9, R. S. Supp., 1951, providing for the appointment of a conservator is for the benefit of any adult who is not a spendthrift, mentally ill, or mentally incompetent,

but who considers himself unfit by reason of infirmities of age or physical disability to manage his estate.

10. **Infants.** The county court has power to appoint a guardian ad litem to represent an infant who is interested in a matter then pending in that court.

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

Charles F. Adams, for appellants.

Edgerton & Powell, for appellee.

Chas. L. Whitney, Guardian Ad Litem.

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

BOSLAUGH, J.

This is a proceeding to subject the property and person of Clara M. Cass to guardianship for the reason, as alleged, that she is physically incapable and mentally incompetent to manage her property and care for herself.

The petition for the appointment of a guardian for appellee was made by appellants, nephew and niece respectively, of appellee. It is alleged therein that: Appellee, a resident of Hamilton County and the owner of real and personal property, is 81 years of age, is in ill health mentally and physically, and because thereof is unable to care for herself or to manage her property. The next of kin and heir presumptive of appellee is Aleeta Clare Cass, a granddaughter. Nellie M. Phelps had been, for a year, living in the home of appellee and had been her housekeeper and nurse. Appellants asked that the court appoint Frank M. Farr or some other suitable person as guardian.

Appellee denied the allegations of the petition, alleged she was not an idiot, a lunatic, or mentally incompetent, but by reason of physical disability she deemed herself unfit to manage her estate with prudence and understanding. She asked the court to appoint Maurice Miller,

who had acted as her agent for about five years, as conservator of her estate as permitted by the law of Nebraska.

The county court found that appellee was not an idiot, a lunatic, or insane, but that she was by reason of long-continued, severe ill health and advanced age, mentally and physically incompetent to have charge of her estate and to manage her property, and it was necessary that a guardian be appointed for her person and her estate. The application for the appointment of a conservator was denied and a guardian was appointed.

The district court heard the matter on appeal from the judgment of the county court and found that appellee was feeble of body and physically incapable of managing her estate, but that she was not an idiot, a lunatic, or mentally incompetent, and that a conservator rather than a guardian should be appointed for her estate. The judgment of the county court was reversed and it was directed to appoint Maurice Miller as conservator of the estate of appellee and to require him to furnish bond of $20,000, conditioned as provided by law, subject to the right of that court to change the amount of the bond if and when a future condition justified it. The motion of appellants for a new trial was denied.

The parties disagree as to the manner of the disposition of this appeal in this court. A proceeding for the appointment of a guardian is a probate matter. In re Guardianship of Hergenrother, 141 Neb. 858, 5 N. W. 2d 118. Commencing with August 27, 1949, all appeals in probate matters from the county court to the district court, except appeals from the probate or denial of probate of wills and appeals from the allowance or disallowance of claims filed against an estate, have been triable in district court as suits in equity are conducted, and appeals to this court from the district court in such matters are heard and determined de novo. §§ 25-1105, 25-1925, R. R. S. 1943, § 30-1606, R. S. Supp., 1951; In re Estate of Bergren, 154 Neb. 289, 47 N. W. 2d 582.

It is the duty of this court to determine the facts from the record without regard to the findings and conclusions of the district court.

The record establishes that appellee is a widow 81 years of age and a resident of the city of Aurora. Her husband died in 1945. She had one child, a son. He died and left surviving him one daughter, Aleeta Clare Cass, a minor resident of Kansas. Appellee is the owner in fee of 80 acres of land in Clay County and 240 acres of land in Hamilton County. She has a life estate in 400 acres of land in Hamilton County, the home residence property in Aurora, and a building in the retail business district of Aurora. Her personal property consists of household goods, about $12,000 cash, bank certificates of deposit of about $3,000, checking accounts in two local banks, and a small amount of stock of the banks. The Clay County land has been rented by her to her nephew Forrest Pense. Since the death of her husband she has employed Maurice Miller as her agent and he has managed the other land for her. He has transacted all of the business in reference to that land. He was a tenant and resided on a part of the land at the time of the death of Mr. Cass. There is no evidence that appellee has not been provident in her business matters; that her agent has not been honest, faithful, and efficient; or that she has lost or been deprived of any income to which she was entitled. There is no proof that she has improperly expended any amount of money or encumbered or disposed of any of the property. It is not claimed that she has been taken advantage of in any transaction.

Appellee 4 or 5 years before the trial in district court suffered a cerebral accident referred to in the record as a "stroke." It disabled her and she was cared for in her home. On the 17th day of February 1951, she suffered a second cerebral accident. She was immediately taken to, and has since been confined in, a hospital in Aurora. She is bedfast and is physically incapacitated.

The evidence does not establish that appellee is mentally incompetent but preponderates in support of the conclusion that she is not.

It is not claimed by appellants that appellee is insane. It is only alleged that she is physically and mentally incapable of caring for herself, her property, and business affairs by reason of ill health. The statute contemplates the appointment of a guardian for "any mentally ill person or * * * any person who * * * is mentally incompetent to have the charge and management of his property * * *." § 38-201, R. S. Supp., 1951. The power to appoint a guardian for an adult person depends upon statute and unless the requisites thereof are shown to exist the court cannot act favorably to the appointment. In statutory requisites for the appointment of a guardian for an adult person insanity is one consideration and mental incompetency, by reason of old age or other cause to have the charge and management of property, is another.

It is inevitable that if life is prolonged to old age the advance of the years will be marked by greater or less decrease of bodily powers and mental efficiency. But generally if that course be normal, if it be such only as attends age unaffected by abnormal brain conditions, there will not be mental incompetency within the meaning of the law and nothing to justify a court in depriving a person involuntarily of the control of his property. The purpose of a guardianship of this kind has reference to the preservation of the property of the ward and any assistance he may personally require. The mere fact that he manifests the weakness, forgetfulness, and normal characteristics of age is quite immaterial unless his debility has reached the stage where he cannot manage or intelligently direct the management of his affairs and his estate is liable to suffer material loss or waste for want of a responsible person in charge.

A guardian should not be appointed either of the person or property of an adult simply because he is

aged or infirm or because his mind is to some extent impaired by age or disease. On the other hand the object of the statute under which this proceeding is brought is primarily the protection of property and if one does not possess sufficient mentality to understand in a reasonable manner the business he is transacting, or the nature and effect of his acts with reference to business affairs, or if he has lost his reasoning powers to such an extent that he is incapable of understanding or acting with ordinary discretion in common affairs and his property has thus become subject to loss or waste, then a guardian should be appointed to manage his affairs. The term mentally incompetent as used in the statute does not refer to a person who is sane but not as wise, intelligent, or mentally strong as some other person. It applies to the person whose mind is so affected as to have lost control of itself to such a degree as to deprive the person affected of sane and normal action. Obviously no general rule can be stated on this subject. Each case must be determined upon its particular facts. Keiser v. Keiser, 113 Neb. 645, 204 N. W. 394; In re Guardianship of Blochowitz, 135 Neb. 163, 280 N. W. 438; In re Johnson's Estate, 286 Mich. 213, 281 N. W. 597; In re Guardianship of Warner, 232 Wis. 467, 287 N. W. 803; In re Guardianship of Olson, 236 Wis. 301, 295 N. W. 24; Annotations, 17 A. L. R. 1065, 113 A. L. R. 354; 25 Am. Jur., Guardian and Ward, § 19, p. 19. The evidence is insufficient to show that appellee was mentally incompetent to have charge and management of her property, and the district court properly refused to subject her property and person to guardianship.

Prior to the intervention of the Legislature in 1947 a guardian for an adult person, not a veteran, could only be appointed if he was a spendthrift, insane, or mentally incompetent to have the charge and management of his property. If he was incapacitated by the infirmities of years or physical disability the court had

no jurisdiction on his application or otherwise to preserve or protect his estate. The act of 1947 is for the benefit of the adult who is not a spendthrift, insane, or mentally incompetent but who considers "himself unfit by reason of infirmities of age or physical disability to manage his estate * * *." He may apply to the court for a conservator and the court may appoint a suitable person or a qualified corporation as conservator of his estate. C. 38, a. 9, R. S. Supp., 1951. In 25 Am. Jur., Guardian and Ward, § 21, p. 20, it is said: "In several states statutes authorize a person who, although of sound mind, believes he is incapable of managing his own estate or of caring for his own property to apply for, request, or consent to the appointment of a conservator of his estate, who, when appointed, possesses over the estate substantially the same powers and is subject in regard thereto to substantially the same duties as a guardian of an incompetent. It is said that an application for the appointment of a conservator of the petitioner's estate is only a voluntary application for a guardian with limited powers, dignified under the law by another name * * *." See, also, Hogan's Appeal, 135 Me. 249, 194 A. 854, 113 A. L. R. 350.

The fact that appellee was not mentally incompetent to have the charge and management of her property, that she made application for the appointment of a conservator of her estate as the statute permits, and the incidence of her physical incapacity entitled her to the benefit of the statute. It is not shown that Maurice Miller was disqualified or unsuitable to be conservator of the estate of appellee and he was properly selected to perform the trust.

Appellee by cross-appeal contests the authority of the county court to appoint and the power of the district court to continue the services of a guardian ad litem for Aleeta Clare Cass, a minor, the granddaughter and sole heir presumptive of appellee, and the right of the district court to assess compensation for the services

of the guardian ad litem against the estate of appellee. The granddaugter was named in the petition and it asked that the court cause notice to be given to her of the pendency of the proceeding and of the date of the hearing. This was done.

The county court appointed Chas. L. Whitney, Jr., as guardian ad litem for Aleeta Clare Cass. She by pleading in the district court set forth that she was about 18 years of age; that her interest and welfare in the matters involved in the proceeding were identical with that of her grandmother, the appellee; that she desired F. E. Edgerton, the attorney for her grandmother and her attorney, to appear and act for her in the pending matter; and she asked that the court show on the record of the case that she was represented by Mr. Edgerton and not by Mr. Whitney. Her pleading was, on motion of appellants, stricken from the record because the court found that the interest of Aleeta Clare Cass might conflict with the interest of appellee who was represented by Mr. Edgerton; that it would be improper for him to appear for the granddaughter "in this case because of said conflict of interests"; that the appointment of Chas. L. Whitney, Jr., as guardian ad litem by the county court was proper in all respects; and that he should be and was retained and continued as guardian ad litem for the granddaughter. The district court allowed $60 as compensation for the services of the guardian ad litem in the county court and district court and ordered it be paid by the conservator, upon his qualification, from the estate of appellee.

The position of appellee is that the statutes regulating practice in the probate court do not require the appointment of a guardian ad litem for a minor interested in a matter pending in that court; that the granddaughter had no legal interest in this matter; that she had not been impleaded therein; that the appointment and continuance of a guardian ad litem for her were improper and without authority of law; and that in any event

she had a right to be represented, if she had a legal interest in the matter in controversy, by the attorney of her choice and designation as her next friend. The granddaughter is the nearest relative and heir presumptive of appellee and she therefore has a legal interest in appellee and her estate. § 38-201, R. S. Supp., 1951. In Tierney v. Tierney, 81 Neb. 193, 115 N. W. 764, the court said: "The legislature has expressly declared the next of kin and the heirs apparent or presumptive to have an interest in the estate of an incompetent person. It is very apparent that the next of kin have as great an interest in the property and estate of an incompetent person before he has been declared such as they have thereafter. While the interest of heirs apparent is not vested, yet their right to protect the same is a present and existing one. * * * It is the policy of our law that the heirs apparent or presumptive and those dependent upon an incompetent person have an interest in him and in his property, and that they are proper parties to any proceedings affecting him or his property." See, also, Prante v. Lompe, 77 Neb. 377, 109 N. W. 496; Hall v. Hall, 123 Neb. 280, 242 N. W. 607.

The practice in this state intends that a minor interested in a matter in litigation may and generally should be represented by a guardian ad litem or a next friend. §§ 25-307, 25-309, 30-1603, R. R. S. 1943, § 38-114, R. S. 1943. The distinctions between the functions of a guardian ad litem and of a next friend have all but been completely removed by the development in procedure. See Schade v. Connor, 84 Neb. 51, 120 N. W. 1012. The right of the probate court to appoint a guardian ad litem to represent the minor granddaughter seems to be recognized and within the contemplation of the statute. § 38-114, R. S. 1943. The statute providing for appeals in matters of probate jurisdiction lends support to this view because it provides that "Every party so appealing shall give bond * * *. But an executor, administrator, guardian or guardian ad litem shall not be re-

quired to enter into bond * * *." § 30-1603, R. R. S. 1943. This section is applicable to and controls an appeal in proceedings for the appointment of a guardian. In re Guardianship of Hergenrother, *supra.*

The findings of the district court are adopted and made the findings of this court in this case. The compensation of Chas. L. Whitney, Jr., as guardian ad litem for services in this matter in all courts (including the $60 allowed by the district court), should be and is fixed at the sum of $250, and shall be paid by the conservator from the estate of appellee. The judgment of the district court should be and it is affirmed.

AFFIRMED.

CHARLES W. PETERSON, APPELLANT, V. J. ED. HANCOCK, COUNTY TREASURER OF HOLT COUNTY, NEBRASKA, APPELLEE.

54 N. W. 2d 85

Filed June 6, 1952. No. 33172.

1. **Constitutional Law: Statutes.** Chapter 250, Laws of Nebraska, 1949, page 680, appearing as sections 79-438.01 to 79-438.07, R. R. S. 1943, is not unconstitutional for defect of title in violation of Article III, section 14, Constitution of Nebraska.
2. ———: ———. However, sections 4 and 5 of the act, now appearing as sections 79-438.04 and 79-438.05, R. R. S. 1943, are unconstitutional as in violation of Article VIII, section 1, and Article VIII, section 4, Constitution of Nebraska.
3. ———: ———. Since the remainder of the act is so connected with the aforesaid invalid portions that it cannot be upheld without doing violence to the legislative intent as a whole, the entire act must fall as unconstitutional.

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

Davis, Stubbs & Healey, Julius D. Cronin, and *Harlan A. Bryant,* for appellant.

Clarence S. Beck, Attorney General, and *William T. Gleeson,* for appellee.

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

CHAPPELL, J.

Plaintiff, a resident, real-property owner, and taxpayer of Class I elementary school district No. 231, having an enrollment of less than five pupils, in Holt County, Nebraska, brought this action for himself and all others similarly situated, against defendant county treasurer, to have chapter 250, Laws of Nebraska, 1949, page 680, known as the Blanket Mill Tax Levy Act, now designated as sections 79-438.01 to 79-438.07, inclusive, R. R. S. 1943, declared unconstitutional and void; to enjoin the levying, assessing, collecting, or attempting to collect any part or all of the taxes purportedly authorized thereby; and for equitable relief. Defendant answered, admitting that plaintiff was a resident, real-property owner, and taxpayer as alleged, denying unconstitutionality of the act, and alleging that unless restrained he intended to perform his duties required thereby. He prayed for a declaration of constitutionality and for equitable relief.

After a hearing whereat evidence was adduced, the trial court rendered its decree, finding and adjudging the issues generally against plaintiff and in favor of defendant. Plaintiff's motion for new trial was overruled, and he appealed, assigning that the trial court erred in declaring the act constitutional. We sustain the assignment.

For clarity and brevity, the Blanket Mill Tax Levy Act will be hereinafter referred to as the act, and in discussing its provisions we will refer to the sections as they appear in chapter 250, Laws of Nebraska, 1949, page 680.

The pertinent facts are not in dispute. School district No. 231 in which plaintiff's property is located has

fewer than five pupils enrolled for the school year 1951-1952. For the 1950-1951 school year there were 31 elementary school districts in Holt County having fewer than five pupils, all of which operated and maintained their own schools, and 10 other such districts had no pupils. During the year 1951-1952 there were 22 such schools having fewer than five pupils and 16 of them operated and maintained their own schools.

On August 6, 1951, plaintiff tendered and offered to pay defendant, who refused to accept, the amount of all taxes levied against his property for all purposes, including all school district levies except the amount of a four-mill levy made under purported authority of section 2 of the act. Admittedly plaintiff's property was assessed for tax purposes at a valuation of $235,995 for 1950, and on August 3, 1950, there was levied thereon, concurrently with other lawful levies, a tax in the amount of four mills, and the amount of the tax to be derived as a consequence of such imposition upon plaintiff's property was $934.98.

No part of district No. 231 is separated from other elementary school districts by streams of water or other natural barriers, nor would any children presently residing therein be required to travel in excess of four miles over unsurfaced roads to the next school, so that such district does not come within the provisions of section 6 of the act.

On June 11, 1951, district No. 231 had $7.09 cash on hand. On said date there was in the hands of the county treasurer $848.89 belonging to such district, and there was $723 representing other outstanding and unpaid taxes for school purposes for said district. On that date the school board and electors at the annual meeting adopted a budget of $1,718.50 needed for operating expenses during the 1951-1952 school year, which amount was duly certified to the county clerk, and thereafter the county board of equalization levied a tax upon all property in the district of 3.8 mills for school purposes

upon an assessed valuation of $521,635, which, if all collected, would produce $1,982.21.

Thereafter on or about July 1, 1951, for "the first year" during which "no district shall lose its blanket tax" as provided in section 4 of the act, the district received back $633.25 from the county treasurer, same being the distribution to it from the 1950 blanket mill tax school levy of four mills made in Holt County by the county board of equalization. Such levy for 1951 was also four mills, no part of which was or could be distributed back to the district or others of like character because, as provided by section 4 of the act, in order to be eligible therefor: "After the first year" it "must have had an enrollment of five or more students for the school year immediately preceding this levy." Such sums went into a general fund and were apportioned to other eligible districts in the county, including two high school districts as provided by sections 4 and 5 of the act. The State Superintendent of Public Instruction furnished forms to all county superintendents to be used by them for the computation, allocation, and distribution of money from the blanket mill tax levy, and to carry out the provisions of the act, as provided therein.

After defining blanket tax levy as a minimum tax levy on all elementary school districts within a county, as more particularly set forth in section 2, and defining merging of districts, the act provides:

"Sec. 2. A blanket mill levy tax sufficient to raise two-thirds of the cost of operating the elementary school districts of a county shall be levied upon the actual value of all the taxable property in the elementary school districts of a county, except intangible property. The amount of this levy shall be determined by the county treasurer from figures based on the previous year's expenditures of the elementary school districts of the county, but in no instances shall this blanket tax levy exceed four mills.

"Sec. 3. The returns from this levy shall be paid by the county treasurer on an order from the county superintendent to those districts that are eligible to receive these funds as provided in section 5 of this act.

"Sec. 4. After the first year, to be eligible to receive these funds a district must have had an enrollment of five or more students for the school year immediately preceding this levy. During the first year no district shall lose its blanket tax because of this provision. Nothing in this section shall prohibit a high school district from participating in such funds if it shall be eligible under the provisions of section 5 of this act nor a district which qualifies under section 6 of this act.

"Sec. 5. The funds raised by the blanket mill levy tax shall be distributed as follows: (1) The entire amount of the blanket tax collected on taxable property within a district shall be refunded to those districts that maintain school and have a total of five or more pupils enrolled; Provided, if the district does not require the total blanket tax, it shall receive only that portion needed; (2) those schools which contract for instruction of pupils shall receive an amount required for carrying out such contract and transportation of pupils, but in no case more than the blanket tax raised in such school district; (3) two-thirds of the remainder of the amount raised, after the payments required by subdivisions (1) and (2) of this section, shall be distributed equally to those districts that have an average daily attendance of five or more for the school year immediately preceding; and (4) one-third of the remainder, after the payments required by subdivisions (1) and (2) of this section, shall be apportioned to the eligible districts on the basis of their average daily attendance; Provided, that no district shall receive more funds under subdivisions (3) and (4) of this section than is required for school purposes. If a high school district shall contract for elementary pupils, it shall qualify as a unit for distribution under subdivisions (3) and (4) of

this section the same as an elementary school district if five or more such pupils are taught in said high school district under contract with an elementary district or districts.

"Sec. 6. When streams of water, other natural barriers, or extreme distances that pupils are required to travel make the merger of school districts impractical, those districts having an enrollment of five or less shall become eligible for payment under subdivision (1) of section 5 of this act where an application is made to and approved by the county superintendent. The term extreme distances, as referred to in this section, shall mean that any of the pupils of that district would be required to travel in excess of four miles over unsurfaced roads to the nearest school."

We are not here particularly concerned with the first year of operation since this action necessarily involves only the levy and payment of the second year and subsequent levies, which are distributed on an entirely different basis. By simple computation it will be observed that a four-mill levy on an assessed valuation of $521,635 upon the property in district No. 231 will raise a fund of $2,086.54, an amount to be paid by the taxpayers therein, including plaintiff, over and above their own lesser regular 3.8 mill levy for the maintenance and operation of their school, and under the provisions of the act none of such larger amount will be returned to the district. Rather, all of it, a sum considerably in excess of the amount required to maintain and operate their own school, will be distributed to other elementary and high school districts solely for their respective local purposes, and thus proportionately reduce their regular school district levy.

At the outset plaintiff argued that the act was unconstitutional as in violation of Article III, section 14, Constitution of Nebraska, which provides in part: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall

be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

Plaintiff first predicated his argument upon the contention that the title is fatally defective in that it failed to disclose that school districts having fewer than five pupils could not participate in distribution of the proceeds of the tax; and second, that the act is amendatory of preexisting laws without reference thereto. We conclude that the contentions have no merit.

To restate the long title herein would serve no purpose. It is sufficient for us to say that it appears therefrom that the act has but one general subject or object, to wit: the levy of a blanket mill tax for the support of certain elementary school districts in the county, and the title expressly gives notice that it contains provisions prescribing a method of distribution thereof.

In Midwest Popcorn Co. v. Johnson, 152 Neb. 867, 43 N. W. 2d 174, this court held: "Where a bill has but one general object, no matter how comprehensive that object may be, and contains no matters not germane thereto, and the title clearly expresses the subject of the bill, it does not violate Article III, section 14, of the Constitution.

"Article III, section 14, of the Constitution, does not require that the title to an act shall be a complete abstract of the bill. If the act contains but one subject and that subject is clearly expressed in the title, the constitutional requirements have been met, even though the title contains duplicitous or extraneous provisions not necessary to its validity."

In Affholder v. State, 51 Neb. 91, 70 N. W. 544, it is said: "But this constitutional provision should be liberally construed, and so construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the title, are comprehended within the objects and purposes of the act as expressed in its title; and to admit all provisions

which are germane, and not foreign, to the purposes of the act as expressed in its title." See, also, Van Horn v. State, 46 Neb. 62, 64 N. W. 365.

The case of Wayne County v. Steele, 121 Neb. 438, 237 N. W. 288, relied upon by plaintiff, is clearly distinguishable and not controlling. Therein it was concluded, under circumstances not comparable with those at bar, that the title "wholly silent as to penalties" was plainly not comprehensive enough to authorize the penalty provisions of a simple nepotism act.

With regard to plaintiff's second defective title contention, he argued that the act changed and amended sections 79-431 and 79-432, R. R. S. 1943, making an intelligent levy impossible. We conclude otherwise.

Section 79-431, R. R. S. 1943, provides that the school board shall, prior to the annual meeting in each year, prepare an estimate showing the amount of money required for maintenance of the school in the manner provided by law during the coming school year. Section 79-432, R. R. S. 1943, simply relates to limitations of the levy for school purposes.

In Union Pacific R. R. Co. v. Troupe, 99 Neb. 73, 155 N. W. 230, this court held: "When a school district has money in its treasury available for the support of the school during the ensuing school year, it is bound to take that fact into account in fixing the tax levy, and the levy should be made for no more than will approximately raise the difference between the amount on hand and the amount determined as necessary to meet the expenses of the district for the ensuing school year."

In that connection the act here involved simply provides certain school districts with another source of income which must be taken into account in making their estimate, which, with aid of the county superintendent, can be done as intelligently as it would be to take into account any money left in its treasury from the previous year.

In any event, the rule in this jurisdiction is: "Where

an act is passed as original and independent legislation and is complete in itself so far as applies to the subject matter properly embraced within its title, the constitutional provision respecting the manner of amendment and repeal of former statutes has no application." Stewart v. Barton, 91 Neb. 96, 135 N. W. 381. See, also, Scott v. Dohrse, 130 Neb. 847, 266 N. W. 709; State ex rel. Beal v. Bauman, 126 Neb. 566, 254 N. W. 256; State ex rel. City of Columbus v. Price, 127 Neb. 132, 254 N. W. 889; State ex rel. Kaspar v. Lehmkuhl, 127 Neb. 812, 257 N. W. 229. In Live Stock Nat. Bank v. Jackson, 137 Neb. 161, 288 N. W. 515, it is said: "The modern rule is: 'Where an act does not purport to be amendatory, but is enacted as original and independent legislation, and is complete in itself, it is not within the constitutional requirement as to amendments, though it may, by implication, modify or repeal prior acts or parts thereof.' 1 Lewis' Sutherland, Statutory Construction (2d ed.) 446, sec. 239." Such rules are controlling here.

In Board of Education v. Moses, 51 Neb. 288, 70 N. W. 946, relied upon by plaintiff, the act was not complete but clearly amendatory only. It is therefore distinguishable from the case at bar.

On the other hand, we do conclude that the act is unconstitutional for other reasons hereinafter discussed. In doing so, we have not been unmindful of the statement appearing in Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729, that: "We quite agree that, in construing an act of the legislature, all reasonable doubt must be resolved in favor of constitutionality. Likewise, it has been held that, if a statute is subject to more than one construction, one of which would make the act constitutional and the other unconstitutional, this court is required to adopt the former. Hinman v. Temple, 133 Neb. 268, 274 N. W. 605; Abie State Bank v. Weaver, 119 Neb. 153, 227 N. W. 922." We have also observed the rule that: "The court in considering the meaning of a statute should if possible discover the

legislative intent from the language of the act and give it effect." Armstrong v. Board of Supervisors, 153 Neb. 858, 46 N. W. 2d 602.

Article VII, section 6, Constitution of Nebraska, provides: "The legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." However, such provision is not self-executing and in enacting legislation thereunder the Legislature is of course restrained by other related limitations of the Constitution. State ex rel. Shineman v. Board of Education, 152 Neb. 644, 42 N. W. 2d 168; State ex rel. Caldwell v. Peterson, 153 Neb. 402, 45 N. W. 2d 122.

In that connection, Article VIII, section 1, Constitution of Nebraska, provides: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property." Article VIII, section 4, Constitution of Nebraska, also provides: "The Legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

The act here involved, when considered in pari materia with other related statutes as must be done, deals with both the county and all school districts therein. They are two well-recognized separate governmental subdivisions of the state. The county was not made a school district. It was only a taxing unit for elementary school districts therein, which remained intact as such districts, which, "once lawfully established retain their character and territorial integrity until such time as

they shall be divided, changed or modified in some manner authorized by law." Whelen v. Cassidy, 64 Neb. 503, 90 N. W. 229.

The act contemplates and provides for the levy of two separately characterized taxes for the same purpose. One is the blanket mill levy upon the actual value of all tangible taxable property in the elementary school districts in the county sufficient to raise two-thirds of the cost of maintaining and operating such districts, to be determined by the county treasurer based upon the previous year's expenditures, but not to exceed four mills. The other is the regular maintenance of school levy to be made in each district upon all taxable property of such district, determinable in the light of the money then on hand and the proportionate share, if any, distributable to them of the blanket levy on all districts in the county.

In that connection, section 4 of the act provides that an elementary district, although subject to both taxes "must have had an enrollment of five or more students for the school year immediately preceding this levy" in order "to be eligible to receive these funds * * *." On the other hand, as provided by section 5, "The entire amount of the blanket tax collected * * * within a district shall be refunded to those districts that maintain school and have a total of five or more pupils enrolled; * * *" provided, that, "if the district does not require the total blanket tax, it shall receive only that portion needed; * * *." Of the balance remaining, schools which contract for instruction of pupils shall receive the amount of the contract and transportation. However, in the light of section 79-486, R. R. S. 1943, which provides that: "School districts, thus providing instruction for their children in neighboring districts, shall be considered as maintaining a school as required by law," and the blanket restriction of sections 4 and 5 of the act, only school districts having five of more pupils could in any event so participate in the blanket levy fund.

The balance of such fund is then distributed among all districts having an average attendance of five or more pupils. Two-thirds of it is divided equally among all such districts and the other one-third is "apportioned to the eligible districts on the basis of their average daily attendance; * * *." The latter distribution is even made to high school districts which teach five or more pupils, "under contract with an elementary district or districts." It appears then that such high school districts offer no benefits to any of the other elementary school districts except by contract already paid for by them.

The only conclusion that can logically be drawn is that districts having less than five pupils are required to pay the blanket levy on all their property into the fund for the sole benefit of districts with five or more pupils. As a result, the regular school district taxes in such districts are thereby released, discharged, or commuted at the expense of districts having less than five pupils, who are required not only to pay the blanket tax levy in full to others without any benefit to them, but also to pay all regular school taxes required to maintain the school in their own respective districts.

There is no standard provided in the act whereby districts having less than five pupils can voluntarily qualify for any distribution of the fund to them for which they are taxed. Concededly, the laudable intention of the Legislature by the enactment was by taxation processes to induce elementary school districts having less than five pupils to merge with neighboring school districts by consolidation or reorganization, and thus bring about proficiency and general school economy based upon a broader and greater tax base.

In that connection defendant argued that districts having less than five pupils could escape the alleged unconstitutionality of such taxes imposed upon them by

perfecting a merger or consolidation. However, if such contention had merit, a question which we do not decide, it has no application here because there are jurisdictional procedures which preclude such ipso facto voluntary action by any one district without the electoral consent of other districts concerned.

In that regard, section 79-402, R. R. S. 1943, provides: "The county superintendent shall create a new district from other districts, or change the boundaries of any district upon petitions signed by fifty-five per cent of the legal voters of each district affected." Further, the creation of a new district is subject to the limitations of section 79-405, R. R. S. 1943, and subsequent related sections. Sections 79-426.01 to 79-426.18, inclusive, R. R. S. 1943, also provide for the reorganization of school districts. Section 79-426.02, R. R. S. 1943, provides for: "(1) The creation of new districts; (2) the uniting of one or more established districts; (3) the subdivision of one or more established districts; (4) the transfer and attachment to any established district of a part of the territory of one or more districts; and (5) the dissolution or disorganization of any established district for any of the reasons specified by law." Related subsequent sections then provide for the creation of state and county committees for reorganization, who shall perfect and recommend plans therefor, whereupon as provided by section 79-426.15, R. R. S. 1943: "* * * the proposition of adoption or rejection of the proposed plan of reorganization shall be submitted at a special election to all the electors of districts within the county whose boundaries are in any manner changed by the plan * * *" and "Approval of the plan shall require a majority of all electors within each voting unit voting on the proposed plan."

As we view it, the blanket mill levy tax is also discriminatory as one levied upon one district of the county for the exclusive benefit and local purpose of other

districts and that it is not levied uniformly and proportionately.

City of Fremont v. Dodge County, 130 Neb. 856, 266 N. W. 771, relied upon by defendant, is distinguishable upon the facts and applicable law. In that opinion it is said: "It is true that inequality of tax assessments vitiates an act of the legislature, but inequality of distribution of the proceeds does not, provided the purpose be for the *public welfare of the whole taxing district.*" (Italics supplied.)

In the afore-cited case, four municipalities asked for an accounting and payment to each of taxes previously collected on property within their borders under a county road tax levy expended and to be expended for the specific purpose of improving all the county roads, which benefited all of the taxpayers of the county, including those within the municipalities. Clearly the purpose there was for the public welfare of the whole taxing district, and we sustained an act providing that all funds derived therefrom should belong to the county as a county road fund for the benefit of all the county roads, which are used by every taxpayer of such a district. Here there results not only an inequality of tax levies but also the school districts having less than five pupils receive no benefit from the blanket tax levy.

In State ex rel. City of Omaha v. Board of County Commissioners, 109 Neb. 35, 189 N. W. 639, this court sustained the constitutionality of an act requiring the county to furnish rooms in the courthouse for municipal courts of any city in which is located the county seat of that particular county. In doing so, the court said: "The revenues of the county do not become the property of the county in the sense of private ownership, and the legislature has authority to prescribe the division and apportionment of money, raised by county taxation, between the county and a city within its limits. 37 Cyc. 1589. It is true that the legislature could not divert funds raised by one district to the use of another dis-

trict (Board of Commissioners v. Lucas, supra), since a tax levied for a public purpose must also be levied for the use of the district which is taxed. Should the legislature order that money be raised by one district and paid to another district, to be used for the sole benefit of that other district, that would be an exaction of money for the benefit of others than those who are taxed and clearly beyond what could be justified as taxation. 26 R. C. L. 72, sec. 51. * * * This is not a diversion of funds or property of the county to the use of persons who have not contributed by taxation to those funds. A large part of the contributions from which the courthouse was built was furnished by the city of Omaha. It is simply an apportionment of the use for general benefits and a direction as to how the property, procured by those funds, shall be used to the interest and benefit of the taxpayers in that particular taxing district." Such statement clearly defines a yardstick upon which constitutionality may be predicated. It is likewise distinguishable from the case at bar. Such case is cited in 61 C. J., Taxation, § 2235, p. 1522, to support the statement that: "It is a sound principle of taxation which prescribes that the benefits of taxation should be directly received by those directly concerned in bearing the burdens of taxation, so that a legislature cannot divert taxes raised by one taxing district to the sole use and benefit of another district." See, also, 61 C. J., Taxation, § 67, p. 136.

State v. Delaware Iron Co., 160 Minn. 382, 200 N. W. 475, involved constitutionality of a statute providing for a comparable county school tax levy, which tax and the proceeds thereof were apportioned "among the school districts of the county on the basis of their respective school enrollments during the school year last preceding." In the opinion it is said: "Appellants further contend that this act taxes one locality for the sole benefit of another and is void for that reason. We may concede that an act taxing one county for the sole benefit

of another, or one school district for the sole benefit of another, could not be sustained, but this is not such a statute. This statute makes the county a taxing unit for the support, in part, of the schools within it. The money produced by the county tax is to be apportioned to the school districts of the county on the basis of their respective school enrollments. Each district receives its proportionate part. The county tax contributes to the support of only those schools which are maintained for the benefit of the people of the county. That the legislature has power to impose such a tax has been settled too long and too firmly to require argument." A fortiori, after the first year the act involved in the case at bar taxes certain school districts for the sole benefit of others, and does not proportionately contribute to all of those schools which are maintained for the benefit of the people of the county.

The over-all general rule is stated in 1 Cooley, Taxation (4th ed.), § 314, p. 653, as follows: "A state purpose must be accomplished by state taxation, a county purpose by county taxation, and a public purpose for any inferior district by taxation of such district. This is not only just but it is essential. To any extent that one man is compelled to pay in order to relieve others of a public burden properly resting upon them, his property is taken for private purposes, as plainly and as palpably as it would be if appropriated to the payment of the debts or the discharge of obligations which the person thus relieved by his payments might owe to private parties. 'By taxation,' it is said in a leading case, 'is meant a certain mode of raising revenue for a public purpose in which the community that pays it has an interest. An act of the legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of certain sums by one portion or

class of people to another.' This principle has met with universal acceptance and approval because it is as sound in morals as it is in law."

Also, as stated in 1 Cooley, Taxation (4th ed.), § 316, p. 663: "A state cannot tax itself for the benefit of the people of another state. So the imposing a tax on one municipality or part of the state, for the purpose of benefiting another municipality or part, violates the rule as to uniformity. No taxing district can be taxed for the exclusive benefit of another district."

Further, as stated in 1 Cooley, Taxation (4th ed.), § 314, p. 650: "In order to give validity to any demand made by the state upon its people under the name of a tax, it is essential not only that the purpose to be accomplished thereby shall be public in its nature, but it is equally essential, that the purpose shall be one which in an especial and peculiar manner pertains to the district within which it is proposed that the contribution called for shall be collected, and which concerns the people of that district more particularly than it does others."

In Morford v. Unger, 8 Iowa 82, it is said: "If there be such a flagrant and palpable departure from equity, in the burden imposed; if it be imposed for the benefit of others, or for purposes in which those objecting have no interest, and are, therefore, not bound to contribute, it is no matter in what form the power is exercised—whether in the unequal levy of the tax, or in the regulation of the boundaries of the local government, which results in subjecting the party unjustly to local taxes, it must be regarded as coming within the prohibition of the constitution designed to protect private rights against aggression, however made, and whether under the color of recognized power or not."

In Bromley v. Reynolds, 2 Utah 525, a regular school tax was levied on all property in the district, including railroad property. Section 19 of the act, relating to school district taxes, provided that any amount of any

such taxes paid by a railroad should be paid to the county treasurer and by him distributed to the several school districts in the county upon the order of the county superintendent, according to the school population. Thus, a part of the school district tax levied on railroad property therein was distributed to other districts. In that regard, the court said: "To carry out the provisions of section 19 the inhabitants of Echo school district must be assessed a larger amount for the reason that a part of the funds so raised is to be diverted to the use of other districts, and to that extent relieves the burdens upon the inhabitants of those districts. Either this increased taxation must be the result, or the individual patrons of the school in Echo district would be required to pay larger tuition fees to meet the ordinary expenses of the district, and in either case the provision is obnoxious to all the objections against appropriating of private property for private purposes, which can exist in any other case." See, also, State ex rel. Ahern v. Walsh, 31 Neb. 469, 48 N. W. 263, a comparable case.

In Board of Education v. Haworth, 274 Ill. 538, 113 N. E. 939, it is said: "The effect of the act of 1915 is to require the tax-payers in a district maintaining a high school to indirectly contribute to the tuition of persons residing in districts maintaining no such school, and thereby to contribute to the local and corporate purpose of furnishing an education to the children of such district. The tax-payers of the district maintaining a high school pay to make up the State school fund and then are deprived of a portion of it for the benefit of districts not maintaining any high school; and the same is true of a district not maintaining a high school which does not send any of its pupils to a high school in another district. The tax-payers of a high school district offering the advantages of a high school education are indirectly forced to assist in the education of pupils living in other districts. The act violates the fundamental

principle of uniformity and equality in taxation and contravenes section 1 of article 9 of the constitution."

High School District v. Lancaster County, 60 Neb. 147, 82 N. W. 380, 83 Am. S. R. 525, 49 L. R. A. 343, declared an act invalid which provided that students from a district without a high school should be admitted to any high school district in the county upon payment of 75 cents a week to the receiving district by the district from which the pupil came. The act was challenged upon the ground that such arbitrary payment would violate the rule of uniformity and result in commutation. In the opinion it was said: "We quite agree with counsel for plaintiff that, under this act, the county is the proper unit of taxation; but we have already shown that, in the event the cost of tuition should exceed or fall below the amount provided by section 3 of the act to be raised by taxing the property of the whole county, it would indirectly violate the rule of uniformity prescribed in section 6 of the article of the constitution named. It would also violate section 4 of said article, as an advantage would accrue to the taxpayers resident in the one or the other of the two portions of the county affected thereby, and it would clearly be a commutation of the taxes to be paid by the taxpayers resident in the one or the other of the two localities. It may be true that such commutation would be brought about indirectly, that is, in case the cost of tuition exceeded the amount provided to be paid by the general tax upon the whole county, the taxpayers resident within the school district would be compelled to supply the deficiency by another levy upon the property within such district, whence it would follow that the difference would be a commutation in favor of those portions of the county outside the district; or, in case the cost of tuition should fall below the specified amount, the taxpayers within the limits of the district would profit at the expense of those without its limits; and it is clear that in either event a commutation of taxes would re-

sult." In such case this court also specifically held that: "The constitution of this state requires not only that the valuation of property for taxation, but the rate as well, shall be uniform." See, also, Smith v. Barnard, 142 Or. 567, 21 P. 2d 204, citing High School District v. Lancaster County, *supra,* as supporting authority. The court therein said: "Since the taxpayers in districts 4, 45, 69, and 19 must pay the special tax under this law, as do all taxpayers in non-high school districts, and must also, by reason of the arbitrary basis of distribution as provided in section 35-4004, pay whatever is necessary to make up the deficiency, the practical effect of the law is to contravene the constitutional provision of this state relative to uniform taxation. * * * Dallas v. Love (Tex. Civ. App.), 23 S. W. (2d) 431, is squarely in point. In that case a statute was under consideration which required a school district to accept a non-resident pupil for instruction at a tuition less than the actual per capita cost of such instruction. It was held that the law was unconstitutional on the ground that it permitted unequal taxation and deprived the district receiving such pupil of due process of law. We note therein this significant language which we think is applicable to the case at bar:

" 'We do not believe, however, that it was ever, even remotely contemplated by the makers of our Constitution that, however essential a general diffusion of knowledge is to the preservation of liberties and rights, this essential purpose should be accomplished in disregard of other, equally sacred, provisions of the Constitution.' "

Wilkinson v. Lord, 85 Neb. 136, 122 N. W. 699, 24 L. R. A. N. S. 1104, never receded from the basic principles with regard to uniformity and commutation set forth in High School District v. Lancaster County, *supra.* It simply arrived at a different conclusion for want of pleading and proof that the tuition to be paid would fall below or exceed the expense of educating such a pupil.

Thereafter, Peterson v. Anderson, 100 Neb. 149, 158 N. W. 1055, involved an act which established a county

high school district with power to establish a high school and levy a tax for its maintenance upon all property in the county not in a district already having a high school. Obviously, all residents and property owners in the districts taxed had a right to send their children to such a high school, and they were therefrom benefited as directly as the residents of an elementary school district who may send their children to the elementary school. The basic law was therefore held valid, but it was pointed out that the law permitted free tuition to any pupil in the county and that some districts were excluded from the payment of tax to the county high school district, which was clearly invalid because it provided benefits for a district in which the property bore no part of the burden of taxation for the support of the county high school. The opinion, citing High School District v. Lancaster County, *supra,* said: "With respect to the provision for free tuition of all pupils in the county, we are satisfied this provision cannot be enforced so far as it applies to pupils residing in districts which bear no part of the burden of taxation for the support of the county high school."

In City Trust Co. v. Douglas County, 101 Neb. 792, 165 N. W. 155, this court construed Article VIII, section 1, Constitution of Nebraska, as inhibiting "the legislature from discrimination between taxpayers in any manner whatever."

In Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317, this court held that: "The legislature does not have the power to release or discharge a tax, such action being prohibited by section 4, art. VIII of the Constitution." Further, "Neither may the legislature circumvent an express provision of the Constitution by doing indirectly what it may not do directly." The opinion, quoting from County of Lancaster v. Trimble, 33 Neb. 121, 49 N. W. 938, said: " 'The legislature is without power to release any inhabitant or corporation from his or its proportionate share of taxes, nor can it confer

such authority upon county commissioners. * * * The legislature is powerless to confer such authority. It cannot do indirectly what the Constitution prohibits it from doing directly; that is clear. Wood v. Helmer, 10 Neb. 65, 68.' "

In State ex rel. Cornell v. Poynter, 59 Neb. 417, 81 N. W. 431, this court held: "The rule of uniformity prescribed by section 1, article 9, of the constitution, inhibits the legislature from discriminating between taxpayers in any manner whatever.

"Under section 4, article 9, of the constitution the legislature is powerless to pass a law releasing or discharging any individual or corporation or property from the payment of any portion of the taxes to be levied for state or municipal purposes." In the opinion, it is said: "The rule of uniformity inhibits the legislature from discriminating between taxpayers in any manner. See State v. Graham, 17 Nebr., 43. In every instance where this court has spoken upon the subject it has been determined that the legislature is powerless to relieve from the burdens of taxation the property of any individual or corporation, but that the constitutional rule of uniformity requires all taxable property within the taxing district where the assessment is made shall be taxed, except property specifically exempt by the fundamental law. This doctrine is entirely sound, and the language of the constitutional provision we have been considering will not authorize or permit of any other or different interpretation.

"By section 4, article 9, of the constitution the legislature, in plain and unequivocal language, is inhibited from enacting any law releasing or discharging any individual or corporation or property from their or its proportional share of taxes to be levied for state or municipal purposes."

In State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N. W. 716, this court said: "The subject relating to the rule of uniformity has heretofore received

consideration by this court in the case of the State v. Osborn, 60 Nebr., 415. It is there held that the valuation of property for taxation must be uniform. Says the court in the opinion, at page 419: 'There is another cardinal rule of taxation, and that is that "every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises." Constitution, art. 9, sec. 1. And this rule of uniformity applies not only to the rate of taxation but as well to the valuation of property for the purposes of raising revenue. High School District No. 137 v. Lancaster County, 60 Nebr., 147. The constitution forbids any discrimination whatever among taxpayers. State v. Graham, 17 Nebr., 43; State v. Poynter, 59 Nebr., 417. * * *' "

In Atchison, T. & S. F. Ry. Co. v. Clark, 60 Kan. 826, 58 P. 477, 47 L. R. A. 77, the court said: "As some of the taxpayers appear to have been purposely excluded from the benefit and protection of the law, the tax, therefore, lacks that equality and uniformity essential to its validity. It is a discrimination against one taxpayer in favor of others, and is a denial of the equal protection of the law required by both state and federal constitutions. Absolute equality in taxation is, of course, unattainable, but a law, the manifest purpose and legitimate result of which is discrimination and inequality, cannot be sustained."

In State ex rel. City of Reno v. Boyd, 27 Nev. 249, 74 P. 654, the court said: "The purpose of an exaction from the public in the form of a tax or license, either for revenue or in the exercise of the police power, is for the benefit of the locality from which the money is collected. Any exaction laid upon a district or community in which it has no interest, or imposed for the benefit of others, to which it is not justly bound to contribute, is invalid."

In Newport Mining Co. v. City of Ironwood, 185 Mich. 668, 152 N. W. 1088, the court said: "While exact equality in taxation can never be achieved, intentional inequality of assessment invalidates the tax. Merrill

v. Auditor General, 24 Mich. 170; Auditor General v. Hughitt, 132 Mich. 311, (93 N. W. 621); Solomon v. Township of Oscoda, 77 Mich. 365, (43 N. W. 990); Auditor General v. Pioneer Iron Co., 123 Mich. 521, (82 N. W. 260)."

We conclude as aforesaid that portions of the act, to wit, sections 4 and 5 thereof, are unconstitutional as in violation of Article VIII, section 1, and Article VIII, section 4, Constitution of Nebraska, and in so concluding apply the rule that: "If portions of an act are unconstitutional and the remainder is so connected with the invalid portions that it cannot be upheld without doing violence to the legislative intent as a whole, the entire act must fall, * * *." Thorin v. Burke, 146 Neb. 94, 18 N. W. 2d 664.

It is elementary, of course, that when taxes are levied on property without authority of law a court of equity may enjoin collection thereof. Earl v. Duras, 13 Neb. 234, 13 N. W. 206; Hemple v. City of Hastings, 79 Neb. 723, 113 N. W. 187.

For the reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is reversed, and the cause is remanded with directions to enter a judgment for plaintiff in conformity with this opinion. All costs in this court and the district court are taxed to defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE PETITION OF WILLIAM RITCHIE ET AL.
53 N. W. 2d 753

Filed June 6, 1952. No. 33188.

1. **Adoption.** Statutes providing for adoption are of civil and not common law origin.
2. ———. Adoption proceedings were unknown to the common law.
3. ———. The matter of adoption is statutory, and the manner of

procedure and terms are all specifically prescribed and must be followed.

4. ———. Statutes which limit to minors persons who may be adopted exclude adults.
5. ———. Under our statutes the adoption of an adult is not authorized.
6. **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.
7. ———. The maxim "Equity follows the law" in its broad sense means that equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in common or statute law.
8. ———. The maxim is strictly applicable whenever the rights of the parties are clearly defined and established by law, especially when defined and established by constitutional or statutory provisions.
9. ———. Equity has never been an instrument of law violation and an equity court will not by its decree set aside legislative enactments or render for naught their mandates.
10. **Adoption: Equity.** Adoption proceedings do not depend upon equitable principles. Where the essential statutory requirements have not been met, equity cannot decree an adoption.

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

William Ritchie, pro se.

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

SIMMONS, C. J.

So far as involved in this appeal, this proceeding is one to secure a decree of adoption of an adult person. The trial court denied adoption. We affirm the judgment of the trial court.

This proceeding began on December 26, 1951, as an action in equity by the filing in district court of a petition, jointly by William Ritchie and Robert Hun Hee Pai, for adoption and change of name. Mr. Ritchie was

at that time 65 years of age, a widower, and without children. Mr. Pai was of Korean ancestry, a naturalized American citizen, and at the time 26 years of age. It was alleged that Mr. Ritchie desired to adopt Mr. Pai as his son and heir at law; that Mr. Pai desired to accept the adoption; and that it was the desire of both petitioners that Mr. Pai adopt the surname Ritchie to be added to his name. Mr. Ritchie prayed for an order whereby he adopted Mr. Pai as his son and heir at law and that Mr. Pai be granted authority to add the surname Ritchie to his then name. Mr. Pai joined in this prayer.

The matter was first heard on January 28, 1952. At the beginning of the hearing Mr. Ritchie stated that the object of these proceedings was "the adoption" of Mr. Pai "as my son and heir, and by adding the name of Ritchie to his name." There was evidence offered as to the reasons which Mr. Ritchie and Mr. Pai had for desiring to secure this adoption. They are not material to our inquiry and hence are not recited. After evidence was taken the parties rested.

Thereafter on January 29, 1952, Mr. Ritchie and Mr. Pai filed an amendment to the petition for adoption and change of name, wherein it was alleged that on December 26, 1951, the parties entered into a contract whereby Mr. Ritchie agreed that "he would adopt" Mr. Pai as his heir at law and would will to him his property with certain exceptions, in consideration for which Mr. Pai was to change his name as above indicated. This amendment contained a prayer that Mr. Pai be granted authority to change his name as above indicated and that the court find that the contract had been executed and Mr. Pai had performed.

On January 29, 1952, at a second hearing, the contract was offered in evidence.

The trial court entered a decree that Mr. Pai's lawful name should thereafter be Robert Hun Hee Pai Ritchie, and denied adoption. Petitioners appeal. The appeal

does not involve the decree as to the change of name.

Although the prayers of the petition and amended petition are variously worded and by brief here we are asked to approve the contract, the appeal involves, and the petitioners have treated it throughout as, a petition in equity for a decree of adoption. It was so treated at the beginning of the hearing, by the trial judge in his decree, in the motion for a new trial, in the notice of appeal, in the assignments of error, and in the argument here.

The assignments are in effect that the adoption will be beneficial to Mr. Pai and is not contrary to public policy. It is urged that a court of equity has authority to permit the adoption.

It is to be remembered that no one is here challenging the validity of the contract, nor asking that it be enforced, construed, or set aside. The issue is as to the power of an equity court to decree the adoption.

Adoptions are provided for by Chapter 43, article 1, R. S. 1943. Section 43-101, R. S. 1943, provides in part that "Any minor child may be adopted by any adult person or persons." Section 43-102, R. S. 1943, provides that "Any person or persons, desiring to adopt a minor child, shall file in the county court * * * a petition for adoption * * *." The term "minor child" appears throughout the act with reference to the person to be adopted. Section 38-101, R. S. 1943, provides: "All persons under twenty-one years of age are declared to be minors; but in case a female marries under the age of twenty-one years her minority ends."

Petitioners concede that the statutes make provision only for the adoption of minors but contend that the adoption of an adult is not prohibited.

We have held that statutes providing for adoption are of civil and not common law origin. Tiffany v. Wright, 79 Neb. 10, 112 N. W. 311; Nielson v. Kammerer, 128 Neb. 57, 257 N. W. 534.

Adoption proceedings were unknown to the common

law. Ferguson v. Herr, on rehearing, 64 Neb. 659, 94 N. W. 542.

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.

Statutes which limit to minors persons who may be adopted exclude adults. 1 C. J., Adoption of Children, § 13, p. 1376; 2 C. J. S., Adoption of Children, § 13, p. 380; 1 Am. Jur., Adoption of Children, § 13, p. 628; Estate of Taggart, 190 Cal. 493, 213 P. 504, 27 A. L. R. 1360; Estate of Morris, 56 Cal. App. 2d 715, 133 P. 2d 452; McCollister v. Yard, 90 Iowa 621, 57 N. W. 447; Hendy v. Industrial Accident Board, 115 Mont. 516, 146 P. 2d 324.

Consistent with our decisions, it is clear that under our statutes the adoption of an adult is not authorized.

The effect of petitioners' position is that an equity court has the power and should, when equity requires, extend the rights of adoption beyond the plain terms of the statutes and likewise bypass the requirement that a petition for adoption be filed in the county court and the procedures fixed by statute. In short, the request here is that an equity court ignore statutory provisions and do, what petitioners term, equity.

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.

"The maxim 'Equity follows the law' in its broad sense means that equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in common or statute law.

" 'The maxim is strictly applicable whenever the rights

of the parties are clearly defined and established by law, especially when defined and established by constitutional or statutory provisions.'" Dawson County Irrigation Co. v. Stuart, 142 Neb. 428, 6 N. W. 2d 602.

"Equity has never been an instrument of law violation and an equity court will not by its decree set aside legislative enactments or render for naught their mandates." Oman v. City of Wayne, 149 Neb. 303, 30 N. W. 2d 921. See, also, Warren v. County of Stanton, 147 Neb. 32, 22 N. W. 2d 287.

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.

The judgment of the district court denying adoption is affirmed.

AFFIRMED.

WINIFRED PETERSON ET AL., APPELLANTS, V. WILLIAM D. MASSEY, APPELLEE.
53 N. W. 2d 912

Filed June 13, 1952. No. 33136.

1. **Trial.** A defendant is entitled to test the sufficiency of plaintiff's evidence without the risk of penalizing himself.
2. ———. When a defendant demurs to the evidence or moves for a dismissal at the close of plaintiff's evidence, he thereby admits plaintiff's testimony to be true together with every conclusion which may be reasonably drawn therefrom.
3. ———. When a demurrer to the evidence is sustained the case is ready for judgment.
4. **Appeal and Error: Trial.** If, on appeal, it is determined that the trial court erroneously sustained either a demurrer to the

evidence or a motion to dismiss, both parties are entitled to be placed in the same position they were in before the error occurred.

5. **Trusts.** The burden of establishing a constructive trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing.
6. **Partnership.** Partnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions.
7. **Joint Adventures.** A joint adventure is in the nature of a partnership, but may exist where persons embark on an undertaking without entering on the prosecution of a business as partners strictly but engage in a common enterprise for their mutual benefit.
8. ———. To constitute joint adventure, there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control over the agencies used therein, though one party may entrust performance to another.
9. **Joint Adventures: Partnership.** The burden of establishing the existence of either a joint enterprise or a partnership is upon the party asserting that the relationship exists.
10. **Trusts: Husband and Wife.** No resulting trust necessarily arises in favor of a person furnishing the consideration, in whole or in part, for the purchase of property taken in the name of another, where the parties were sufficiently close so as to give rise to the presumption that a gift was intended. And where the parties are husband and wife, there is a presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift.
11. ———: ———. An express contract between husband and wife that she shall receive reasonable compensation for extra and unusual services rendered him outside of her domestic duties is valid, and, when established by a preponderance of the evidence, is enforceable as against him or his estate.
12. **Husband and Wife.** Though a wife renders services outside of the ordinary household duties, it is generally held that there is no implied obligation on the husband's part to pay her for them.

APPEAL from the district court for Garfield County: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

Herbert W. Baird, for appellants.

William F. Manasil and *Conrad C. Erickson, for appellee.*

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

WENKE, J.

Winifred Peterson as administratrix of the estate of Cora E. Massey, deceased, and Winifred Peterson and Claude Sizemore as heirs of Cora E. Massey, deceased, brought this action in the district court for Garfield County against William D. Massey. The purpose of the action is to establish that Cora E. Massey, who died intestate, was, at the time of her death on June 26, 1944, the owner of an undivided one-half interest in all the property, both real and personal, of which defendant was then seized and possessed, and to declare he is holding her interest therein in trust for the heirs of her estate and for an accounting thereof. Trial was had. After plaintiffs produced their evidence and rested, defendant demurred thereto. The court sustained the demurrer and thereupon rendered judgment for defendant. Plaintiffs filed a motion for new trial and, from the overruling thereof, have taken this appeal.

Appellants contend that in an equity action a defendant cannot test the sufficiency of the evidence without either resting or presenting his own case. While this is the rule in some states, this jurisdiction holds to the contrary.

A defendant is entitled to test the sufficiency of plaintiff's evidence without the risk of penalizing himself.

When a defendant demurs to the evidence or moves for a dismissal at the close of plaintiff's evidence, he thereby admits plaintiff's testimony to be true together with every conclusion which may be reasonably drawn therefrom.

When a demurrer to the evidence is sustained the case is ready for judgment.

If, on appeal, it is determined that the trial court

erroneously sustained either a demurrer to the evidence or a motion to dismiss, both parties are entitled to be placed in the same position they were in before the error occurred.

See, Pettegrew v. Pettegrew, 128 Neb. 783, 260 N. W. 287; Lucas v. Lucas, 138 Neb. 252, 292 N. W. 729; Casper v. Frey, 152 Neb. 441, 41 N. W. 2d 363; Paul v. McGahan, 152 Neb. 578, 42 N. W. 2d 172; Busteed v. Sheffield, 153 Neb. 253, 44 N. W. 2d 471.

The question then arises, is the evidence introduced sufficient to support a judgment for appellants? This being an equitable action to enforce a constructive trust, we shall consider the record de novo. In doing so we shall apply the rules in regard thereto that have hereinbefore been set forth.

Cora E. Sizemore and William D. Massey, appellee herein, were married on January 25, 1909. She had been previously married, and appellants Winifred Peterson and Claude Sizemore were children of that union. They were apparently young when their mother remarried.

After their marriage the Masseys moved to a farm near Decatur, Nebraska. Later they moved to a farm near Rosalie, then to one near Bartlett, and finally to one near Ericson. All of these places are in Nebraska. Then, about 1931, they moved to Burwell, Nebraska, where they bought a home. They lived there until Mrs. Massey died. She died on June 26, 1944. The evidence shows that while they lived on these farms that on occasions Mrs. Massey worked in the field, which work included shucking some corn.

When the Masseys started farming they rented. It appears they had few worldly possessions to start with although Mrs. Massey had about $700. Her parents helped them with some machinery and the use of horses.

The first land the Masseys bought was a 40-acre tract near Rosalie in Thurston County, Nebraska. This tract they later sold and then bought a tract of 140

acres near Ericson. This was also sold. At the time of Mrs. Massey's death appellee owned the home they then lived in in Burwell, a business building in Burwell, and a 1,200-acre ranch north of Burwell, all of which was then reasonably worth about $10,100. He was possessed of very little personal property and about all the cash he had was used in paying the expenses of Mrs. Massey's last sickness and burial. It appears that whenever appellee was considering selling or buying any property he would always talk the matter over with Mrs. Massey and in doing so refer to the matter as "our" property, saying that "It's your's as well as mine." Then she in turn would tell him he was head of the household and whatever he did was all right.

Appellant Winifred Peterson did not immediately live with the Masseys after the marriage but later, when they lived near Rosalie, she joined their household. She was then 14 years of age. She lived with them about four years when she was married. After that she did not live with them again although she visited in their home occasionally. Nothing is shown as to appellant Claude Sizemore in this respect.

In Box v. Box, 146 Neb. 826, 21 N. W. 2d 868, we quoted with approval, in regard to constructive trusts, the following from Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679: "Thus if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. Again, if a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits; out of such circumstances

or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title." Of course the burden of establishing such a trust is always upon the person who bases his rights thereon and he must do so by evidence the quality of which is clear, satisfactory, and convincing. 54 Am. Jur., Trusts, § 618, p. 477.

Appellants' position is primarily based on the allegations of their second amended petition to the effect that when Cora E. Sizemore and William D. Massey were married they orally agreed upon and entered into a business partnership or joint enterprise for the purpose of engaging in farming, ranching, and trading in farms, ranches, and residence properties, including acreages; that she contributed $750 of money and goods as original capital therefor; that she agreed to and did devote all of her nondomestic or nonhousehold time and labor thereto; and that all the properties owned by them and held in his name at the time of her death were the result thereof and that she owned a one-half interest therein by reason thereof.

"A partnership is an association of persons organized as a separate entity to carry on a business for profit." § 67-306, R. R. S. 1943.

"Partnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions." Baum v. McBride, 143 Neb. 629, 10 N. W. 2d 477.

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

"To constitute joint adventure, there must be an agreement to enter into an undertaking in the objects

of which the parties have a community of interest and common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control over the agencies used therein, though one party may entrust performance to another." Soulek v. City of Omaha, 140 Neb. 151, 299 N. W. 368.

The burden of establishing the existence of either a joint enterprise or a partnership is upon the party asserting that the relationship exists. See, Baum v. McBride, *supra;* 30 Am. Jur., Joint Adventures, § 63, p. 711. This burden the appellants have not carried for there is no evidence to establish either.

The evidence does establish that Mrs. Massey had $700 at the time of the marriage which was apparently used in their farming operations. However the evidence fails to prove that there was any understanding or agreement between them in regard thereto. But even though it could be said that this money ultimately became invested in one of the properties of which appellee was seized at the time of Mrs. Massey's death that fact would not help the appellants for it would be presumed to be a gift. See, Brodsky v. Brodsky, 132 Neb. 659, 272 N. W. 919; First Trust Co. v. Hammond, 140 Neb. 330, 299 N. W. 496. As stated in Brodsky v. Brodsky, *supra*: "No resulting trust necessarily arises in favor of a person furnishing the consideration, in whole or in part, for the purchase of property taken in the name of another, where the parties were sufficiently close so as to give rise to the presumption that a gift was intended. And where the parties are husband and wife, there is a presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift." And the same would be true of personal property. See First Trust Co. v. Hammond, *supra.*

As to decedent's work outside of what were her domestic duties, this court has said: "An express contract between husband and wife that she shall receive reasonable compensation for extra and unusual serv-

ices rendered him outside of her domestic duties is valid, and, when established by a preponderance of the evidence, is enforceable as against him or his estate." In re Estate of Cormick, 100 Neb. 669, 160 N. W. 989.

But here no such express contract was established. In the absence thereof the following principle is applicable and controlling: " 'Though a wife renders services outside of the ordinary household duties, it is generally held that there is no implied obligation on the husband's part to pay her for them.' 13 R. C. L. 1089, sec. 113." Brodsky v. Brodsky, *supra*.

We have examined the evidence, which is very brief, and find nothing therein that would give rise to and support any holding that Cora E. Massey, at the time of her death, was the owner of any interest in the property of which appellee was then seized. In view thereof the claims of the appellants are without merit, the demurrer to the evidence was properly sustained, and judgment for appellee is correct.

Other questions are raised by appellee which are not without merit but in view of the foregoing need not be discussed. The judgment of the trial court is affirmed.

AFFIRMED.

IN RE ESTATE OF ANNA L. BREUER, DECEASED. KARL BREUER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ANNA L. BREUER, DECEASED, ET AL., APPELLEES, V. FRED J. CASSIDY ET AL., APPELLANTS.

54 N. W. 2d 75

Filed June 13, 1952. No. 33145.

1. **Executors and Administrators.** In the settlement of an estate an administrator is merely the agent and trustee of the decedent. He possesses only such powers as are granted to him by statute, and he must discharge the trust subject to all limitations imposed upon him.

2. ———. Compensation for services rendered during the lifetime of a decedent must be based on an agreement, express or implied, to pay therefor, which is established by a preponderance of the evidence.
3. ———. Every person having a claim or demand against the estate of a deceased person must exhibit it to the county judge within the time fixed, in accordance with sections 30-601 and 30-609, R. R. S. 1943; otherwise it is forever barred.
4. ———. A volunteer, who pays claims of a decedent in his lifetime without taking an assignment and making proof thereof, in accordance with the statute, does not have an allowable claim. The fact that the volunteer subsequently becomes administrator of the estate does not change the requirement.
5. ———. One who intermeddles in an estate after the death of the decedent and without authority pays alleged claims with his own funds without taking assignments thereof or making proof, as the statute requires, occupies the same position as a volunteer acting before the death of the decedent.
6. Courts: Executors and Administrators. The county court has no jurisdiction over a claim against the estate of a decedent, which is not properly filed for allowance until after it has been finally barred by the statute of nonclaims.
7. Executors and Administrators. An administrator who pays out funds of the estate in payment of attorney fees and other expenses incurred in administering the estate, without their being approved and finally allowed by the county court, does so subject to such approval and final allowance.
8. Costs. It is a general rule that representatives of estates are personally liable for costs incurred on an appeal resulting from their fault or misconduct.

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

Fred J. Cassidy and *Max Kier*, for appellants.

Merle M. Runyan, for appellees.

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

CARTER, J.

This is an appeal from a decree of the district court for Custer County confirming the final account of the

administrator in the estate of Anna L. Breuer, deceased, on appeal from the county court of such county.

The appellee contends that the issues sought to be litigated in this court were not raised properly by the parties appealing. In this respect the record shows that the appellants and appellees entered into a signed stipulation appearing in the record wherein it was stipulated "that the above matter may be tried to the Court without a jury, on the issues presented by the claim of Karl Breuer, report and final account of Karl Breuer, administrator, the objections filed to said claim and said report and final account, and the order of November 8, 1949, designated as final decree, and that it shall not be necessary to file additional pleadings to present said issues, unless it shall be so ordered by the District Court of Custer County, Nebraska." All the issues raised by this appeal were raised in the district court by one or more of the appellants. The district court had jurisdiction of the issues on the appeal and the stipulation removes the technicalities of pleading of which the appellants complain.

This appeal involves the correctness of the court's rulings on (1) the claim of Karl Breuer for $589.03, (2) the amount of administrator's fees allowed, (3) the amount allowed as attorney's fees, and (4) the items set forth in the administrator's final account. We shall dispose of these matters in the order listed.

The record shows that Anna L. Breuer died intestate on March 30, 1949, leaving as her sole heirs her brother, Frederick W. Blummer, and her sister, Mary Jahn. The latter subsequently passed away, and the administrator of her estate and her heirs-at-law, or some of them, are the appellees herein. On June 8, 1949, Karl Breuer was appointed administrator of Anna L. Breuer's estate and letters of administration were issued on June 10, 1949. The time fixed for filing claims was September 27, 1949. The claim of Karl Breuer was filed on September 3, 1949. The final account of the administrator

was filed on October 17, 1949, and a final decree approving it was entered on November 8, 1949.

It also appears that John D. Breuer, the husband of Anna L. Breuer, died on January 11, 1949, leaving a will in which Anna L. Breuer was designated as sole beneficiary. After Anna L. Breuer renounced her appointment as executrix of her husband's estate, Karl Breuer, her husband's brother, was appointed administrator with will annexed. On March 21, 1949, Karl Breuer filed a petition for the appointment of a guardian for Anna L. Breuer, who died before further action was taken thereon. On May 16, 1949, Karl Breuer was appointed special administrator of the estate of Anna L. Breuer, and he filed his final account as such on June 8, 1949, the date of his appointment as administrator of the estate of Anna L. Breuer. He was discharged as special administrator on June 13, 1949.

The record shows that Karl Breuer filed a claim against the estate in the amount of $589.03. The record does not reveal that this claim was ever allowed except as a credit to Karl Breuer in his report and final accounting as administrator of the estate. The final account was approved by the county court for Custer County on November 8, 1949. The claim contains a number of items which in substance were as follows: Mileage for trips from his home to the home of the deceased prior to her death; mileage and expenses for a trip to Lincoln to see the brother of deceased before her death; and compensation for laundry work and for miscellaneous items purchased for the home, including a grocery bill, all incurred during the lifetime of the deceased. In a second group of items in the claim were those incurred after the death of Anna L. Breuer on March 30, 1949, and prior to the appointment of Karl Breuer as special administrator on May 16, 1949, and are generally described as follows: Mileage, expenses, and compensation for Karl Breuer and his wife for cleaning up the house after the death of Anna L. Breuer;

amounts paid for nonprofessional care of the deceased during her last sickness; amounts paid himself and others in repairing a house for rental purposes which belonged to the estate; and a general item for 11 days work at $7.50 a day, alleged to be for work not otherwise included in the claim.

As to the first group consisting of items accruing in her lifetime, we fail to find any basis for their allowance as valid claims against the estate of Anna L. Breuer. There is no agreement established showing that the deceased agreed to pay the mileage claimed for traveling to and from his home, or in making the trip to Lincoln. The most that the record shows is that two witnesses testified that they heard the deceased ask Karl Breuer shortly before her death if he would attend to her business and that he responded in the affirmative. Such an understanding, even if made, does not contemplate the payment of the mileage and expenses here claimed. It is evident that these items were intended to be gratuitous at the time they were incurred and that there was no mutual expectation by claimant and decedent that the expenses here claimed were to be paid for. Such services are usually rendered by members of the family in times of emergency without any intention of making claim therefor. Compensation for such services must be based on an agreement to pay, express or implied, which is established by a preponderance of the evidence. The record in this case does not sustain any such agreement. As to the claim for the grocery account and other miscellaneous items paid with his own funds during the lifetime of Anna L. Breuer, they are not allowable for another reason. Our statute provides that "Every person having a claim or demand against the estate of a deceased person who shall not after the giving of notice as required in section 30-601 exhibit his claim or demand to the judge within the time limited by the court for that purpose, shall be forever barred from recovering on such claim or demand, or setting off the same

in any action whatever." § 30-609, R. R. S. 1943. The persons holding the obligations against the estate filed no claim therefor, and it is fundamental that an administrator may not waive the defense of nonclaim. The claimant here took no assignment of the claims in question and has therefore failed to show, as a matter of law, that he was the owner of any claim against the estate for these items. When he personally paid these claims he was a volunteer and nothing more. He was not authorized to pay claims of Anna L. Breuer during her lifetime. At most, he was but an agent who might obligate his principal in her lifetime. But any claims thus incurred must be filed in the same manner as if she contracted them herself. Reasons of public policy demand that claims against the estates of deceased persons be filed by the owners thereof within the time prescribed by law, that the administrator scrutinize them as to their correctness and object to those appearing to be improper in whole or in part, and that they be paid only after they have been allowed by the county court. The account of the administrator will be surcharged with the amount of these items which the record shows to be $129.22.

As to the second group, consisting of items which accrued after the death of Anna L. Breuer and before the appointment of Karl Breuer as special administrator, a different rule is applicable. During this period Karl Breuer was an intermeddler in the estate of Anna L. Breuer. If the estate demanded immediate handling, the provisions of our statute providing for the appointment of a special administrator afford an adequate remedy. No claim is here made that all the assets of the estate have not been accounted for. Under such circumstances Karl Breuer was, strictly speaking, an intermeddler and not chargeable as an executor de son tort. 34 C. J. S., Executors and Administrators, § 1063, p. 1359 et seq. Where one takes possession of the assets of an estate, without authority to do so, he will be held liable therefor as an

executor de son tort. The expression is used as a basis of fixing liability and it does not have the effect of making one a de facto executor. The assets of the estate of Anna L. Breuer are properly accounted for and consequently any rules of law applicable to an executor de son tort have no application here. See Gilbert v. First Nat. Bank, 154 Neb. 404, 48 N. W. 2d 401. It is clear from the record that Karl Breuer had no authority to meddle or interfere in the estate of Anna L. Breuer until he was appointed special administrator on May 16, 1949. Prior to that time he was a stranger to the estate, bound by the same rules as any other third person. He could, of course, have purchased claims by assignment during this period, subject to their subsequent approval in a proper proceeding by the county court. But he had no authority to pay off such claims and assert them as a part of a claim of his own merely on the basis that he had voluntarily paid them. Such claims must be filed, proved, and their ownership established in the same manner as is required of any other creditor. This he did not do. The fact that he was later appointed administrator gives him no rights not possessed by any other creditor. The evidence does not show that the claims were properly made or that Karl Breuer became the assignee thereof. To permit the allowance of claims in the manner here described would amount to a circumvention of the powers of the county court to pass upon their validity in the manner that applicable statutes provide. That part of the claim of Karl Breuer which accrued after the death of Anna L. Breuer and before the appointment of Karl Breuer as administrator of her estate is not valid, and he will be surcharged with $443.73, the amount thereof.

The appellants contend that Karl Breuer was allowed an excessive administrator's fee, the amount being $600. The evidence shows that total cash receipts coming into his hands as administrator amounted to $5,217.32. There was also a real estate mortgage in the amount of $5,650.

The total personal property in the estate therefore amounted to $10,867.32. The commission allowed an administrator on this amount in the absence of extraordinary services is $267.35. § 30-1412, R. S. Supp., 1949. An examination of the evidence shows that no extraordinary services were performed by the administrator. Those claimed to be such were the services required of an administrator in the common course of his duty. The final account of the administrator will therefore be surcharged by the excess commission charged in the amount of $332.65.

The administrator paid out attorney fees and expenses to R. E. Brega in the amount of $967.19, without an order allowing same by the county court. The sum was approved subsequently by the county court when it approved the final account of the administrator. Any payment made in advance of allowance is subject to the approval of the county court and, if finally disapproved in whole or in part, the administrator will be surcharged with the excessive payment. The evidence sustains the findings of the trial court in the allowance of attorney fees and expenses, except as to the allowance of $100 for filing a guardianship proceeding against Anna L. Breuer in her lifetime. No claim was ever filed against her estate within the time fixed for filing claims. But in any event, it was not an obligation contracted by Anna L. Breuer in her lifetime, nor one for which her estate could be held liable. No basis exists for the allowance of this $100 out of the estate of Anna L. Breuer, and the administrator will be surcharged with this $100.

The appellants contend that the report and final account of the administrator credits the administrator with items for which the estate is not liable. The administrator takes credit for the amount of $16.95 which he paid to Lonnie Swisher for fuel oil and for $4.75 he paid to Rufus Twist for repairing a stove. He also takes credit for $57 which he paid Dr. E. H. Reeves for services rendered Anna L. Breuer in her last sickness. These

items accrued in the lifetime of Anna L. Breuer and were paid by the administrator on July 13, 1949. Claims for these items were never filed. The administrator merely paid the claims and took credit for the same in his final account. This he cannot lawfully do. An administrator is not entitled to credit for payment of provable claims against the estate which originated before the decedent's death and which were not filed and allowed as required by law. Administrators cannot waive the defense of nonclaim nor circumvent the functions of the county court in auditing and allowing claims against the estates of deceased persons before their payment. Huebner v. Sesseman, 38 Neb. 78, 56 N. W. 697; Estate of Fitzgerald v. First Nat. Bank of Chariton, 64 Neb. 260, 89 N. W. 813; Schaberg v. McDonald, 60 Neb. 493, 83 N. W. 737. The final account of the administrator will be surcharged with the three items here discussed amounting to $78.70. Other contentions of appellants concerning the correctness of the final account are not sustained. The evidence is not sufficient to show that such credits had not been allowed as proper claims, or that the mileage and other expenses claimed were not proper charges against the estate.

In the settlement of an estate an administrator is merely the agent and trustee of the decedent. He possesses only such powers as are granted to him by statute and he must discharge the trust subject to all the limitations imposed upon him. He may not treat the property of the decedent as his own without peril to himself. He must comply with applicable statutes and he may not waive them as to others claiming an interest in the estate, either as creditor or beneficiary. He must account to the county court and obtain approval of his acts. Volunteers and intermeddlers in estates of deceased persons are liable for any loss accruing to the estates resulting from their acts. An executor or administrator becomes liable for his wrongful acts while serving in such capacity. These general rules apply be-

cause the decedent is not present to protect the interests of his estate. The law undertakes to do it for him and the responsibility of applying it in the first instance is lodged in the county courts of this state. This function is an important one and should be discharged strictly in compliance with applicable statutes. Unless this be done, the estates of deceased persons will become the prey of unscrupulous persons and defeat the intention of legislative enactments on the subject.

The judgment of the district court is reversed and remanded with directions to surcharge the final account of the administrator in the sum of $1,084.30 in accordance with the findings of this opinion. The costs of this appeal will be taxed against Karl Breuer personally in accordance with our holding in In re Estate of Jurgensmeier, 145 Neb. 459, 17 N. W. 2d 155, wherein we stated the general rule to be that a representative of an estate is personally liable for costs when he unsuccessfully appeals in his own interest from a settlement of his final account, or when an appeal is successful because of his fault or misconduct.

REVERSED AND REMANDED WITH DIRECTIONS.

DONALD A. MARTIN, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.
53 N. W. 2d 923

Filed June 13, 1952. No. 33148.

1. **Municipal Corporations: Injunctions.** One seeking equity to restrain an act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it entails an illegal expenditure of public funds or involves an illegal increase in the burden of municipal taxation.
2. ———: ———. A resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal corporation or the illegal creation of a debt which he, in common with other property holders, may otherwise be compelled to pay.

3. ———: ———. A resident taxpayer without showing any interest or injury peculiar to himself may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
4. **Pleading.** A general demurrer admits the truth of all alleged material facts and the reasonable inferences to be drawn therefrom.
5. **Municipal Corporations: Injunctions.** In an action by a taxpayer to enjoin municipal authorities from making illegal purchases the seller is not a necessary party.

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

Louis B. Finkelstein, and *Littrell & Patz,* for appellant.

C. Russell Mattson and *John H. Comstock,* for appellees.

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

YEAGER, J.

This is an action in equity by Donald A. Martin, plaintiff and appellant, against the City of Lincoln, a municipal corporation organized under the laws of Nebraska, Victor E. Anderson, Mayor, Fern Orme, John Comstock, Roy A. Sheaff, Thomas R. Pansing, Arthur J. Weaver, and Rees Wilkinson, members of the City Council, and Raymond Osborn, Director of the Department of Public Welfare and Safety of the City of Lincoln, defendants and appellees, to enjoin the defendants from entering into a contract with one M. H. Rhodes, Inc., for the purchase of certain parking meters and from expending public funds in payment of the purchase price of the meters. After the commencement of the action Chauncey W. D. Kinsey and Pat Ash were substituted as defendants for the defendants Pansing and Weaver.

The action was instituted by petition to which the defendants jointly and severally filed a demurrer. The demurrer contained four grounds as follows: (1) That

the court has no jurisdiction of the subject matter; (2) that the plaintiff has no legal capacity to sue; (3) that there is a defect of parties defendant; and (4) that the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the respective defendants or any of them.

The district court sustained the demurrer, whereupon the plaintiff elected to stand upon his petition. Judgment of dismissal was rendered and plaintiff has appealed therefrom.

The essential allegations of the petition are that the city of Lincoln is a city operating under a home-rule charter, and that the charter contains the following: "Before the City Council shall enter into any contract or authorize any expenditures involving over $500, they shall cause to be made and filed an estimate of the total costs thereof, together with detailed plans and specifications, * * * and the work or improvement shall be done substantially in accordance therewith. No contract shall be entered for a price exceeding such estimate, and the City Council shall, except in cases of emergency, advertise for bids and cause the amount of such estimate to be published therein. Such advertisement shall be published in some daily newspaper of general circulation in the city for at least 10 days * * *."

The city council caused to be made specifications for the purchase of 350 parking meters which were approved on January 26, 1951. The estimate of the cost of the meters was $28,000. Pursuant to the ordinance and in accordance with the approved specifications advertisement for bids was published. A considerable number of bids were received among which was that of M. H. Rhodes, Inc. The bid was $57.50 a meter or $20,125.

It was alleged that the meters did not conform to the specifications and were inferior in that, whereas the specifications called for meters the signals of which should be plainly visible from front and back of the

meter, those on the meters described in the bid were visible only on one side.

It was alleged that the purchase of and payment for these meters would result in an unlawful expenditure of the purchase price.

In the petition were pleaded certain ordinance provisions of the city which were in force at all times of concern in the action. Among these was the following from ordinance No. 4301, section 902, providing for exaction of fees from parking meters and defining the purpose and use to which the fees so exacted should be applied: "For the purpose of defraying the cost to the city of regulating, supervising and policing the exercise of the privilege of parking vehicles in, along, or upon the streets so designated by the Council, there is hereby imposed a fee, as hereinafter provided, upon each person parking a vehicle upon the streets so designated, between the hours of 9:00 A. M. and 6:00 P. M. of any day, except Sundays and legal holidays. * * *."

Also among these was article 9, section 909, of ordinance No. 4301 as follows: "The fees collected under this article shall not exceed the reasonable cost to the city of regulating, supervising and policing the exercise of the privilege of parking. All monies received from the operation of said parking meters, shall be deposited with the CITY TREASURER and by him placed to the credit of the POLICE DIVISION of the GENERAL FUND of the CITY."

The specifications upon which bids were requested were made a part of the petition. The following are provisions contained in the specifications:

"Section 2. CERTIFIED CHECK. Each bid must be accompanied by a certified check in the sum of five (5) per cent of the total amount of the bid, made payable to the order of Frank J. Miller, City Treasurer, which will be retained by and forfeited to the City of Lincoln, as liquidated damages, if such bid is accepted and a contract is awarded and the bidder or bidders

fail to enter into a contract with the City and furnish satisfactory bond within ten (10) days after the date of such award."

"Section 5. CONTRACT AND BOND. The successful bidder or bidders will be required, within ten (10) days after the award of contract, to enter into and sign a contract with the City, and also furnish an approved surety company's bond in the sum of the full contract price, conditioned upon the faithful performance of all the terms and conditions of the contract."

"Section 20. BASIS OF PAYMENT. All bids shall be made with the understanding that the City will make payment for all meters purchased by making monthly remittances at the rate of one-half the average monthly receipts from such meters, such payments to continue until the meters are fully paid for."

On what ground or grounds the demurrer was sustained does not authentically appear, hence it becomes necessary to consider all of the grounds assigned, at least to the extent argued in the brief, since it was the plaintiff's petition that was stricken down by the ruling and judgment.

The first assignment has received no substantial consideration in the brief and it will be treated as having been abandoned by the defendants. Furthermore, on its face, it is clearly without merit. No citation to sustain this viewpoint is necessary.

The second and fourth assignments are in essence interrelated and will be considered together. The theory of the two is that the plaintiff as a citizen and taxpayer has no legal capacity to maintain an action to enjoin the acts complained of, hence the petition does not and could not contain sufficient allegations of fact to constitute a cause of action in his favor.

The substantial theory of the defendants is that the petition discloses that the plaintiff is a private citizen and taxpayer; that in his capacity as a citizen and taxpayer he has not shown any special injury to himself

independent of injury to the general public; that the alleged illegal expenditure is not of public funds raised for governmental purposes; and that the proposed expenditure would not increase the burden of taxation, therefore the petition shows that plaintiff has no legal capacity to sue, and in consequence does not state facts sufficient to constitute a cause of action.

It is an established principle in this jurisdiction that a person seeking equity to restrain an act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it entails an illegal expenditure of public funds or involves an illegal increase in the burden of municipal taxation. Kirby v. Omaha Bridge Commission, 127 Neb. 382, 255 N. W. 776. See, also, Miller v. Inc. Town of Milford, 224 Iowa 753, 276 N. W. 826, 114 A. L. R. 1423.

Another established principle, which is conceded by defendants, is that a resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal corporation or the illegal creation of a debt which he, in common with other property holders, may otherwise be compelled to pay. Crampton v. Zabriskie, 101 U. S. 601, 25 L. Ed. 1070; Woodruff v. Welton, 70 Neb. 665, 97 N. W. 1037; Fischer v. Marsh, 113 Neb. 153, 202 N. W. 422; Davenport v. Kleinschmidt, 6 Mont. 502, 13 P. 249, 8 Mont. 467, 20 P. 823.

Another principle is that a resident taxpayer without showing any interest or injury peculiar to himself may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes. Woodruff v. Welton, *supra;* Fischer v. Marsh, *supra;* Noble v. City of Lincoln, 153 Neb. 79, 43 N. W. 2d 578; Miller v. Inc. Town of Milford, *supra.*

The decision upon these two grounds of demurrer depends upon an application of these principles to the allegations of fact contained in the petition.

The allegations of fact contained in the petition must be taken as true under the rule that a general demurrer admits the truth of all alleged material facts and the reasonable inferences to be drawn therefrom. Central Nebraska P. P. & I. Dist. v. Walston, 140 Neb. 190, 299 N. W. 609; City of Grand Island v. Willis, 142 Neb. 686, 7 N. W. 2d 457; In re Estate of Halstead, 154 Neb. 31, 46 N. W. 2d 779.

It follows therefore that for the purpose of this review it must be said that the contract which the city proposes to let to M. H. Rhodes, Inc., is an illegal one in that the meters involved are inferior and do not conform to the requirements of the specifications.

This being true it becomes necessary to decide within the meaning of the legal principles announced whether or not the plaintiff herein may maintain the action. If this proposed contract calls for the expenditure of public funds raised for governmental purposes then the right of the plaintiff to maintain the action may not properly be denied.

We are convinced that the petition discloses conclusively that this proposed contract would be a charge against public funds raised and to be raised for governmental purposes.

The ordinances quoted disclose in specific and unambiguous terms that the fees from all parking meters, including these if they are allowed to be installed, are to be collected and allocated to policing which is a governmental purpose and function.

The defendants arguendo say that this is not true as to these. In support of their argument the defendants rely on section 20 of the specifications which has been quoted. They say that this provision requires that payment shall be made out of the avails of these meters. The provision may not be so interpreted, first because the ordinance does not permit it, and second, the specifications do not so provide. It furnishes a measure only of the city's monthly obligation against its funds. The ob-

ligation is the equivalent of one-half of the monthly receipts but not one-half of the receipts.

The distinction is real and not fanciful. By way of illustration, it is well known that funds may be and frequently are lost or stolen or for other reasons never reach their proper repository. If that should happen for any day or month it could not well be said that to that or to any extent would the monthly obligation of the city be reduced.

The remaining ground of demurrer to be discussed is that there is a defect of parties defendant. As the basis for this the defendants urge that M. H. Rhodes, Inc., being the bidder to which it was proposed to let the contract, was a necessary party defendant.

Examination discloses that the cases cited in support of the defendants' theory that M. H. Rhodes, Inc., was a necessary party relate to situations where a municipality has entered into a contract with a third party. None of them deals with a situation such as here where according to the petition no contract has been entered into. There was a bid which was approved but sections 2 and 5 of the specifications make clear that no contractual relation did or could exist unless and until a contract was signed and a performance bond furnished. The authorities are therefore not in point.

It has been held that in an action by a taxpayer to enjoin municipal authorities from making illegal purchases the seller is not a necessary party. Johnson v. Farley, 8 Ohio N. P. 498; City Water Supply Co. v. City of Ottumwa, 120 F. 309; Williams v. Klemmer, 177 Minn. 44, 224 N. W. 261; Davenport v. Kleinschmidt, *supra*.

We conclude therefore that the demurrer was improperly sustained. The judgment of the district court is therefore reversed and the cause remanded with directions to overrule the demurrer.

REVERSED AND REMANDED WITH DIRECTIONS.

FRANCIS E. FLAHERTY, APPELLEE, V. CLAY CARSKADON, APPELLANT.
53 N. W. 2d 756

Filed June 13, 1952. No. 33163.

1. Trial. In the trial of an action at law where a jury is waived the findings of fact have the same effect as the verdict of a jury.
2. Trial: Appeal and Error. The findings of fact in a law action where a jury has been waived will not be disturbed unless they are clearly wrong.
3. Appeal and Error. In order that assignments of error as to the admission or rejection of evidence may be considered, the rules of court require that appropriate reference be made to specific evidence against which objection is urged.

APPEAL from the district court for Platte County: ROBERT D. FLORY, JUDGE. *Affirmed.*

William S. Padley, and *Beatty, Clarke, Murphy & Morgan,* for appellant.

Brower & Brower, for appellee.

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

YEAGER, J.

This is an action at law by Francis E. Flaherty, plaintiff and appellee, against Clay Carskadon, defendant and appellant, for the recovery of $300 which the plaintiff claims is the balance due and owing on an oral contract for services performed. The alleged service covered a period of two months and plaintiff claims that the reasonable value of the service was $500 of which he received $200.

The defendant by answer admits a contract of employment but says that it was for $200 a month and that the wages earned were $166.77. He says that plaintiff received $200 which was $33 in excess of what he earned, and of course he denies any indebtedness.

The defendant in his answer filed in effect a cross-petition in which he claims that because of neglect

and omission of the plaintiff in the performance of the work covered by the contract of employment the defendant has been damaged in the amount of $2,000 by reason of which he seeks a recovery against the plaintiff for $999.99. The action originated in the county court and obviously the reason for the difference between the amount of damage claimed and the recovery sought is the fact that the maximum recovery allowable in the county court is $1,000. There was a denial by plaintiff of the allegations of the answer.

A jury was waived and a trial was had to the court. By the judgment the defendant was denied a recovery on his cross-petition and judgment was rendered in favor of plaintiff on his cause of action for $184 with interest at six percent from the date of judgment and costs amounting to $62.92. From the judgment the defendant has appealed.

A jury having been waived the findings of fact made have the same effect as the verdict of a jury and may not be disturbed on appeal unless they are clearly wrong. Foltz v. Brakhage, 151 Neb. 216, 36 N. W. 2d 768; Floyd v. Edwards, 152 Neb. 673, 42 N. W. 2d 292.

It cannot be said that the findings of fact as to plaintiff's alleged contract of employment, his work thereunder, or the amount due him were clearly wrong. He testified in detail to the conversations which culminated in the contract and his performance thereunder. There is nothing in this testimony to render it incapable of belief. If it had been accepted in its entirety it would have been sufficient to sustain a judgment for $200 instead of $184.

The trial court, as was its right, weighed the evidence and found that the lesser amount was due. This was an advantage in favor of the defendant of which of course he had no cause for complaint.

There is therefore no basis for disturbing the findings and judgment as to plaintiff's cause of action and this

conclusion disposes of all assignments of error relating thereto.

As to the cross-petition the defendant says that the court erred in excluding evidence offered to prove damage as alleged. This assignment may properly receive no consideration. Reference has not been made to any particular ruling or rulings on evidence which was offered and rejected in the statement of the case, the review of the evidence, or the argument.

This calls for the application of the following: "In order that assignments of error as to the admission or rejection of evidence may be considered, the rules of court require that appropriate reference be made to the specific evidence against which objection is urged." Joiner v. Pound, 149 Neb. 321, 31 N. W. 2d 100.

The defendant says, which of course is independent of the error relating to the rejection of evidence, that the court erred in refusing to render judgment in favor of defendant on his cross-petition.

As to this there is an absence of proof of certain essential elements of the pleaded cause of action. It was pleaded that plaintiff failed to properly cultivate corn, which was the important work contemplated by the contract for services, and as a consequence more than 40 acres were destroyed by weeds; and that if the more than 40 acres had been cultivated they would have produced 2,000 bushels of corn of the value of $2,000 above the cost of harvesting.

The record discloses that about 40 acres of corn were plowed up. This was done with the consent of defendant, on the representation of the plaintiff that on account of weeds it was worthless. This consent was given in a telephone conversation on August 3, 1949. It fairly appears from the testimony of plaintiff that the weeds resulted from inability to cultivate because of rainfall and the texture of the soil. The evidence of defendant as to the condition of the field when it was broken up is his inferences drawn from what he apparently saw on

June 18, 1949, when the contract was made, and on and after August 17, 1949, which was after the breaking. He was on the farm on two occasions between these dates but did not examine the field.

Whether or not this evidence of the defendant had probative value we do not need to decide since, assuming that it did, the finding in relation thereto was in favor of the plaintiff. Under the rule already stated, a jury having been waived, the finding must be accepted by this court.

There is another reason why the court did not err in rendering judgment against the defendant on his cross-petition. The defendant wholly failed to prove or offer to prove the amount or any portion of the amount of the loss which he claims to have sustained by the alleged acts or omissions of the plaintiff. There was no evidence in this respect upon which to base a judgment in favor of defendant on his cross-petition.

The judgment of the district court is affirmed.

AFFIRMED.

STEPHEN M. GASPER, APPELLANT, V. JULIUS STANLEY MAZUR ET AL., APPELLEES.
54 N. W. 2d 66

Filed June 13, 1952. No. 33181.

Judgments. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate the judgment except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Reversed and remanded with directions.*

August Ross, for appellant.

George Evens, for appellees.

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

MESSMORE, J.

The plaintiff, Stephen M. Gasper, brought this action in the district court for Douglas County to foreclose a second mortgage on real estate owned by defendants Julius Stanley Mazur and his wife Evelyn Mazur. In the same proceedings the defendants filed an application to vacate and set aside the decree of foreclosure, order of sale, and confirmation thereof; to cancel the sheriff's deed; and to enjoin the sheriff from executing the writ of assistance issued to him. The trial court, upon hearing the cause at a subsequent term of court, sustained the defendants' application. The plaintiff filed a motion for new trial which was overruled. Plaintiff appeals from this order.

For convenience we refer to the parties as they were designated in the district court.

The record shows the defendants purchased the property in controversy on October 27, 1948, from John Gasper, the father of the plaintiff, for one dollar and other valuable consideration. There was a first mortgage on the property held by the Prudential Insurance Company of America, hereafter referred to as Prudential, in the amount of $7,988.50. The defendants were to pay to Prudential $57.84 a month on the principal, interest, taxes, and insurance. When the property was purchased the defendants made a payment of $1,392.82. They were informed by John Gasper that this payment was insufficient, and they would be required to pay an additional sum of $413.15. This was accomplished by the plaintiff, the son of John Gasper, loaning defendants $413.15 with interest at 5 percent per annum, to be paid in monthly installments of $10 until the debt was paid. As security for the loan the defendants executed and delivered to the plaintiff a second mortgage on the property. Under the terms of this mortgage the

defendants were in default, and the plaintiff instituted this suit.

The plaintiff's petition to foreclose his mortgage was filed April 20, 1951. Summons was issued April 20, 1951, and returned April 25, 1951. Service was had on defendants as provided for by law. The defendants failed to plead or answer as required and their default was taken. On June 11, 1951, decree of foreclosure was entered in the amount of $273.54. Order of sale was issued July 3, 1951. On August 14, 1951, sale was had and the property bid in by the plaintiff in the amount of $315. On August 15, 1951, plaintiff moved to confirm the sale, and sale was confirmed, sheriff's deed issued to plaintiff, and a writ of assistance issued. The defendants' application to vacate the judgment was filed September 6, 1951.

The application, insofar as necessary to consider, alleged that the defendants paid until the original debt to Prudential was reduced to $7,462.25, and paid interest as required, and until the plaintiff's debt was reduced to $264.63. The application also alleged the price for which the property was sold was so inadequate as to shock the conscience of the court. Defendants further alleged expenditures on their part in the amount of $411 to improve the property.

On September 26, 1951, the plaintiff filed a motion to dismiss the defendants' application, setting forth the regularity of the mortgage foreclosure proceedings, the indebtedness owing by defendants to plaintiff, and the amount of the Prudential mortgage which the plaintiff would be obligated to pay, a total of $7,960.63, the reasonable value of the property at the time the sale was confirmed, and prayed dismissal of the defendants' application.

The defendants produced evidence by witnesses engaged in the real estate business and familiar with the market value of property of this type fixing the value of defendants' property between $11,000 and $11,500,

which would leave an equity claimed by the defendants in excess of $2,400. John Gasper testified for plaintiff that the reasonable market value of the property would be $9,000.

The May term of court adjourned on September 29, 1951. On November 26, 1951, hearing was had on the defendants' application to set aside the judgment. The trial court sustained the same, and in its order granted the defendants 30 days to pay into court the sum of $682.30 for the benefit of the plaintiff. The order of November 26, 1951, in addition to sustaining the defendants' application also, in effect, overruled the plaintiff's motion to dismiss the defendants' application to set aside the judgment. On December 3, 1951, the defendants tendered into the court the sum of $682.30, as required by the order of November 26, 1951.

The defendants do not contend that their application to set aside the judgment is based on fraud or perjury, nor is it considered by defendants in the nature of a motion for new trial.

The plaintiff assigns as error that the trial court erred in finding it had the power to sustain the defendants' application to set aside the judgment.

The only question presented for determination is the power of the district court to vacate a judgment after the term of court at which it was entered has adjourned.

In this jurisdiction the law is established that courts of general jurisdiction possess inherent power to vacate or modify their own judgments at any time during the term at which they were pronounced. See, Bradley v. Slater, 58 Neb. 554, 78 N. W. 1069; Lyman v. Dunn, 125 Neb. 770, 252 N. W. 197.

After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate the judgment except for the reasons stated and within the time limited in what is now Chapter 25, article 20, R. R. S. 1943, § 25-2001, contained therein. See, Lyman v. Dunn, *supra;* Cronkle-

ton v. Lane, 130 Neb. 17, 263 N. W. 388; State v. State Journal Co., 77 Neb. 771, 111 N. W. 118; Schuyler Building and Loan Assn. v. Fulmer, 61 Neb. 68, 84 N. W. 609; Feldt v. Wanek, 134 Neb. 334, 278 N. W. 557.

No contention is made by the defendants that they were entitled to a new trial within the time and in the manner prescribed in sections 25-1143 and 25-1145, R. R. S. 1943, as provided by subdivision (1) of section 25-2001, R. R. S. 1943. In any event, we conclude that no such reasons were appropriately set forth in the defendants' application to vacate the judgment in the foreclosure proceedings, and apparently nothing is stated in the defendants' application to show any grounds for vacating the judgment after the term as appears in section 25-2001, R. R. S. 1943. See, Shipley v. McNeel, 149 Neb. 793, 32 N. W. 2d 636; Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

For the reasons given herein, the judgment of the district court is reversed and the cause remanded with directions to set aside the order of November 26, 1951, and to reinstate the judgments and proceedings vacated by that order.

REVERSED AND REMANDED WITH DIRECTIONS.

ELWIN MURRAY, A MINOR, BY LOUIS MURRAY, HIS FATHER AND NATURAL GUARDIAN AND NEXT FRIEND, APPELLEE, V. PEARSON APPLIANCE STORE ET AL., APPELLANTS.
54 N. W. 2d 250

Filed June 20, 1952. No. 33012.

1. **Negligence.** Users of the highway are required to exercise reasonable care. What is reasonable care must, in each case, be determined by its own peculiar facts and circumstances.
2. **Automobiles: Negligence.** The existence or presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care com-

mensurate with such surrounding circumstances.

3. **Negligence.** Negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.
4. **Automobiles: Negligence.** The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance.
5. ———: ———. As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision.
6. **Negligence.** Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.
7. ———. The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred.
8. **Damages.** Where there are elements of damage, such as expenditures, capable of pecuniary measurement, the law requires the amount shall be proved.
9. **Negligence.** If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect.
10. ———. Under the comparative negligence law, section 25-1151, R. R. S. 1943, the words "slight" and "gross" as therein used are comparative terms and the intent of the statute is that the negligence of the parties will be compared one with the other in determining questions of slight and gross negligence.

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

Maupin & Dent, for appellants.

V. H. Halligan, for appellee.

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

WENKE, J.

Elwin Murray, a minor, by Louis Murray, his father and natural guardian and next friend, brought this action in the district court for Lincoln County against Pearson Appliance Store, Herbert R. Pearson, and Rollo Harvey. The purpose of the action is to recover for personal injuries and property damage suffered in a truck-car accident. The basis for recovery is that defendant Harvey was negligent in operating a truck owned by defendant Pearson, who is doing business under the trade name of Pearson Appliance Store, and that such negligence was the proximate cause of the accident which resulted in plaintiff's damages. By the time the action was tried the plaintiff had reached maturity and the case proceeded to trial in his name. The jury returned a verdict for the plaintiff on both counts. An alternative motion for either a judgment notwithstanding a verdict or for a new trial was filed and overruled and judgment entered on the verdict. The defendants appeal therefrom.

Appellants contend their motion for a judgment notwithstanding the verdict should have been sustained for the reason that appellee's evidence shows he was guilty of contributory negligence which was more than slight and sufficient, as a matter of law, to defeat his right to recover.

In this respect we have said: "When the court can say, as a matter of law, that the plaintiff is guilty of negligence that is more than slight as compared with that of the defendant and that such negligence is a proximate cause of the accident then the court should direct a verdict for the defendant and dismiss the action." Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106.

The evidence is not in dispute as to the following:

Appellant Pearson operated a store in Wallace, Nebraska, under the trade name of Pearson Appliance Store. While this business was primarily engaged in selling electrical appliances and machines it also sold propane gas. For the purpose of delivering this latter product Pearson owned and operated a two-ton Studebaker truck with a bulk propane gas tank. Pearson had in his employ the appellant Harvey and Wilbur Owens. They operated the store in Wallace.

Appellee, Elwin Murray, lived in Wallace and was engaged in farming and ranching with his father. Their operations were located some three miles east and one-half mile south of Wallace and their livestock consisted of some 45 head of cattle. Appellee was in sole charge of this livestock at the time of the accident as his father was at that time in California. There was no one staying at the place where these cattle were being kept. The cattle consisted mostly of stock cows but did include a few milk cows. Appellee owned a 1947 Studebaker five-passenger coupé which he used in going to and from the place where the cattle were kept.

Dickens, Nebraska, is some nine or ten miles east of Wallace and located on Highway No. 23, which is a graded and graveled road. About 9 p. m. on Sunday evening, January 2, 1949, snow began to fall at Wallace. By Monday morning it had become a blizzard. Early that morning, about 2 a. m., a customer near Dickens called the Pearson Appliance Store and asked them to deliver some propane gas. This Harvey and Owens attempted to do. They used the Studebaker truck for this purpose and put chains on the rear dual wheels before starting. When loaded this truck weighs between six and seven tons. They left Wallace about 8 a. m. but after getting within about three miles of Dickens the weather conditions caused them to turn around and return to Wallace. The wind was blowing from the northeast. On their return, at a point about one-half mile south and one and one-half miles east of Wallace

on Highway No. 23, just as the truck was coming out of a snowdrift which was across the highway, the truck collided with appellee's coupé. The accident happened about the middle of the forenoon.

Appellee, on Monday morning, because of the weather conditions, decided to go out and look after the livestock he and his father owned. He used his car for that purpose. He first went south one-half mile and then turned east on Highway No. 23. After he had gone east about a mile and a half his coupé collided with the Pearson truck, the left-front wheel and fender of the car striking the left-front wheel and fender of the truck. After the collision the car was standing upright, but at an angle, on the south edge of the highway. It was partly in the ditch. Its left-front wheel was on the graded and graveled surface, its right-front wheel was off the graded and graveled surface, but on the shoulder, and its rear wheels were in the ditch. At this point the slope of the shoulder into the ditch is very gradual.

Appellee testified that he was driving his coupé without chains; that he was familiar with the road, having driven it many times; that while driving south out of Wallace for a distance of a half mile he had some visibility; that after turning east on Highway No. 23 his visibility was zero; that he could not see ahead; that he put his car in low and drove about five miles an hour; that, in order to be able to proceed, he rolled down the glass in the right door of his coupé, sat on the right side of the front seat which was wide enough for three people, and put his head out of the opening in the door and looked down to see the edge of the gravel; that he guided the car by aligning it with the edge thereof, keeping it about a foot and a half therefrom; that some 100 to 150 yards from the place of the accident there was some snow drifted across the road; that just before the accident he heard his tires starting to creak like they might be rolling into a snowdrift; that

he thereupon pulled his head into the car and started to put on the brakes; that the impact occurred; that the impact occurred after he had traveled east about a mile and a half; that at the place of impact the road was straight and level; that he never saw the truck before the impact; that his head went through the right front of his windshield; that his car was at all times on the right side of the center of the graveled and graded portion of the road; that after the impact the truck was right in front of him; and that before it could go forward it had to back up a little to get around the front end of his car.

Appellant Harvey, who was driving the truck, and his fellow employee Owens, who was riding with him, testified that after they turned around to return to Wallace they had some visibility as they were traveling with the storm; that as they approached a point just east of where the accident occurred they came to snow that was drifted across the highway; that this snow had drifted as deep as two and one-half feet; that in an endeavor to get through this snow they put the truck in compound underdrive which did not permit a speed in excess of five miles an hour; that while trying to get through this drift they had no visibility; that while driving through the drift they did not know where the truck was with reference to the center of the road; that on the third effort they broke through the drift; that just as they broke through the drift their vision improved a little and they saw appellee's car coming toward them; that it was some 15 to 20 feet away; that they saw it in the glare of their lights, which were turned on; that the car did not have its lights burning; that the windshield of the car was completely covered with frost, ice, and snow; that Harvey hit the brakes and endeavored to turn right; that he could not turn right because they were still in the snow, the front wheels in eight or ten inches thereof and the rear wheels in the deeper part of the drift; that the impact

occurred almost immediately; that the truck stopped almost immediately, moving forward only a foot or two; that the car rebounded from the impact and went back in sort of a semicircle or arc, ending up almost off the graded and graveled portion of the road; that the car and truck were between 15 and 25 feet apart after the collision; that the truck was north of the center of the road when it came to rest; that Harvey drove it straight forward alongside the car to pick up appellee and take him to Wallace; and that the truck had been north of the center of the graded and graveled portion of the highway.

The facts of this case do not present an emergency situation where either party was caught out in a storm and was endeavoring to get to shelter. Both parties drove out into it. Each had the right to do so but, of course, if negligent while doing so each will be held responsible for his own conduct. As stated in Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569: " 'Users of the highway are required to exercise reasonable care. What is reasonable care must, in each case, be determined by its own peculiar facts and circumstances.' McClelland v. Interstate Transit Lines, supra. See, also, Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491; Lammers v. Carstensen, 109 Neb. 475, 191 N. W. 670."

In this respect we have said: "On principle it would appear that the existence or presence of smoke, snow, fog, mist, blinding headlights or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances. Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825; Fischer v. Megan, 138 Neb. 420, 293 N. W. 287." Fairman v. Cook, 142 Neb. 893, 8 N. W. 2d 315.

" '* * * where the vision of the driver of an auto-

mobile is obscured whether by the lights of an approaching car, fog, smoke or for any other reason, it is his duty to stop until visibility is restored, or to reduce his speed and have his car under such control that he can stop immediately if necessary. French v. Nelson, 111 Vt. 386, 391, 17 A. 2d 323; Powers v. Lackey, 109 Vt. 505, 507, 1 A. 2d 693; Palmer v. Marceille, 106 Vt. 500, 508, 175 A. 31; Steele v. Fuller, 104 Vt. 303, 311, 312, 158 A. 666.'" Price v. State Highway Commission, 62 Wyo. 385, 167 P. 2d 309, quoting from Taylor v. Quesnel, 113 Vt. 36, 29 A. 2d 812.

Negligence has been defined: "'Negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.' McGraw v. Chicago, R. I. & P. R. Co., 59 Neb. 397, 81 N. W. 306." McClelland v. Interstate Transit Lines, 142 Neb. 439, 6 N. W. 2d 384.

The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance.

As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. See, Buresh v. George, *supra;* Huston v. Robinson, 144 Neb. 553, 13 N. W. 2d 885.

The basis for this rule is stated in Buresh v. George, *supra,* as follows: "The basis of this rule is that a driver of an automobile is legally obligated to keep

such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it."

Under these principles the appellee was undoubtedly guilty of negligence in driving his car but negligence alone is not sufficient to prevent recovery. It must contribute to the injury complained of as a proximate cause. This principle is stated in Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394: "Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause."

" ' "The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred." Spratlen v. Ish, 100 Neb. 844, 161 N. W. 573. See, also, Williams v. Hines, 109 Neb. 11, 189 N. W. 623, and Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117.' Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501. See, also, Bixby v. Ayers, supra; Johnson v. Mallory, 123 Neb. 706, 243 N. W. 872." Stark v. Turner, *supra*.

There is evidence from which a jury could find that appellee's car was at all times being driven on the right-hand side of the highway and that the accident happened there. If that is true then if the truck had been on its right side of the highway the accident would not have happened. Under such circumstances it would appear that the negligence of appellee in driving blind would not necessarily have been a proximate cause of the injury.

We realize that several jurisdictions have held to the

contrary and have said that blind driving prevents recovery no matter how the accident happens although some of these cases are clearly distinguishable from this case by reason of a material difference in the facts on which the conclusion is based. However, we think to say such is true in every case would be an improper application of the principle of contributory negligence. If it can be said, without question, that the accident happened because thereof then it presents a question of law for the court but otherwise one of fact for the jury. We think the latter is true here. See Crowe v. O'Rourke, 146 Wash. 74, 262 P. 136.

As stated in Baden v. Globe Indemnity Co. (La.), 146 S. 784:

"The evidence, in our opinion, preponderates in favor of the contention that the Johnson car was on its proper side of the road, and that the Baden car was at least partly on Johnson's side of the road.

"In view of these conditions, the rate of speed of the Johnson car and the absence of lights therefrom, or inefficient lights thereon, cease to be of primary importance to a correct determination of the question of responsibility for the accident, for certainly there would have been no collision, notwithstanding the negligence on part of Johnson, had the Baden car, equipped with bright lights, maintained its side of the highway. The efficient and proximate cause of the accident was the contributing negligence of Baden in failing to observe his own duty at the time."

Appellants contend the court erred when it included in its instruction on what the jury could consider in assessing the amount of damages the following: "The measure of damage for personal injuries is that amount which will fairly and reasonably compensate plaintiff for * * * reasonable medical or other expense incurred on account of said injuries." This contention is based on the fact that appellee introduced no evidence as to

the amount of such expenses incurred or the reasonable value thereof.

In his petition appellee alleged: "* * * plaintiff has suffered doctors', hospital and medical expenses and personal injury totaling the sum of Five Thousand Dollars * * *."

The evidence introduced shows in detail the appellee's need for medical care and hospital attention because of the injuries he received in the accident and that such services were rendered and the extent thereof but no evidence was introduced to show any amount of liability appellee had incurred by reason thereof nor to show the reasonable value thereof. In other words, if the jury included any amount for medical or other expenses incurred on account of the injuries suffered it would have had to have based its decision on speculation or guess as there is nothing in the evidence on which it could base it.

" 'Where there are elements of damage, such as expenditures, capable of pecuniary measurement, the law requires the amount shall be proved.' " Library Board v. Ohlsen, 110 Neb. 146, 193 N. W. 110, quoting from North Chicago Street R. R. Co. v. Fitzgibbons, 180 Ill. 466, 54 N. E. 483.

The following discussion found in Reed v. C., R. I. & P. R. Co., 57 Iowa 23, 10 N. W. 285, is applicable here. Therein the court, in discussing a similar problem, said: "The court directed the jury that if they found that plaintiff was entitled to recover, they should among other damages allow for 'expenses reasonably incurred for medical care and attention.' Of course upon proper evidence showing the amount, or proximate amount, of these expenses, plaintiff would be entitled to recover them. But there is not one word in the evidence upon which an estimate can be based of their amount. The testimony shows that plaintiff was treated by a physician three or four times and that he procured medicine for his injuries. The value of these medical services and

medicines are not attempted to be shown in any manner and their extent and character are no more definitely shown in the testimony than in the statement we have just made. Under the instruction in question the jury were directed to include compensation for medical services in their verdict. They doubtless would feel authorized to determine the amount to be allowed therefor according to their own judgment without aid of evidence. But the law cannot be administered in this uncertain way. Damages of this kind cannot be found by the jury except upon proof. It will not do to say that the amount of damages allowed by the jury may have been small. We can know nothing about the amount and if we could know it to be insignificant, we could not relieve this case from the operation of the familiar rules of law which require damages of the character of those under consideration to be established by proof. For the error pointed out the judgment of the District Court must be REVERSED."

When the question has come up the courts seem to be uniform in so holding. See, Hobbs v. City of Marion, 123 Iowa 726, 99 N. W. 577; Cousins v. Lake Shore & M. S. Ry. Co., 96 Mich. 386, 56 N. W. 14; Little Rock & M. R. R. Co. v. Barry, 58 Ark. 198, 23 S. W. 1097, 25 L. R. A. 386; Gibler v. Terminal R. R. Assn., 203 Mo. 208, 101 S. W. 37; Smith v. Whittlesey, 79 Conn. 189, 63 A. 1085; Chicago, St. L. & P. R. R. Co. v. Butler, 10 Ind. App. 244, 38 N. E. 1; Consolidated Arizona Smelting Co. v. Egich, 22 Ariz. 543, 199 P. 132; Olson v. Erickson, 53 Wash. 458, 102 P. 400; Brown v. White, 202 Pa. 297, 51 A. 962, 58 L. R. A. 321; Willis v. Barber, 280 Ky. 417, 133 S. W. 2d 551.

Appellants complain of instruction No. 4 given by the court and contend it is erroneous in several respects. We will therefore set out the instruction in full. It is as follows:

"If you find from the evidence that defendants' negligence was the proximate cause of injury to the person or

property of the plaintiff, you will next consider the affirmative defense that plaintiff's own negligence formed a part of the proximate cause of said collision. The burden of proof is upon the defendants to prove the material allegations of such defense. Such material allegations are stated to you in three propositions, to-wit:

"(1) That at the time of or immediately prior to said collision, the plaintiff was negligent in one or more of the following respects:

"(a) That he negligently drove on the left-hand side of said highway.

"(b) That he negligently failed to maintain a proper lookout for other vehicles.

"(c) That he negligently failed to maintain proper control over the operation of his vehicle.

"(2) That such negligent act or omission formed such a part of the proximate cause of said collision that said collision would not have occurred but for such negligent act or omission.

"(3) That after weighing and comparing the negligence of each party with that of the other, you find either one of the following statements to be true:

"(a) That the negligence of plaintiff was more than slight in comparison with the negligence of defendants.

"(b) That the negligence of defendants was less than gross in comparison with the negligence of plaintiff.

"If you are satisfied by a preponderance of the evidence that each and all of the foregoing propositions are true, you will find for the defendants and so state in your verdict.

"If the evidence is evenly balanced or preponderates in favor of the falsity of any one of said three propositions, you will find against the defendants upon their affirmative defense and proceed to compute the amount of damage suffered by the plaintiff.

"If you should find Propositions 1 and 2 of this instruction in favor of defendants, but Proposition 3 against defendants, you will bear in mind the compar-

ison made by you and apply the same to the computation of damages as you are hereinafter instructed."

Appellants complain of this instruction because it did not properly submit the defendants' burden of proving contributory negligence. They claim the instruction should have been so worded as to give them the benefit of appellee's evidence.

The rule in this regard is as follows: "If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect." Mundy v. Davis, *supra.* See, also, Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839.

It will be noted the instruction submitted the issue of contributory negligence in the following language: "The burden of proof is upon the defendants to prove the material allegations of such defense." While appellee testified that he drove his car on the right side of the road at all times there are facts and circumstances in his evidence which the jury could properly consider in deciding the question of whether or not appellee was actually guilty of contributory negligence. The appellants were entitled to an instruction on this issue which would give them the benefit thereof.

Appellants further complain because they feel this instruction places on them too great a burden by requiring them to prove all of the alleged grounds of negligence of which they complain the appellee is guilty. We do not think the instruction has that effect. It is true that this instruction provides that appellants must establish, by a preponderance of the evidence, that "each and all of the foregoing propositions are true," but this language does not refer to the separate acts of negligence of which appellants complain the appellee is

guilty. It refers to the three propositions contained in the instruction which are negligence, proximate cause, and comparative negligence. The language in this instruction actually referable to the separate acts of negligence complained of is found in proposition "(1)." It is as follows: "That * * * the plaintiff was negligent in one or more of the following respects: * * *." We think this language properly submitted this phase of the issue of contributory negligence.

Appellants' next complaint is that proposition "(3)", contained in this instruction, did not correctly submit the doctrine of comparative negligence. They contend it is not a proper statement thereof.

The rule is: If plaintiff is guilty of negligence directly contributing to the injury he cannot recover, even though defendant was negligent, unless his contributory negligence is slight and the negligence of defendant is gross in comparison therewith. If, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which under the circumstances amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, then the contributory negligence of plaintiff, however slight, will defeat a recovery.

When plaintiff is entitled to recover under this rule it then becomes the duty of the jury to deduct from the total amount of any damages which it determines he has sustained such an amount as his contributory negligence bears to the entire negligence of the parties which contributed thereto. Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N. W. 158, as clarified by Sgroi v. Yellow Cab & Baggage Co., Inc., 124 Neb. 525, 247 N. W. 355; Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704.

"Under the comparative negligence law, section 25-1151, R. S. 1943, the words 'slight' and 'gross' as therein used are comparative terms and the intent of the statute

is that the negligence of the parties will be compared one with the other in determining questions of slight and gross negligence." Roby v. Auker, 151 Neb. 421, 37 N. W. 2d 799.

We think this instruction is confusing because it places a burden of proof on the appellants with reference to the making of such comparison. After the parties establish and the jury, under proper instructions, finds the respective parties guilty of actionable negligence and contributory negligence the responsibility is then on the jury to make the comparison as contemplated by the statute. This comparison is to determine the rights of the parties to recover, if at all, and the extent thereof. In this respect there is no burden of proof on either party but solely a duty on the part of the jury to make the proper comparisons on the evidence before them. The court should give the jury an instruction in which the correct basis for making the comparison is set forth.

In view of what has been said a new trial should have been granted. We therefore vacate and set aside the verdict and judgment of the trial court and grant a new trial.

REVERSED AND REMANDED.

DAROLD E. BUSSELL ET AL., APPELLANTS, V. CLIFTON MCCLELLAN ET AL., APPELLEES.
54 N. W. 2d 81

Filed June 20, 1952. No. 33142.

1. **Waters.** The grant of section 31-201, R. S. 1943, is limited to the owner of the land whereon the open ditch or tile drain may be discharged into a natural watercourse or natural depression or draw.
2. **Appeal and Error.** This being an action in equity it is the duty of this court to consider it de novo.
3. **Waters.** Surface waters are a common enemy and a proprietor of real estate may fight them as he deems best, however, in fighting them an upper proprietor may not accumulate them into

a ditch or drain and increase the flow and discharge them in volume on a lower or servient estate or divert them in a different direction to the damage of the lower or servient estate.

4. ———. Where surface water flows in a well-defined course, whether the course be ditch, swale, or drain in its primitive condition, the flow cannot be arrested or interfered with to the injury of neighboring proprietors.
5. Negligence. Negligence is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do; the want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances.
6. Injunctions. Injunction is the appropriate remedy for the protection of plaintiffs' rights herein.

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

P. J. Barrett, and *Blackledge & Sidner,* for appellants.

Kirkpatrick & Dougherty, and *Davis & Vogeltanz,* for appellees.

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

YEAGER, J.

This is an action in equity by Darold E. Bussell and Esther M. Bussell, plaintiffs and appellants, to enjoin Clifton McClelland, Merrill McClelland, Arnold Malottke, Wilber Fuss, Dean Fuss, Rose Fuss, and John Doe, operator of a dragline, real name unknown, defendants and appellees, from the construction of ditches which drain certain lands onto the lands of plaintiffs to their injury and damage. Issues were joined and a trial was had to the court at the conclusion of which a decree was entered denying the relief prayed for in the petition of plaintiffs. From this decree plaintiffs have appealed.

The true name of the party designated as John Doe was found to be Claussen, Olson & Benner, Inc., and as such it is designated in the decree. This party owned

no land involved. It was the owner of a dragline and was employed by the other defendants or some of them to construct the ditches of which plaintiffs complain. The true name of the defendants designated as McClelland was found to be McClellan and they will be hereinafter so referred to. The defendants other than Claussen, Olson & Benner, Inc., were landowners charged by plaintiffs with a joint purpose to construct ditches and collect waters with the end that they would be caused to flow upon plaintiffs' land to their damage.

The plaintiffs are the owners of land in Sections 5 and 6 in Township 17 North, Range 12 West of the 6th P. M., in Greeley County, Nebraska. This land is bounded on the east by the North Loup River. The northern boundary is of no importance in this case. On the west it is bounded by lands of the defendant Malottke. The Malottke lands extend west and northwest from plaintiffs' west line. The west line of the Malottke land is a county line road between Greeley and Valley Counties. To the west of the Malottke land is land belonging to the defendants McClellan. The north line of this land is an extension westward of the north line of the Malottke land. The land below the south line of the western part of plaintiffs' land and the land immediately to the south of this line extended westward to the county line road mentioned is owned by the defendants Fuss.

A completely accurate description of the lands involved herein cannot be given since no such description is found in the record.

Paralleling each other and extending from about the northwest corner of plaintiffs' land diagonally to the southeast are a track of the Union Pacific Railroad and a state highway. The highway is to the west of the railroad. There is a constructed outlet for flow of water under these. This outlet is on plaintiffs' land a considerable distance north of the south line. Water flows from this point in a meandering course eastward into the North Loup River.

The natural flow of surface water is from the McClellan land south and east onto the Malottke land and the natural flow from the Malottke land is south and east to the approximate south side thereof and thence east onto the plaintiffs' land. The natural flow from a part of the Fuss land is north and east to the approximate north line where it joins the water on the Malottke land and flows thence east onto plaintiffs' land.

It is undisputed that up to the time the waters reach a point very close to the east line of the Malottke land they are completely diffused surface waters and at no point or points do they follow a fixed line of flow, draw, depression, or any kind or nature of channel.

To expedite the flow of these surface waters with a common purpose and in furtherance thereof the defendant landowners caused a ditch to be constructed starting about 300 feet west of and extending eastward to the county line road. This ditch is parallel with and at about the south line of the McClellan land. They also caused to be constructed east of the highway a ditch extending from the east side of the road to a point about 300 feet west of the southwest corner of plaintiffs' land. The dimensions of the channel are not definite. There is testimony that its depth is as much as 5 feet, its width at the base 18 feet, and its bank width about 66 feet. Extension further eastward was stopped by restraining order issued out of the district court. The purpose of the defendants was not to stop at this point but to continue eastward to a point on the Malottke land near the line between it and plaintiffs' land where they contend there is a depression or draw which extends on and over plaintiffs' land eventually leading into the North Loup River. The purpose of the ditches was to collect the surface water from the land of the defendants therein and to facilitate the flow thereof into this claimed draw or depression starting on Malottke's land and extending over plaintiffs' land to the river.

The defendants contend that they have a right so to

do under the terms of sections 31-201 and 31-202, R. S. 1943. These sections of the statute are as follows:

"Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation." § 31-201, R. S. 1943.

"Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse." § 31-202, R. S. 1943.

It is to be observed that in these provisions a watercourse is defined, but a depression or draw is not. If the point of the contemplated ending of the ditch on the Malottke land would not provide an opening into a watercourse as defined by statute, or a depression or draw properly defined, it follows of course that the construction of the ditch to the damage of plaintiffs would be unlawful.

Whether or not however the contemplated eastern end of this ditch on the Malottke land would empty into a watercourse as defined or a depression or draw which is not defined is not a matter for first consideration herein on the issues made by the pleadings and tried by the district court.

The petition pleaded a combined and concerted purpose of all of the landowner defendants to cause the surface water from all of their lands in the watershed to be collected on the McClellan and Malottke lands and to be carried in concentration in increased volume and force onto and over plaintiffs' lands. The defendants by their answer and by their evidence responded to this charge against them and asserted the right to pursue the alleged combined and concerted purpose. There is

no pleading the effect of which was to say that Malottke had the right alone thus to ditch and drain his land individually.

The defendants presented their defense on the assumption that Malottke did have that right, and with that assumption as a basis proceeded on the theory that all landowners back of the Malottke land and within the watershed had the right to have their surface water collected in ditches and carried onto and over the Malottke land and thence onto and over the plaintiffs' land through what they contended was a watercourse thereon but which the district court found was not a watercourse but a depression or draw leading to a watercourse.

The question for first consideration therefore is that of whether or not, assuming that Malottke had authority under the statute and the conditions existing to construct the ditch on his own land, the landowners back of him in the watershed had the right under the statute to have accumulated and concentrated with his their surface water and to have it all in accumulation and concentration carried onto and over plaintiffs' lands to plaintiffs' damage.

The last clause of section 31-201, R. S. 1943, appears to be a full and complete answer to the question. Repeating here, it is as follows: "* * * and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation."

The section clearly means as it clearly says that in order that there shall be no liability in damages for the construction of a ditch or drain such as is authorized by the statute the ditch or drain must be "wholly" on the owner's land and the water collected therein must be discharged in a natural watercourse or natural depression or draw on the owner's land.

Conclusively no water from the McClellan or Fuss lands ever did or could drain into a natural watercourse or natural depression or draw thereon. None existed. The design was to cause them to be collected in the

ditch on the McClellan land which was closed at the east end and when the ditch was filled to capacity have them spill therefrom eastward over the county line road, thence into the ditch on the Malottke land, and thence onto and over plaintiffs' land to the river.

As to whether or not this would result in damage to the land and crops of plaintiffs there is sharp conflict in the evidence. The evidence of the defendants in this respect is largely conjectural and speculative. The evidence of plaintiffs is also in part conjectural and speculative, however some of it is definitive of results which have already flowed from the incompleted project.

Considered de novo (§ 25-1925, R. R. S. 1943; Byram v. Thompson, 154 Neb. 756, 49 N. W. 2d 628) as must be true in this equity case we are convinced that this project in its incompleted condition has already caused and if it is completed will cause the flow of water to be concentrated and increased onto and over the lands of plaintiffs to the damage of the lands and crops thereon.

In this light and in the light of a lack of statutory authority which is the only authority advanced by the defendants as a basis for their project it follows that the rights of the parties are determinable under the established general rules relating to the collection of surface waters and the discharge thereof on the lands of a lower proprietor.

This court, in Hengelfelt v. Ehrmann, 141 Neb. 322, 3 N. W. 2d 576, recognized the common law rule that surface water is a common enemy and that a proprietor of real estate may fight it as he deems best, but an exception as follows was pointed out: "* * * that in fighting surface water the upper proprietor may not accumulate surface waters into a ditch, or drain, and thereby increase the flow, and discharge them in volume on the servient estate, and cannot divert them so they go in a different direction."

In Schomberg v. Kuther, 153 Neb. 413, 45 N. W. 2d 129,

it was said: "A proprietor may not collect surface waters on his estate into a ditch or drain and discharge them in a volume on the lands of his neighbor, nor can he divert them so they go in a direction different from the natural flow."

It was also said: "Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors." This latter quotation was repeated in McGill v. Card-Adams Co., 154 Neb. 332, 47 N. W. 2d 912.

In Courter v. Maloley, 152 Neb. 476, 41 N. W. 2d 732, it was said: "Water which appears upon the surface of the ground in a diffused state with no permanent source of supply or regular course is regarded as surface water."

It was also said: "In this jurisdiction it is a general rule that surface waters may be controlled by the owner of the land on which they fall, or originate, or over which they flow and he may refuse to receive any that falls, or originates, or flows on or over adjoining land. His right in this respect however must be so exercised as not to unnecessarily or negligently cause injury to the rights and property of others."

Under these rules each of the landowners in the watershed above the lands of plaintiffs had a right in his turn to exercise control of surface waters on and in passage over his own land. However in the exercise of that control he was required to do so without negligence, without collecting it and discharging it in volume on the lower estate, and without diverting it from the course of natural flow to the damage of the lower estate. Of course what one could not legally do a group could not in concert legally do.

It may not be said with certainty in the present instance, within the meaning of law relating to rights with reference to surface water, that there was diver-

sion. It may however be said with certainty that there was a collection and discharge of water in volume on the property of plaintiffs. The acts involved were committed in disregard of the rights of plaintiffs and the duty which the defendants owed to them. The acts must be regarded as negligence within the proper definition of that term.

This court has defined negligence as the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do; want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances. Bohmont v. Moore, 138 Neb. 784, 295 N. W. 419, 133 A. L. R. 270.

The appropriate remedy for the protection of plaintiffs against the evils of which they complain is by injunction. Schomberg v. Kuther, *supra.*

The decree is reversed and the cause remanded with directions to the district court to render a decree in favor of plaintiffs and against the defendants in conformity with the prayer of the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

HARRY GREATHOUSE ET AL., APPELLEES, V. DIX RURAL HIGH SCHOOL DISTRICT, OF KIMBALL COUNTY, NEBRASKA, APPELLANT.

54 N. W. 2d 58

Filed June 20, 1952. No. 33150.

1. **Schools and School Districts: Elections.** Section 10-702, R. S. Supp., 1949, requires 55 percent of all the qualified electors of a school district voting in favor of the issuance of bonds for the purpose of building a new school building and securing the necessary furniture and apparatus for the same.
2. **Elections.** It is the policy of the law to prevent the dis-

franchisement of qualified electors who have cast their ballots in good faith by requiring only a substantial compliance with the election laws of the state.

3. ———. On the trial of a contested election ballots will not be treated as void simply because of irregular or unauthorized markings or mutilations which appear to have been innocently made as the result of awkwardness, inattention, mistake, or ignorance, if the lawful intent of the voter can be ascertained therefrom.

4. **Schools and School Districts: Elections.** Under section 10-702, R. S. Supp., 1949, requiring a proposal for the issuance of school bonds to be adopted by 55 percent of the ballots cast at the election by qualified electors of the school district on the question, ballots improperly cast or rejected for illegality cannot be counted in determining the vote cast.

5. ———: ———. In the absence of statutory provision to the contrary, ballots which have been cast in a school district election which are entitled by law to be counted in declaring the result of the election shall alone be counted in determining the vote cast.

APPEAL from the district court for Kimball County: JOHN H. KUNS, JUDGE. *Affirmed.*

Heaton & Connors, for appellant.

Torgeson, Halcomb & O'Brien, for appellees.

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

MESSMORE, J.

This is an action involving a contest of a special election, the object and purpose of the election being to authorize Dix Rural High School District to issue negotiable bonds in the principal amount of $53,000 to build a new school building and secure the necessary furniture and apparatus for the same.

Section 10-702, R. S. Supp., 1949, provides: "No bonds shall be issued until the question has been submitted to the qualified electors of the district, and fifty-five per cent of all the qualified electors voting on the question shall have voted in favor of issuing the same, at an election called for the purpose, upon notice given by the

officers of the district at least twenty days prior to such election."

One or more of the contestants is competent to contest the election.

The special election held on June 2, 1951, by defendant contestee was duly and legally called and the proposition legally submitted.

The trial court, in its decree, found generally in favor of the contestants, and particularly that the ballots cast at the election, designated in the record as exhibits Nos. 4, 5, 6, 7, 8, and 9, purportedly cast as absentee or disabled voters ballots, were not cast in compliance with the law; that these ballots were by the canvassing board of the contestee counted as "yes" votes but in fact said ballots should not have been counted; that the votes cast by Winnie Peterson and Wayne Bailey were "yes" votes on the proposition submitted and should not have been received and counted because such persons were not legally qualified electors of the contestee school district at the election held June 2, 1951; that the ballots identified as exhibits Nos. 2 and 3 were considered by the election board and the canvassing board of contestee as spoiled ballots and were rejected and not counted; that such ballots should have been counted as "no" votes; that 55 percent of the qualified electors of the Dix Rural High School District voting on the question submitted did not vote in favor of the proposition submitted; that Clyde Acheson and Olive Bailey who did vote were not legally qualified electors but there was not sufficient credible evidence to show how they voted; and ordered and adjudged that the election be annulled.

Judgment was entered on the findings. The contestee's motion for new trial was overruled, and contestee perfected appeal to this court.

For convenience we will refer to the plaintiff appellees as contestants, and the defendant school district appellant, as contestee.

Winnie Catherine Peterson testified in behalf of the contestants that she had lived in Dix, apparently referred to as Dix City, since 1910. She had no children of school age, did not own real estate in the Dix Rural High School District, did not receive a tax assessment for the year 1950, filed no personal tax schedule for the year 1950, but did file a personal tax schedule for the year 1951. She voted at the special election June 2, 1951.

Olive Isabel Bailey, in behalf of the contestants, testified that she was living in Dix on June 2, 1951; that she and her husband had moved their furniture to Dix about May 1, 1951, and they came to Dix later; and that prior to that time she and her husband resided on the Herb Linn farm which is not in the Dix Rural High School District. They lived there a year before returning to Dix. Their children attended grade school district No. 4, which is not in the Dix Rural High School District. She did not remember whether they were assessed in Dix for taxes or not. They owned a home in Dix, went to work for Herb Linn, and in the interim rented their home. Upon inquiry by the court she testified that they operated a farm owned by Herb Linn on a salary basis, could stay there as long as they wanted to, and had no special arrangements to return to Dix. She informed the court she voted at the special election on June 2, 1951.

Her husband, Wayne Bailey, testified that he and his wife lived on the Herb Linn place for about a year and moved to Dix on May 6, 1951. He did not know that this farm and the improvements thereon were not in the Dix Rural High School District when he voted at the election held on June 2, 1951. He thought he was qualified to vote on the proposition.

Clyde Acheson testified in behalf of the contestants that he had lived in Dix for more than two years; that he lived with his father and did not own any real estate in the Dix Rural High School District, nor did he own any personal property therein. He had no property that

was assessed in 1950 or 1951. He filed a personal tax schedule for the year 1951. Upon inquiry by the court he testified that he voted at the election of June 2, 1951.

The contestee assigns as error (1) that the evidence is insufficient to sustain the judgment of the trial court and is contrary to law; and (2) that the court erred in counting exhibits Nos. 2 and 3 as sufficient legal ballots.

The ballots and poll books, identified as exhibit No. 1, are in evidence.

Section 32-705, R. S. 1943, provides that the voter shall make a cross in the square to the left of the answer he wishes to give to the question submitted.

The following exhibits were identified, offered, and received in evidence without objection: Exhibit No. 2 is an official ballot which properly submitted the question to be voted on, with two squares or blocks with the word "yes" to the right of the top square or block, and the word "no" to the right of the lower square or block. The blank in the top square or block to the left of the word "yes" was completely filled in with blue pencil markings. The lower block to the left of the word "no" contained a cross.

Exhibit No. 3 is the same type of ballot. The block to the left of the word "yes" is filled in completely with blue pencil markings. To the right of the word "yes" is written in blue pencil the word "void." The block or square to the left of the word "no" contains a cross.

In Miller v. Mersch, 152 Neb. 746, 42 N. W. 2d 652, this court said: "It is the policy of the law to prevent the disfranchisement of qualified electors who have cast their ballots in good faith by requiring only a substantial compliance with the election laws of the state."

"On the trial of a contested election ballots will not be treated as void simply because of irregular or unauthorized markings or mutilations which appear to have been innocently made as the result of awkwardness, inattention, mistake or ignorance, if the lawful intent of the voter can be ascertained therefrom." Griffith v. Bona-

witz, 73 Neb. 622, 103 N. W. 327. See, also, State ex rel. Lanham v. Sheets, 119 Neb. 145, 227 N. W. 457; White v. Slama, 89 Neb. 65, 130 N. W. 978, Ann. Cas. 1912C 518; State ex rel. Waggoner v. Russell, 34 Neb. 116, 51 N. W. 465, 33 Am. S. R. 625, 15 L. R. A. 740; Deckert v. Hesch, 296 Ky. 176, 176 S. W. 2d 397; Allen v. Fuller, 332 Ill. 304, 163 N. E. 675; 29 C. J. S., Elections, § 182, p. 266.

It is obvious from the afore-cited authorities that the intention of the voter is the dominant factor to be determined from the ballot.

We have examined exhibits Nos. 2 and 3 carefully and find the intention of the voters casting the ballots to oppose the proposition submitted, and these ballots should have been counted as "no" votes.

Qualified electors to vote at a special election such as in the case at bar are every citizen of the United States (1) who has resided in the district forty days, (2) who is twenty-one years or more old, and (3) who owns real or personal property that was assessed in the district in his name at the last annual assessment, or whose spouse owns real or personal property that was assessed in the name of said spouse in the district at the last annual assessment, or who has children of school age residing in the district. § 79-427, R. R. S. 1943.

In Miller v. Mersch, *supra,* this court said: "While the cases are not in accord as to whether illegal, rejected, and blank ballots shall be counted in determining the total vote cast, we think the correct rule is, in the absence of statutory provisions to the contrary, that ballots which have been cast which are entitled by law to be counted in declaring the result of the election shall alone be counted in determining the vote cast. This simply means that ballots improperly cast, or rejected for illegality, or left wholly blank, are no part of the 'ballots cast at such election' within the meaning of section 79-616, R. S. 1943." For the purposes of this case this would be section 10-702, R. S. Supp., 1949.

The canvassing board for the Dix Rural High School District for the special election met on June 4, 1951, to canvass the vote and count the absentee and disabled ballots. Five absentee and one disabled ballots were opened and counted, all in favor of the proposition submitted. The board then resolved that 272 qualified electors voted, 152 in favor of the question submitted and 118 against it, and 2 ballots, identified as exhibits Nos. 2 and 3, were rejected as spoiled.

While the trial court's finding and judgment are not attacked in such respect, an examination of the record discloses sufficient compliance with the statute, Chapter 32, article 8, R. S. 1943, and the 1949 Supplement thereto, was not had, and the trial court correctly held the absentee ballots and disabled ballot to have been illegally cast and not proper to be counted at said election.

We find the ballots of Winnie Catherine Peterson and Wayne Bailey to be "yes" ballots, and the ballots of Olive Isabel Bailey and Clyde Acheson to be "no" ballots. It is apparent that these electors did not meet the qualification required of electors voting in an election such as the one in this case as clearly indicated by the statute previously summarized, and the trial court did not err in declaring these ballots to be illegal.

Applying the rule above stated in Miller v. Mersch, *supra,* and considering the results determined by the canvassing board wherein the board resolved 272 qualified electors voted, 152 voting in favor of the question submitted, it is apparent that 8 "yes" votes for the proposition submitted were illegal and should be deducted from the 152 votes which would leave 144 "yes" votes. It is unquestioned that 118 votes were "no" votes. We find that exhibits Nos. 2 and 3 should be counted as "no" votes, and therefore added to the 118 "no" votes which would make 120 "no" votes, against the proposition. It is also apparent that there are 2 "no" votes which were illegal, therefore, these 2 "no" votes should be deducted from the 120 "no" votes, leaving 118 "no"

votes, which, together with the 144 "yes" votes, constitute the 262 votes cast at the election by qualified electors. Therefore, the number of "yes" votes, for the proposition, would be less than 55 percent of the qualified electors voting on the proposition submitted, as required by law, and the proposition failed to carry.

We conclude the judgment of the trial court is right, and the same is hereby affirmed.

AFFIRMED.

MARGARET DANIELSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
54 N. W. 2d 56

Filed June 20, 1952. No. 33168.

1. **Trial.** A trial court may properly refuse tendered instructions which are covered by instructions given on its own motion.
2. **New Trial: Appeal and Error.** An exception to a group of instructions collectively in a motion for a new trial shall be deemed for the purpose of review in this court as a separate exception to each instruction included within the group.
3. ———: ———. The exceptions taken to a group of instructions in a petition in error need be no more specific than required in a motion for a new trial.
4. **Criminal Law.** Proof of prior convictions under section 39-727, R. S. Supp., 1949, is properly made by offering in evidence the complaint or information, the judgment rendered on the verdict or plea of guilty, proof that the judgment has become final, and evidence that defendant is the same person presently before the court.
5. ———. Compliance with a sentence lawfully imposed is not essential to the proof of a prior conviction under section 39-727, R. S. Supp., 1949.

ERROR to the district court for Sarpy County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

William N. Jamieson, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Bert L. Overcash,* for defendant in error.

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

CARTER, J.

The defendant below was charged with operating a motor vehicle while under the influence of alcoholic liquor. It was further charged by proper averments that the crime constituted a third offense. The jury returned a verdict finding the defendant guilty and the trial court sentenced her to confinement in the State Reformatory for Women for a time of not less than one year nor more than fifteen months. The defendant appeals.

The evidence shows that during the evening of April 24, 1951, patrolman Stewart E. Halpin observed defendant driving a Dodge panel truck near Bellevue, Nebraska, in such a manner that he believed her to be intoxicated. Patrolman Halpin, being off duty, reported the incident to Jack Pfeffer, a police officer at Bellevue. Pfeffer, accompanied by Louis Lienemann, another police officer at Bellevue, drove out on State Highway No. 131 and found the Dodge truck in the ditch. The defendant was seated behind the steering wheel of the truck. The evidence of defendant's alleged intoxication is substantially as follows: She smelled of intoxicating liquor; she was abusive towards the officers and had to be forcibly placed in the police car; she had to be assisted at the police station; she staggered when she walked; and her tongue was thick, her hair and clothing were disarranged, her eyes were glassy, and her language was vulgar. Several witnesses testified to these facts and expressed opinions based thereon that she was intoxicated. The evidence, although disputed by her, was ample to sustain the verdict of the jury under our holdings in Poppe v. State, *ante* p. 527, 52 N. W. 2d 422, and Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462.

The defendant complains of the failure of the trial court to give seven instructions requested by her. The

record discloses that the first five were given in substantially the language requested. The trial court may properly instruct in his own language and refuse tendered instructions, though correct, which are covered by the instructions given by the court. Instructions Nos. 6 and 7, requested by the defendant, purport to define the word "intoxicated" and the term "under the influence of alcoholic liquor" as they bear upon the issues of this case. The trial court gave an instruction upon this question and, if it is correct, no error can be predicated upon the court's refusal to give defendant's requested instructions Nos. 6 and 7.

Instruction No. 6, given by the court, is as follows: "The meaning of the term 'under the influence of alcoholic liquor' as applied to a person operating a motor vehicle is, if the alcoholic liquor has so far affected the nerves, brain and muscles of the operator of a motor vehicle so as to impair to any appreciable degree his ability to operate his motor vehicle in the manner that an ordinary prudent and cautious man, in full possession of his faculties would operate the same, then the operator of said motor vehicle is under the influence of alcoholic liquor."

The foregoing instruction appears to have been approved in People v. Dingle, 56 Cal. App. 445, 205 P. 705. It was followed in People v. Ekstromer, 71 Cal. App. 239, 235 P. 69.

Defendant relies upon Freeburg v. State, 92 Neb. 346, 138 N. W. 143, Ann. Cas. 1913E 1101, wherein an instruction employed the test of visible effect to determine if one was under the influence of intoxicating liquor. The instruction given in the present case does not limit its meaning to the test of visibility. The condition and actions of the defendant are included with that of the visible effect in determining whether defendant was driving a motor vehicle while "under the influence of alcoholic liquor." This removes the criticism contained in the Freeburg case. We find no error prejudicial to

the rights of the defendant in the giving of the trial court's instruction No. 6. We have examined the other instructions complained of and find them to be free from error.

The Attorney General argues that the errors claimed in the giving of instructions on the court's own motion and in the refusal of those tendered by the defendant are not properly before the court for the reasons stated in Gates v. City of North Platte, 126 Neb. 785, 254 N. W. 418, wherein it is said: "The instructions given were grouped in one assignment, and those refused were grouped in another assignment in the motion for new trial; hence, the instructions will not be reviewed, as all of them given were not erroneous, and at least one of the defendant city's requests was rightfully refused." In the case before us the assignments of error set forth in the petition in error, filed in this court, complied with the rule announced in Klause v. Nebraska State Board of Agriculture, 150 Neb. 466, 35 N. W. 2d 104. The exceptions taken to a group of instructions in a petition in error need be no more specific than required in a motion for a new trial. Consequently, the objections to the instructions were properly raised under the rule announced in the Klause case.

The defendant complains of the manner and form adopted in proving the first and second convictions of the defendant for operating a motor vehicle while under the influence of alcoholic liquor. The procedure followed was in conformity with that approved in Haffke v. State, *supra*. We reiterate that proof of such convictions is properly made by offering in evidence the complaint or information, the judgment rendered on the verdict or the plea of guilty, evidence that the judgment has become final, and that defendant is the same person presently before the court.

Defendant contends that the evidence is insufficient because it does not show that the sentences imposed in the prior convictions were served or paid. Such proof

is not relevant. The word "conviction" as used in section 39-727, R. S. Supp., 1949, means the adjudication by the court of defendant's guilt and the pronouncement by the court of the penalty imposed on the acceptance of a plea of guilty or a finding of guilt by the court. The actual service of imprisonment or the payment of a fine has nothing to do with the question of determining whether a conviction has or has not been had. State v. Smith, 160 Fla. 288, 34 S. 2d 533; State v. Volmer, 6 Kan. 379.

Prejudicial error is not pointed out or found in the record before us. The judgment is affirmed.

AFFIRMED.

ROBERT SCHREINER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
54 N. W. 2d 224

Filed June 20, 1952. No. 33178.

1. **Rape.** In a prosecution for assault with intent to commit rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
2. **Trial: Appeal and Error.** The correctness of the ruling of a district court in giving or refusing instructions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial.
3. **New Trial: Appeal and Error.** Whether a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown.
4. **Trial.** The charge or instruction required by law to be reduced to writing is only that which the court may have to say to the jury in regard to the principles of law applicable to the case and to the evidence; and hence an oral statement or communica-

tion by the court to the jury, which is rather in the nature of a cautionary direction, and not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, need not be in writing.

ERROR to the district court for Sheridan County: EARL L. MEYER, JUDGE. *Affirmed.*

Frank F. Aplan and *Charles A. Fisher,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Robert A. Nelson,* for defendant in error.

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

SIMMONS, C. J.

The plaintiff in error was charged by information with assault with intent to commit rape on a 14-year-old girl. He was tried, found guilty, and sentenced. He brings the cause here by petition in error. He will be hereinafter referred to as the defendant.

We consider the argued assignments in the order in which they arose at the trial.

Defendant contends that the corroborating evidence was insufficient to sustain the verdict.

The applicable rule is: "In a prosecution for assault with intent to commit rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." Hughes v. State, 154 Neb. 86, 46 N. W. 2d 904.

The evidence of the state is summarized. The prosecuting witness will be referred to herein as the girl, she was 14 years of age. The defendant was 24 or 25 years of age. On July 14, 1951, at 7:30 p. m., the girl met the

defendant on the streets of Rushville. She got into the seat of a truck which he was driving and with him went to the home of some of her friends in that city. They remained there some 15 or 20 minutes. The defendant and the girl in the truck then went east a short distance, left the main road, and turned into a side road which ran roughly parallel to the main road with a distance of 250 or 300 feet between them. There defendant stopped the truck. Defendant put his arm around the girl and pinched her. The girl was dressed on the evening in question in slacks, a blouse, shoes, and a head scarf. Defendant tried to unbutton her slacks. He started to grab her breasts. A fight ensued first in the truck, and the girl jumped out of the truck. Defendant grabbed her, they fought in a ditch along the highway, defendant threw the girl to the ground, held her there, slapped her, she kicked him, and got up and ran across to the adjoining highway, defendant chasing her. During the events in and near the truck, she lost one of her shoes. This evidence as to the occurrences in and near the truck are testified to by the girl. She reached the highway where she was found by a man and woman passing by as she came up on the shoulder of the road. These witnesses testified that she was crying and excited; her hair was disheveled; and she was without one shoe. She told them what had happened. On the same evening and within a few minutes she told her mother what had happened. Defendant was arrested later that evening. The shoe and scarf of the girl were found in his truck. Defendant was advised of the crime with which he was charged. The next day, defendant told the sheriff, "It don't hurt, a guy can try."

We hold that the evidence was ample to sustain the verdict of guilty.

Defendant tendered two requested instructions. The trial court refused to give them. Defendant did not assign this as error in the motion for a new trial.

The rule is: "The correctness of the ruling of a dis-

trict court in giving or refusing instructions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial." Lackey v. State, 56 Neb. 298, 76 N. W. 561. See, also, Barker v. State, 73 Neb. 469, 103 N. W. 71; Lukehart v. State, 91 Neb. 219, 136 N. W. 40.

During the deliberation of the jury and about 11 a. m., the bailiff furnished a dictionary to the jury, at its request. In a few minutes the court found out about it and required its redelivery. Defendant's counsel was absent, having been excused by the court. At 1:45 p. m., the court in the presence of the defendant and his counsel examined the jury on the matter. The foreman advised the court that they had looked up the definition of a word; that "we didn't get too much out of it"; and all the jurors advised the court that their deliberations had not in anywise been affected by the reference to the dictionary. The court did not stop there, but undertook to explain to the jury why their use of the dictionary was improper. He then told the jury "your verdict must be based alone upon the evidence and the instructions which I gave you; you can use your own general understanding, but not something which you may have gotten from a dictionary or some other source" and that "I want to be sure that you are influenced solely by the instructions given and the evidence here, and not something else."

It seems that before being called to the court room the jury had sent an inquiry to the court as to whether the verdict had to be signed by all of the jurors. The court orally answered: "* * * the foreman alone may sign it, but it must be agreed to and be the verdict of each member." At the conclusion of these matters, counsel for the State and defendant were given leave to examine the jury and had no questions to ask.

The defendant assigns as error the conduct of the jury with reference to the dictionary and error in the giving of oral instructions. Defendant largely relies on

the case of Harris v. State, 24 Neb. 803, 40 N. W. 317. There the jury got possession of a dictionary and the statutes, and used the dictionary to ascertain the meaning of a word. A reading of the decision shows that it turned not upon the use of the dictionary, but upon the use of the statutes to the extent recited in the opinion. In Matters v. State, 120 Neb. 404, 232 N. W. 781, a juror during deliberations produced a dictionary and read from it the definition of some words which were contained in an instruction. We held: "This conduct was highly improper. The jury should have relied solely upon the evidence for the facts, and upon the court's instructions for the law, of the case. Not every violation of the proprieties, however, is sufficient to reverse a judgment. It is only such misconduct of the jury as is calculated to prejudice the substantial rights of the defendant that is ground for a new trial. In Simmons v. State, 111 Neb. 644, this court held: 'Whether a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown.' This ruling was approved and adhered to in Murray v. State, 119 Neb. 16. The record does not disclose that any substantial right of defendant was affected by the alleged misconduct of the jury; * * *."

We reach the same conclusion in the instant case.

The trial court did orally instruct the jury that they were to follow the instructions already given and the evidence. He did orally instruct as to how to sign the verdict. Defendant assigns this as error in violation of provisions of the statutes that require all instructions to be in writing and forbid that they be "orally qualified, modified or in any manner explained to the jury by the court." § 29-2016, R. R. S. 1943.

In Grammer v. State, 103 Neb. 325, 172 N. W. 41, 174 N. W. 507, we considered a number of oral instructions given to a jury. We there adopted the following rule:

" 'The charge or instruction required by law to be reduced to writing is only that which the court may have to say to the jury in regard to the principles of law applicable to the case and to the evidence; and hence an oral statement or communication by the court to the jury, which is rather in the nature of a cautionary direction, and not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, need not be in writing.' "

The instructions here given fall into the classification of those not required to be in writing.

The defendant on his motion for new trial offered an affidavit of a juror that the verdict of guilty had been arrived at by the jury prior to the time the jury was called into court and prior to the oral discussion above summarized. It becomes apparent then by his own showing that he was not prejudiced by what was said by the court.

The judgment of the district court is affirmed.

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29. In a law action where a jury is waived, a finding of fact by the court will not be disturbed on appeal unless clearly wrong. *Grand Island Finance Co. v. Eacker* 546
Flaherty v. Carskadon 853
30. The Supreme Court will not in an appeal consider or determine the constitutionality of a statute unless it has been made an issue in the case in the trial court. *Johnson v. Richards* 552
31. Consideration of a case in Supreme Court will be limited to errors assigned and discussed, and an assignment of error not discussed will be considered waived. *Johnson v. Richards* 552
32. Where an employer appeals to the Supreme Court from an award of the district court in a workmen's compensation case and fails to obtain any reduction in the amount of such award, the Supreme Court should allow the employee a reasonable sum for attorney's fee for the proceedings in the Supreme Court. *Anderson v. Bituminous Casualty Co.* 590
33. The overruling of a motion to dismiss an appeal from the county court to the district court in a probate proceeding wherein upon the face of the record it appears that the district court upon appeal has jurisdiction of the subject matter for hearing upon the merits is not a final order from which an appeal can be taken to the Supreme Court. *Egan v. Bunner* 611
34. Upon appeal the same cause must be presented in the Supreme Court that was tried in the court below. If an issue is there tried by both parties, without objection from either that the issue is not sufficiently pleaded, such objection will not be considered in the Supreme Court as ground for reversal. *Franzen v. Blakley* 621
35. An issue not presented in the trial court may not be raised for the first time in the Supreme Court. *Freeman v. City of Neligh* 651
36. Affidavits used on the hearing of a motion for a continuance cannot be considered in the appellate court unless preserved by a bill of exceptions. *Freeman v. City of Neligh* 651
37. A motion for the continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the trial court. Unless abuse of such discretion is shown, ruling on the motion will not be disturbed. *Freeman v. City of Neligh* 651

38. Where an assignment of error in the Supreme Court fails to specify to which one or more of the various points made by a motion for new trial the assignment was intended to apply, it is too indefinite to present a question for review. *Perry v. Gross* 662

39. Where the issues in an action for criminal conversation are presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside unless clearly wrong. *Klinginsmith v. Allen* 674

40. The meaning of an instruction, not the phraseology, is the important consideration. A claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear. *Scarborough v. Aeroservice, Inc.* 749

41. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions, and the true meaning thereof will be determined by a consideration of all that is said on the subject. *Scarborough v. Aeroservice, Inc.* 749

42. Appeals in probate matters from the county court to the district court, except from the probate or denial of probate of wills and from the allowance or disallowance of claims filed against an estate, are tried in district court as cases in equity are conducted. *Cass v. Pense* 792

43. Appeals to the Supreme Court in probate matters, subject to certain exceptions, are heard and determined de novo. *Cass v. Pense* 792

44. If, on appeal, it is determined that the trial court erroneously sustained either a demurrer to the evidence or a motion to dismiss, both parties are entitled to be placed in the same position they were in before the error occurred. *Peterson v. Massey* 829

45. In order that assignments of error as to the admission or rejection of evidence may be considered, the rules of court require that appropriate reference be made to specific evidence against which objection is urged. *Flaherty v. Carskadon* 853

46. An action in equity is considered de novo in Supreme Court. *Bussell v. McClellan* 875

47. An exception to a group of instructions collectively in a motion for a new trial are deemed for the purpose of review in Supreme Court as a separate ex-

ception to each instruction included within the group. *Danielson v. State* 890
48. The exceptions taken to a group of instructions in a petition in error need be no more specific than required in a motion for a new trial. *Danielson v. State* 890
49. The correctness of the ruling of a district court in giving or refusing instructions cannot be considered in Supreme Court unless such ruling is first challenged by motion for a new trial. *Schreiner v. State* 894
50. Whether a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown. *Schreiner v. State* 894

Assignments.
1. Where an executory contract is rescinded by agreement of the parties an assignee of one of the parties of benefits which had not accrued at the time of rescission may not maintain action therefor against the other party in the absence of assumption of liability therefor by such other party. *Babson v. Village of Ulysses* 492
2. An assignment of a contract or a right flowing therefrom does not create a contractual obligation between the assignee and the other party to the contract in the absence of assumption of the liabilities of the assignor by the assignee. *Babson v. Village of Ulysses* 492
3. An assignee of the obligation of a contract takes subject to its burdens in the hands of the assignor and in order to recover he must show that the conditions have been performed. He is bound by the terms of the contract to the same extent as the assignor. *Babson v. Village of Ulysses* 492
4. An assignee of a non-negotiable chose in action ordinarily acquires no greater right than that possessed by his assignor. He stands in the shoes of the assignor and he cannot sue if the assignor could not have maintained the action. *Babson v. Village of Ulysses* 492

Attorney and Client.
1. An attorney may testify to factual matters relating to the execution of a will but anything in the na-

ture of a communication is privileged and inadmissible unless waived. *Nelson v. Glidewell* 372
2. The right to tax attorney's fees in compensation cases is purely statutory. No other authority to allow an attorney's fee is authorized. *Franzen v. Blakley* 621
3. Except as provided by law or by a uniform course of procedure, recovery of attorney's fees is not allowable in this jurisdiction. *Fulk v. School District* 630
4. The Supreme Court has the sole power to punish for contempt a person assuming to practice law within the state without having been licensed to do so. *Cornett v. State* 766

Automobiles.

1. The duty of a guest riding in an automobile is to use ordinary care. Ordinarily, the guest need not watch the road or advise the driver in the management of the car. *Sautter v. Poss* 62
2. When an action under the guest statute is based on gross negligence, the comparative negligence statute is applicable. *Sautter v. Poss* 62
3. The Certificate of Title Act was enacted for the protection of owners of motor vehicles, those holding liens thereon, and the public. *Bank of Keystone v. Kayton* 79
4. The Certificate of Title Act eliminates the practice of filing and recording chattel mortgages on motor vehicles in the chattel mortgage records, and substitutes the recording of such upon the certificate of title itself. *Bank of Keystone v. Kayton* 79
5. One holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificate of title to motor vehicles. *Bank of Keystone v. Kayton* 79
6. Under the act relating to certificates of title to motor vehicles, no valid lien can be asserted against a motor vehicle unless it is disclosed by a valid certificate of title regularly issued by the county clerk of the county in which the applicant resides. *Bank of Keystone v. Kayton* 79
7. A certificate of title of a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle. *Garbark v. Newman* 188

8. Under the Uniform Sales Act, if a buyer of an automobile for legal cause rescinds the purchase and the seller refuses the offer of return of the vehicle, the buyer becomes a bailee for hire of the property, subject to a lien to secure repayment of the price paid, and is entitled to reasonable compensation from the seller for its care and protection. The buyer may in such a situation place the property in storage, and if he does, the seller is liable for and may be required to pay the reasonable storage charges as a prerequisite of his securing possession of the property. *Garbark v. Newman* 188
9. Installation and use of warning devices on motor-propelled vehicles is required to apprise pedestrians and other drivers of the approach of an on-coming car. The duty to sound a signal warning of the approach of a motor vehicle depends largely on the circumstances of the particular case. *Adams v. Welliver* 331
10. It is the duty of the driver of an automobile to exercise reasonable care in its operation. When pedestrians are numerous and traffic is congested, the degree of care required must be commensurate with the danger reasonably to be anticipated. *Adams v. Welliver* 331
11. 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. *Adams v. Welliver* 331
12. A pedestrian is required to exercise a greater degree of care between intersections than at a crosswalk where protection is afforded by giving the pedestrian the right-of-way. *Wilson v. Wiggins* 382
13. One who crosses a street between intersections is required to keep a constant lookout in all directions from which danger should reasonably be anticipated. *Wilson v. Wiggins* 382
14. One who attempts to cross a street between intersections without looking is guilty of such negligence as would bar a recovery as a matter of law. *Wilson v. Wiggins* 382
15. Unless some reasonable excuse is shown, one who is obligated to keep a lookout is required to see that which is in plain sight. Where he fails to do so, his negligence is sufficient to defeat a recovery. *Wilson v. Wiggins* 382

16. Rules applicable stated under statute providing that every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, crosswalk, or intersection shall yield the right-of-way to vehicles upon the highway. *Wilson v. Wiggins* 382
17. Gross negligence within the meaning of the automobile guest statute means negligence in a very high degree, or the absence of even slight care in the performance of a duty. *Pavlicek v. Cacak* 454
18. In an action under the automobile guest statute a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence. *Pavlicek v. Cacak* 454
19. Imposition of increased penalty for subsequent violations of motor vehicle statute is constitutional. *Poppe v. State* 527
20. Evidence as to the identification of the defendant as the same person charged and convicted of two previous offenses under motor vehicle statute was sufficient to identify the defendant as the same person. *Poppe v. State* 527
21. The presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to exercise a degree of care commensurate with surrounding circumstances. *Murray v. Pearson Appliance Store* 860
22. Rule with respect to duty of driver of motor vehicle to keep a proper lookout stated. *Murray v. Pearson Appliance Store* 860
23. As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. *Murray v. Pearson Appliance Store* 860

Bailments.

Generally a bailee is charged with the amount and kind of care of the subject of the bailment that

would be exercised by an ordinarily prudent person in the same or similar circumstances. *Garbark v. Newman* 188

Bills and Notes.

1. In an action between the original parties to a promissory note, general principles of estoppel apply in determining whether or not defendant is estopped to defend upon the ground that there was a failure of consideration. *Cotner College v. Estate of Hester* 279
2. As between the parties, the consideration for a subscription note is tested by the situation existing at the time it is sought to enforce the subscription. *Cotner College v. Estate of Hester* 279
3. It is implied that the money shall not be diverted from the purpose of a subscription note and that the enterprise shall not be abandoned. *Cotner College v. Estate of Hester* 279

Cancellation of Instruments.

Where it is sought to set aside a written instrument on account of fraud, the presumptions of validity and regularity attaching to such a document require clear and convincing evidence to preponderate against them. The formal instrument furnishes proof of the most cogent and solemn character, and to outweigh this proof requires a higher quality of evidence than in a case where there are no such presumptions to overcome. *Johnston v. Johnston* 222

Carriers.

A private carrier is one that is not bound to carry for any reason unless the obligation to do so is voluntarily assumed by virtue of a special contract. Such carrier is liable only for such loss or injury as results from a failure to exercise ordinary care. *Scarborough v. Aeroservice, Inc.* 749

Charities.

In the absence of any stipulations upon the subject in the subscription, the abandonment of a charitable or public enterprise releases the subscriber to its fund. *Cotner College v. Estate of Hester* 279

Chattel Mortgages.

The Certificate of Title Act eliminates the practice of filing and recording chattel mortgages on motor ve-

hicles in the chattel mortgage records, and substitutes the recording of such upon the certificate of title itself. *Bank of Keystone v. Kayton* 79

Children Born out of Wedlock.

The amount which a defendant in a paternity proceeding will be required to pay for the support of his child is in the discretion of the district court. The award will not be disturbed unless discretion has been abused and it is manifestly excessive. *Race v. Mrsny* 679

Clerks of Courts.

Money paid to the clerk of the court pursuant to an order or judgment of the court is received by the clerk in his official capacity. *Webber v. City of Scottsbluff* 48

Colleges and Universities.

1. In the absence of any stipulations upon the subject in the subscription, the abandonment of a charitable or public enterprise releases the subscriber to its fund. *Cotner College v. Estate of Hester* 279
2. It is implied that the money shall not be diverted from the purpose of a subscription note and that the enterprise shall not be abandoned. *Cotner College v. Estate of Hester* 279

Constitutional Law.

1. When an increase or decrease in compensation occurs during an officer's term because of a change in population after his election, such increase or decrease in compensation does not violate the constitutional provision that the compensation of a public officer shall not be increased or diminished during his term. *Hamilton v. Foster* 89
2. The practice of osteopathy is recognized by law as a lawful occupation in the public interest. It may not be arbitrarily limited or discriminated against, and its advocates may lawfully operate property and facilities for the treatment, according to its tenets, of patients seeking its aid, subject only to reasonable regulations under the police power relating to the public health and welfare. *Morgan v. State* 247
3. A regulation adopted by the Department of Health that all persons admitted to a licensed hospital must

be under the care of a person licensed to practice medicine and surgery in Nebraska has no relation to health or public welfare, is unreasonable, discriminatory and capricious, is an unlawful exercise of the police power, and is invalid. *Morgan v. State* 247

4. Imposition of increased penalty for subsequent violations of motor vehicle statute is constitutional. *Poppe v. State* 527

5. Constitutional guarantees are of little avail unless carried out in the spirit in which they were framed. No plea of public benefits should be permitted to impoverish the owner of private property or override a plain constitutional inhibition. *Quest v. East Omaha Drainage Dist.* 538

6. One of the incidents of taking property by eminent domain is that not only is the condemnor liable to compensate for the taking, but also is liable for consequential damage to other property in excess of the damage sustained by the public at large. *Quest v. East Omaha Drainage Dist.* 538

7. In the provision of the Constitution of Nebraska authorizing recovery for damage to property for public use, the words, "or damaged," include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. *Quest v. East Omaha Drainage Dist.* 538

8. In a suit to recover damages under the constitutional provision for damage to property for public use, it is immaterial whether the petition states a cause of action ex delicto or ex contractu. If the fact is established that property has been damaged for public use, the owner is entitled to compensation. *Quest v. East Omaha Drainage Dist.* 538

9. In a case based on the constitutional provision with respect to taking or damaging of property for public use, proof of negligence or the commission of a wrongful act is not necessary to a recovery. *Quest v. East Omaha Drainage Dist.* 538

10. In an action for damages against a drainage district for the damaging of private property for a public use, it is not necessary for plaintiff to plead or prove that he filed a notice as to how and when the damage had occurred. *Quest v. East Omaha Drainage Dist.* 538

11. The Supreme Court will not in an appeal consider or determine the constitutionality of a statute un-

less it has been made an issue in the case in the trial court. *Johnson v. Richards* 552
12. Statute with respect to improvement of streets is not unconstitutional for failure of lawful classification of property owners or violation of due process. *Freeman v. City of Neligh* 651
13. Conviction of contempt was not violative of the due process provisions of the state and federal Constitutions. *Cornett v. State* 766
14. Blanket Mill Tax Levy Act is not unconstitutional for defect of title. *Peterson v. Hancock* 801
15. Sections 4 and 5 of the Blanket Mill Tax Levy Act are unconstitutional because of lack of uniformity. *Peterson v. Hancock* 801
16. Invalid portions of Blanket Mill Tax Levy Act are so connected with remainder that entire act is unconstitutional. *Peterson v. Hancock* 801

Contempt.

1. The Supreme Court has the sole power to punish for contempt a person assuming to practice law within the state without having been licensed to do so. *Cornett v. State* 766
2. In determining the sufficiency of an information, the test is whether or not enough remains after rejecting all unnecessary averments thereof to satisfy the requirements of a sufficient information. *Cornett v. State* 766
3. If the conduct charged is contemptuous of the district court and of the Supreme Court at the same time, the wrongdoer may be proceeded against in the district court for so much of the conduct that constitutes a constructive contempt of that court. *Cornett v. State* 766
4. If the facts pleaded in an information in contempt clearly show that the act complained of was willful, the information is not fatally defective for failure to use the word "willful." *Cornett v. State* 766
5. The issuance of an order to show cause as a means of obtaining jurisdiction of the person of the defendant does not have the effect of shifting the burden of proof from the state to the defendant. *Cornett v. State* 766
6. A proceeding for a constructive contempt must be instituted in the court toward which the contempt is directed. *Cornett v. State* 766

7. When the facts pleaded in an information charging a constructive criminal contempt show that the contempt was directed toward the court in which the proceeding was filed, the information is sufficient to confer jurisdiction upon that court. *Cornett v. State* 766
8. Where a person, for the purpose of securing money for himself, falsely pretends to another who is interested in pending litigation that he can corruptly influence the course of the suit by approaching officers of the court with money, his conduct is contemptuous of the court toward which it is directed. *Cornett v. State* 766
9. Where the purpose of an act is to create in the mind of another a belief that courts or their officers are dishonest and that justice can be bought, it constitutes a hindrance to the due administration of justice which the court toward which it is directed may punish. *Cornett v. State* 766

Continuances.

1. Affidavits used on the hearing of a motion for a continuance cannot be considered in the appellate court unless preserved by a bill of exceptions. *Freeman v. City of Neligh* 651
2. A motion for the continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the trial court. Unless abuse of such discretion is shown, ruling on the motion will not be disturbed. *Freeman v. City of Neligh* 651

Contracts.

1. The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties. *In re Estate of Bingaman* 24
2. Existing statutes and laws with reference to which a contract is made enter into and become part thereof, subject to appropriate legislative limitations subsequently enacted under the police power of the state, and such principle embraces alike those which affect its validity, construction, discharge, and enforcement. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141
3. When a statute prescribes a duty and a contract is made involving performance of that duty, such statute becomes a part of the contract. Where the

law authorizes the regulation of service rendered the public, such law becomes a part of and controls contracts providing for the public service. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141

4. Where from the nature of a contract it is evident that the parties contracted on the basis of the continued existence of a condition or state of things to which it relates, the cessation of existence of the condition will excuse performance, a condition to such effect being implied in spite of the fact that the promise may have been unqualified. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141

5. A construction conferring a right in perpetuity will be avoided unless compelled by unequivocal language of the contract. A contract will not be construed as imposing a perpetual obligation when to do so would be adverse to public interests. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141

6. Where a contract requires successive steps to be taken by the respective parties, if, when a step becomes due, one party either in words or by their equivalent in acts declines to take it or is unable to do so while the other is ready and willing to do his part, the latter may rescind the contract. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141

7. If a material change in the plan or purpose for which a subscription is made is effected without the consent of the subscriber, he is excused from performing his promise unless estopped to deny his consent to the change. *Cotner College v. Estate of Hester* 279

8. Where there is a total failure of consideration and defendant has derived no benefit beyond the amount of money which he has already advanced, such failure of consideration may be shown in bar of the action. *Cotner College v. Estate of Hester* 279

9. The doctrine of substantial performance has no application where the party obligated to perform deliberately and intentionally departs from the terms of the contract and attempts to substitute another type of performance. *Cotner College v. Estate of Hester* 279

10. It does not follow that, because a technical rescission has not been and cannot be made, a defendant cannot avail himself of the defense of want or failure of consideration. *Cotner College v. Estate of Hester* 279

11. Duty to make compensation is discharged in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited by a judicial order made with due authority by a judge who has jurisdiction of the subject matter and the parties. *Kuhl v. School District* 357
12. Courts will not resort to construction where the terms of a contract are clear and plain, and the interests of the parties are clearly expressed. *Platte Valley P. P. & I. Dist. v. Cover* 479

Corporations.

A corporation is a complete entity, separate and distinguishable from its stockholders and officers. *Safeway Cabs, Inc. v. Honer* 418

Costs.

1. A person who has been brought in as a party to an action between others is ordinarily entitled to recover his costs if no cause of action against him is established and he is not shown to have any interest in the subject matter of the litigation. *Stocker v. Wells* 472
2. Unless it appears that depositions were not taken in good faith or were actually unnecessary, costs of taking them are properly taxable although they were not used at the trial. *Stocker v. Wells* 472
3. The discretion conferred upon the trial court in taxing costs is not arbitrary but a legal one to be exercised within the limitations of legal and equitable principles. *Stocker v. Wells* 472
4. Representatives of estates are personally liable for costs incurred on an appeal resulting from their fault or misconduct. *Breuer v. Cassidy* 836

Counties.

1. Under the County Budget Act, the prohibition against creating indebtedness does not relate to the condition of the budget at the time a claim is filed or acted on by the board but to the time the contract is entered into or liability incurred for any of the purposes for which provision is made in the budget. *Becker v. County of Platte* 180
2. When a private citizen is impressed into service by the sheriff, a contract of employment with the county

results. The county so employing a citizen becomes liable to him for the reasonable value of the services he renders at the direction of the sheriff. *Anderson v. Bituminous Casualty Co.* 590

Courts.

1. The exercise of judicial functions is required when it comes to the stage of compensating the owner of the property in eminent domain proceedings. *Webber v. City of Scottsbluff* 48
2. The owner of the property to be condemned is entitled to notice of the proceedings and an opportunity to protect his rights. *Webber v. City of Scottsbluff* 48
3. Jurisdictional defects may be noticed at any stage of the proceedings. If the court proceeds without jurisdiction the whole proceedings are void. *Webber v. City of Scottsbluff* 48
4. A party invoking the court's jurisdiction in a case where the court has jurisdiction of the subject matter is estopped to object thereto afterward. *Webber v. City of Scottsbluff* 48
5. Whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done. *Spreitzer v. State* 70
6. The character of an action is not changed by an improper transfer thereof from a law to an equity docket. *Garbark v. Newman* 188
7. A litigant cannot trifle with the processes of the court by asserting under oath at different times the truth of each of two or more contradictory versions of an event or events in controversy according to the necessities of the particular occasion presenting itself. *Rahfeldt v. Swanson* 482
8. The rule of practice and procedure in criminal cases promulgated under the authority of the Constitution providing for determination by court if increased penalty for subsequent offenses is adhered to. *Poppe v. State* 527
9. The county court has no jurisdiction over a claim against the estate of a decedent, which is not properly filed for allowance until after it has been finally barred by the statute of nonclaims. *Breuer v. Cassidy* 836

Covenants.

The language of an instrument frequently requires construction to determine whether it creates a condition subsequent, a covenant, or both. When found to create both, the person entitled to enforce the covenant is entitled to all equitable relief normally available with respect to such a covenant, despite the fact that a condition subsequent also exists. *Dahlke v. Dahlke* 169

Criminal Law.

1. In a criminal action, the Supreme Court will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. *Spreitzer v. State* 70
   Schmidt v. State 369
   Poppe v. State 527
2. It is proper to charge, and error to refuse to charge, that a reasonable doubt may arise either from the evidence or from a want of evidence, and that the absence of sufficiently satisfying evidence may be a ground for a reasonable doubt of defendant's guilt. *Spreitzer v. State* 70
3. Where an information is filed under the Probation Act charging a violation of an order of probation, the endorsing of the names of witnesses on an information is not mandatory and the failure to do so is not error. *Young v. State* 261
4. It is entirely proper for the court, where probation violation is established, to inquire into the matters covered by the Probation Act in determining whether or not the probation order should be vacated and the penalty of the law imposed. *Young v. State* 261
5. It is not error, in the absence of a showing that defendant was prejudiced thereby, to sentence a defendant after verdict and before a motion for a new trial has been filed. *Young v. State* 261
6. In a criminal case, the court is not required to defer judgment until the statutory time for filing a motion for a new trial has expired. *Young v. State* 261
7. In determining whether or not to set aside a probationary order and to impose the penalty which it might have imposed before placing the defendant on probation, the trial court is not limited to a consider-

ation of probative evidence of matters arising subsequent to the order of probation. *Young v. State* 261

8. 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. *Young v. State* 261

9. The rule of practice and procedure in criminal cases promulgated under the authority of the Constitution providing for determination by court if increased penalty for subsequent offenses is adhered to. *Poppe v. State* 527

10. When a proper record of a previous conviction has been produced, it becomes a matter of law for the court to determine whether or not that record establishes a previous conviction for the violation of a statute. *Poppe v. State* 527

11. Evidence as to the identification of the defendant as the same person charged and convicted of two previous offenses under motor vehicle statute was sufficient to identify the defendant as the same person. *Poppe v. State* 527

12. Where a person accused of crime is found within the territorial jurisdiction where he is so charged, the right to put him on trial for the offense charged is not impaired by the fact that he was brought from another jurisdiction by illegal means such as unlawful force or fraud. *Howell v. Hann* 698

13. Compliance with a sentence lawfully imposed is not essential to the proof of a prior conviction under statute imposing heavier penalty on conviction of subsequent offense. *Danielson v. State* 890

14. Proof of prior conviction under motor vehicle statute imposing heavier penalty for subsequent convictions is properly made by offering in evidence the complaint or information, the judgment rendered on the verdict or plea of guilty, proof that the judgment has become final, and evidence that defendant is the same person presently before the court. *Danielson v. State* 890

Damages.

1. The recovery of proximate special damages is recognized in this state. *Garbark v. Newman* 188

2. In an action for damages by floodwaters of a stream allegedly caused by the negligent construction of

jetties and a dike, the burden of proof is on the plaintiffs to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto, together with the nature and extent of the increased overflow, if any, and the amount of damages caused thereby. *Stolting v. Everett* 292

3. Where there are elements of damage, such as expenditures, capable of pecuniary measurement, the law requires the amount shall be proved. *Murray v. Pearson Appliance Store* 860

Death.

1. A child born dead cannot maintain an action at common law for injuries received by it before its birth. *Drabbels v. Skelly Oil Co.* 17
2. Since no cause of action accrues to a child born dead for prenatal injuries, none survives to the personal representative under the wrongful death statute. *Drabbels v. Skelly Oil Co.* 17

Deeds.

1. Where the language of a deed conveying a remainder interest to a class does not provide for a defeasance in case of the death of one of the class during the continuance of the life estate the vested interest of such member of the class does not lapse but descends to his heirs. *Semrad v. Semrad* 209
2. A deed is not to be held a mortgage unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase and not a mortgage. *Dingwerth v. Assendrop* 343

Descent and Distribution.

Real estate not disposed of by will becomes intestate property and descends to the heirs at law of the testator. *Jacobsen v. Farnham* 776

Divorce.

1. If the circumstances of the parties shall change or it shall be to the best interests of the children, the court may on its own motion or on the petition of either parent revise or alter, to any extent, a divorce

decree as it concerns the care, custody, and maintenance of the children. *Stanley v. Stanley* 125
2. A party may not in an action for divorce challenge the right of a plaintiff to maintain an action after having filed cross-petition therein for divorce and having obtained the relief prayed for. *Chambers v. Chambers* 160
3. Rule for determination of alimony and division of property in divorce case is stated. *Chambers v. Chambers* 160
Parker v. Parker 325
Dolen v. Dolen 347
4. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties. *Parker v. Parker* 325
5. The exact amount or degree of corroboration required in a divorce case cannot be stated, and each case must be determined upon its facts and circumstances. *Parker v. Parker* 325
6. Extreme cruelty may consist of physical violence, it may be conduct of such a character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom it is inflicted, or it may be such conduct as to destroy the objects of matrimony. *Parker v. Parker* 325
7. A litigant may not have the benefit of condonation unless it is properly pleaded. *Zutavern v. Zutavern* 395
8. In an action by the husband to annul a marriage, the wife is entitled to alimony pendente lite and counsel fees, and the fact that the husband proceeds by cross-petition instead of an original suit does not affect the rule. *Zutavern v. Zutavern* 395
9. Alimony, payable in monthly installments, is generally considered as terminating on the death of either of the parties, where no statute to the contrary exists and the judgment or decree is silent on the subject. *Masters v. Masters* 569
10. A judgment for alimony requiring monthly payments until further order of the court terminates on the death of the husband, where there are no directions or circumstances indicating an intent to provide for payments after his death. *Masters v. Masters* 569

Easements.

1. Title by prescription to an easement can be obtained substantially in the same manner as title to

real estate by adverse possession. *Jurgensen v. Ainscow* 701

2. To establish an easement by prescription, there must be a use having all of the elements of adverse possession, and the use must continue for the full prescriptive period. *Jurgensen v. Ainscow* 701
3. To prove a prescriptive right to an easement all of the elements to a prescriptive use must be generally established by clear, convincing, and satisfactory evidence. *Jurgensen v. Ainscow* 701
4. Where a claimant has shown adverse use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid acquisition of easement by prescription, has the burden of showing the use to be permissive. *Jurgensen v. Ainscow* 701
5. Acquiscence on the part of the owner which is necessary to acquisition of a prescriptive easement means passive assent or submission. *Jurgensen v. Ainscow* 701
6. If the use of an easement has been open, adverse, notorious, peaceable, and uninterrupted, the owner of the servient tenement is charged with knowledge of such use, and acquiscence in it is implied. *Jurgensen v. Ainscow* 701
7. The extent and nature of an easement is determined from the use actually made of the property during the running of the prescriptive period. *Jurgensen v. Ainscow* 701
8. The term "exclusive use" does not mean that no one has used the easement except the claimant. It simply means that his right to do so does not depend upon a similar right in others. *Jurgensen v. Ainscow* 701
9. "Actual possession" means the corporeal detention of the property when used in relation to adverse possession. *Jurgensen v. Ainscow* 701

Elections.

1. Any election at which there is a general popular expression of the public will, whether that election be a state, county, or city election, is a general election. *Allen v. Tobin* 212
2. The constitutional and statutory definitions of a general state election are not conclusive to the ex-

tent of including a general municipal election. *Allen v. Tobin* 212

3. A petition signed by the electors of any city or village of such number as shall equal twenty percent of the votes cast at the last general municipal election held therein is sufficient to comply with provision of Liquor Control Act requiring calling of election. *Allen v. Tobin* 212
4. When a petition meets the requirements of the Liquor Control Act to submit to the electorate of any city or village the proposition of sale of alcoholic liquors by the drink, except beer, such petition vests jurisdiction in the proper city officials to call an election for such purpose. *Allen v. Tobin* 212
5. Under the provisions of the Liquor Control Act liquor may be sold by the drink in any city or village where the people thereof authorize it. *Allen v. Tobin* 212
6. To authorize issuance of bonds for the purpose of building a new school building and securing the necessary furniture and apparatus for the same, the vote of 55 percent of all qualified electors of the school district voting on the proposition in favor thereof is required. *Greathouse v. School District* 883
7. It is the policy of the law to prevent the disfranchisement of qualified electors who have cast their ballots in good faith by requiring only a substantial compliance with the election laws of the state. *Greathouse v. School District* 883
8. On the trial of a contested election ballots will not be treated as void simply because of irregular or unauthorized markings or mutilations which appear to have been innocently made as the result of awkwardness, inattention, mistake, or ignorance, if the lawful intent of the voter can be ascertained therefrom. *Greathouse v. School District* 883
9. Under School Bond Issue Act, requiring a proposal for the issuance of school bonds to be adopted by 55 percent of the ballots cast at the election by qualified electors of the school district on the question, ballots improperly cast or rejected for illegality cannot be counted in determining the vote cast. *Greathouse v. School District* 883
10. In the absence of statutory provision to the contrary, ballots which have been cast in a school district election which are entitled by law to be counted in declaring the result of the election shall

alone be counted in determining the vote cast. *Greathouse v. School District* 883

Eminent Domain.

1. Statutes prescribing proceedings for the condemnation of property must be strictly construed against the condemnor and in favor of the landowner. *Webber v. City of Scottsbluff* 48
2. Eminent domain statute should not be so strictly construed as to defeat the purpose sought to be accomplished. *Webber v. City of Scottsbluff* 48
3. The exercise of judicial functions is required when it comes to the stage of compensating the owner of the property in eminent domain proceedings. *Webber v. City of Scottsbluff* 48
4. The owner of the property to be condemned is entitled to notice of the proceedings and an opportunity to protect his rights. *Webber v. City of Scottsbluff* 48
5. On appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings. *Webber v. City of Scottsbluff* 48
6. In an appeal to the district court from the award of appraisers in a proceeding for condemnation of land for the use of a municipal corporation, if the verdict of the jury exceeds the award of the appraisers the verdict bears interest from the date of the appropriation. *Miller v. City of Scottsbluff* 185
7. When lands are taken through exercise of the power of eminent domain, the owners thereof are entitled to recover as full compensation for the lands actually taken and for damages to the remainder thereof such an amount as is equivalent to the diminution of the fair market value thereof resulting therefrom. *Medelman v. Stanton-Pilger Drainage Dist.* 518
8. The market value of property includes its value for any reasonable use to which it may be adaptable. *Medelman v. Stanton-Pilger Drainage Dist.* 518
9. The purchase of property by a public corporation, where it could have been acquired by the power of eminent domain, carries with it all the incidents of taking or damaging by eminent domain insofar as the question of damages by reason of the taking or damaging is concerned. *Quest v. East Omaha Drainage Dist.* 538

10. One of the incidents of taking property by eminent domain is that not only is the condemnor liable to compensate for the taking, but also is liable for consequential damage to other property in excess of the damage sustained by the public at large. *Quest v. East Omaha Drainage Dist.* 538
11. In the provision of the Constitution of Nebraska authorizing recovery for damage to property for public use, the words, "or damaged," include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. *Quest v. East Omaha Drainage Dist.* 538
12. In a suit to recover damages under the constitutional provision for damage to property for public use, it is immaterial whether the petition states a cause of action ex delicto or ex contractu. If the fact is established that property has been damaged for public use, the owner is entitled to compensation. *Quest v. East Omaha Drainage Dist.* 538
13. Where land is not taken, the measure of damages is the difference in market value before and after the damaging, taking into consideration the uses to which the land was put and for which it was reasonably suitable. *Quest v. East Omaha Drainage Dist.* 538
14. Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to which the property owner is entitled. *Quest v. East Omaha Drainage Dist.* 538
15. In fixing the damages sustained by a landowner in consequence of the appropriation or injury of his property for a public use, the jury may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property. *Quest v. East Omaha Drainage Dist.* 538
16. In a case based on the constitutional provision with respect to taking or damaging of property for public use, proof of negligence or the commission of a wrongful act is not necessary to a recovery. *Quest v. East Omaha Drainage Dist.* 538
17. In an action for damages against a drainage district for the damaging of private property for a public use, it is not necessary for plaintiff to plead

or prove that he filed a notice as to how and when the damage had occurred. *Quest v. East Omaha Drainage Dist.* 538

Equity.

1. Where property is transferred to another subject to the payment of a certain sum to a third person, an equitable charge and not a trust is created. Where property is transferred to another with direction to pay to a third person a certain sum out of the property or its proceeds, a trust and not an equitable charge is created. *Dahlke v. Dahlke* 169
2. In the case of an equitable charge, the person having title to property holds it subject to an equitable interest in another person, and the equitable encumbrancer has an equitable lien thereon. The person who holds subject to the charge is the owner of the property, subject only to the lien. *Dahlke v. Dahlke* 169
3. An original action in equity is an appropriate and permissible remedy to exclude or detach land unlawfully included in the area of an irrigation district. *Smith v. Frenchman-Cambridge Irrigation Dist.* 270
4. If a party is not guilty of inequitable conduct toward the other person concerned in that transaction, the equitable doctrine of clean hands does not apply. *Zutavern v. Zutavern* 395
5. In an equity suit where a motion to dismiss at the conclusion of plaintiff's evidence was improperly sustained, the cause should be remanded for a new trial. *Rosebud Lumber and Coal Company v. Holms* 459
6. Where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation. *Brehan v. The Crete Mills* 505
7. Laches is not available to defeat an action in equity where there has been no material change in the defendant's position or in the subject matter of the action caused by plaintiff's delay; nor where the plaintiff has been ignorant of his rights, or, though apprehensive of them, there was such an obscurity in the transaction that it was difficult to gain the facts upon which to maintain the action. *Fulk v. School District* 630
8. In dealing with legal rights, equity adopts and follows the rules of law. Whenever there is an ex-

plicit 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. *In re Petition of Ritchie* 824

9. The maxim "Equity follows the law" means that equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in common or statute law. *In re Petition of Ritchie* 824

10. The maxim "Equity follows the law" is applicable whenever the rights of the parties are clearly defined and established by law, especially when defined and established by constitutional or statutory provisions. *In re Petition of Ritchie* 824

11. An equity court will not by its decree set aside legislative enactments or render for naught their mandates. *In re Petition of Ritchie* 824

12. Adoption proceedings do not depend upon equitable principles. Where the essential statutory requirements have not been met, equity cannot decree an adoption. *In re Petition of Ritchie* 824

Estates.

1. Where two unequal estates vest in the same person at the same time, without an intervening estate, the smaller is thereupon merged in the greater. *Central Construction Co. v. Highsmith* 113

2. Merger does not always or necessarily result from a coinciding of estates. *Central Construction Co. v. Highsmith* 113

3. Whether two estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the then intention of the party acquiring the two estates, and the equities of the parties to be affected. *Central Construction Co. v. Highsmith* 113

4. An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that upon the occurrence of a stated event, the conveyor or his successor in interest shall have the power to terminate the estate so created. *Dahlke v. Dahlke* 169

5. When a transferor having an estate in fee simple absolute transfers it subject to a condition subsequent, the transferee is regarded as having received the entire estate of the transferor, who, by virtue

of his reserved power of termination has the power to regain his former estate if and when there is a breach of the condition subsequent. *Dahlke v. Dahlke* 169

6. The owner of an estate in fee simple defeasible may be restricted in his uses of the affected land by an outstanding easement or profit or restricting covenant; or his estate may be subject to a money charge in favor of a third person which operates as a lien thereon. *Dahlke v. Dahlke* 169
7. The language of an instrument frequently requires construction to determine whether it creates a condition subsequent, a covenant, or both. When found to create both, the person entitled to enforce the covenant is entitled to all equitable relief normally available with respect to such covenant, despite the fact that a condition subsequent also exists. *Dahlke v. Dahlke* 169
8. Where the grantor conveys real estate to a life tenant with remainder to the children of the life tenant, all children of the life tenant whether in being or born thereafter during the continuance of the life estate are included as remaindermen. *Semrad v. Semrad* 209
9. Where the language of a deed conveying a remainder interest to a class does not provide for a defeasance in case of the death of one of the class during the continuance of the life estate, the vested interest of such member of the class does not lapse but descends to his heirs. *Semrad v. Semrad* 209

Estoppel.

1. A party invoking the court's jurisdiction in a case where the court has jurisdiction of the subject matter is estopped to object thereto afterward. *Webber v. City of Scottsbluff* 48
2. A person who has given a reason for his conduct and decision concerning a matter involved in controversy cannot, after litigation has begun, change his position and place or explain his conduct upon a different consideration. *Garbark v. Newman* 188
3. Equitable estoppel arises from conduct of a party whereby he is absolutely precluded from asserting rights which might have otherwise existed as against another person who in good faith relied upon such conduct and has been led thereby to change his

position for the worse. *Cotner College v. Estate of Hester* 279

4. In an action between the original parties to a promissory note, general principles of estoppel apply in determining whether or not defendant is estopped to defend upon the ground that there was a failure of consideration. *Cotner College v. Estate of Hester* 279

Evidence.

1. While a court will take judicial notice of its records, it will not ordinarily in one case take such notice of the record in another case. *Anderson v. Anderson* 1
2. The doctrine that the court will take judicial notice of a final order made by it in another case which is interwoven and interdependent with the pending case is an exception to the general rule, recognized by the necessity of giving effect to a former holding. *Anderson v. Anderson* 1
3. A litigant may withdraw his motion for a mistrial because of the admission of prejudicial evidence at any time prior to the court's ruling thereon. *Pope v. Tapelt* 10
4. A litigant who adduces evidence allegedly prejudicial from a witness on cross-examination, and makes no timely objection thereto, thereby waives any claim of error in its admission. *Pope v. Tapelt* 10
5. Circumstantial evidence is insufficient to sustain a verdict or to require submission of a case to a jury unless the circumstances proved by the evidence are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom. *In re Estate of Bingaman* 24
6. Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony. *Stolting v. Everett* 292
   Medelman v. Stanton-Pilger Drainage Dist. 518
7. When two or more persons employ the same attorney in relation to the same business their communications are not privileged between themselves where the disclosures are made in the presence of all parties concerned or are intended for the information of all parties. *Nelson v. Glidewell* 372
8. Either lay or expert witnesses may testify as to the value of a tract of land taken or the value of the

remainder thereof immediately before and immediately after the taking if proper foundation is laid, the weight and credibility of their testimony being for the jury. *Medelman v. Stanton-Pilger Drainage Dist.* 518

9. Parol evidence of a prior or contemporaneous oral agreement is not admissible to vary, alter, or contradict the terms of a written agreement. *Perry v. Gross* 662

10. The parol evidence rule is one of substantive law as well as of evidence. As a rule of substantive law, it renders ineffective proof of prior or contemporaneous oral agreement tending to vary, alter, or contradict the terms of a written agreement. *Perry v. Gross* 662

11. As an exception to the parol evidence rule, a distinct oral agreement constituting a condition on which performance of a written contract or agreement is to depend may be proven. *Perry v. Gross* 662

12. Statements made by plaintiff's wife to plaintiff out of the presence of defendant are inadmissible in an action for criminal conversation to prove the alleged wrongful conduct of the defendant. *Klinginsmith v. Allen* 674

13. In an action for criminal conversation, statements made by plaintiff's wife out of the presence of defendant are only admissible where alienation of affections is pleaded by plaintiff as an issue or element of damages and then only when relevant and offered for the limited purpose of showing the wife's state of mind or feelings toward plaintiff. *Klinginsmith v. Allen* 674

14. The exclusion of evidence fully established by other competent and uncontradicted evidence is not reversible error. *Klinginsmith v. Allen* 674

15. The admission of cumulative evidence is ordinarily within the discretion of the trial court and its ruling thereon will not be held erroneous unless it clearly appears that such discretion has been abused. *Klinginsmith v. Allen* 674

16. The necessity of giving effect to a former holding which finally decided questions of law and fact justifies the court in taking judicial notice of a final order made by it in another case which is interwoven and interdependent with the pending case. *Glissmann v. Grabow* 690

17. The admissions of a party to an action against his own interest, upon a material matter, are admissible against him as original evidence. *Scarborough v. Aeroservice, Inc.* 749
18. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will where a claimed ambiguity is patent and not latent. *Jacobsen v. Farnham* 776

Executors and Administrators.
1. An action based on negligence for personal injuries may be prosecuted against the estate of a decedent. *In re Estate of Bingaman* 24
2. The authority of an executor is principally but not solely derived from the will in which he is nominated. Until the court has approved his nomination, and he has qualified and has been granted letters testamentary, his authority is not complete. *Johnson v. Richards* 552
3. The personal representative and his attorney are both fiduciaries in their relation to the estate of the deceased and the persons interested therein. *Johnson v. Richards* 552
4. Upon the death of a husband the homestead vests immediately in his widow and should not be taken into account in the administration of his estate. *Horn v. Gates* 667
5. If, at the time of the husband's decease, there was a homestead the widow cannot abandon that homestead and select another out of the estate in lieu thereof. *Horn v. Gates* 667
6. In the settlement of an estate an administrator is the agent and trustee of the decedent. He possesses only such powers as are granted to him by statute, and he must discharge the trust subject to all limitations imposed upon him. *Breuer v. Cassidy* 836
7. Compensation for services rendered during the lifetime of a decedent must be based on an agreement, express or implied, to pay therefor, which is established by a preponderance of the evidence. *Breuer v. Cassidy* 836
8. Every person having a claim or demand against the estate of a deceased person must exhibit it to the county judge within the time fixed or it is forever barred. *Breuer v. Cassidy* 836
9. A volunteer, who pays claims of a decedent incurred in his lifetime without taking an assignment and

making proof thereof, does not have an allowable claim. The fact that the volunteer subsequently becomes administrator of the estate does not change the requirement. *Breuer v. Cassidy* 836

10. One who intermeddles in an estate and without authority pays alleged claims with his own funds without taking assignments thereof or making proof occupies the same position as a volunteer acting before the death of the decedent. *Breuer v. Cassidy* 836

11. The county court has no jurisdiction over a claim against the estate of a decedent, which is not properly filed for allowance until after it has been finally barred by the statute of nonclaims. *Breuer v. Cassidy* 836

12. An administrator who pays out funds of the estate in payment of attorney fees and other expenses incurred in administering the estate, without approval and final allowance by the county court, does so subject to such approval and final allowance. *Breuer v. Cassidy* 836

Fraud.

1. A person may not be held responsible for misrepresentations not made, authorized, or participated in by him. *Wagoun v. Chicago, B. & Q. R. R.* 132

2. Misrepresentation of a material fact made by a person representing a releasor and relied and acted upon by him does not constitute a basis for avoidance of the release of a claim for personal injuries unless the misrepresentation was also made on the authority or with the knowledge of the releasee. *Wagoun v. Chicago, B. & Q. R. R.* 132

3. A positive statement of a seller of the condition of personal property indicating his intention to be bound for the truth thereof, and which was so understood and relied upon by the other party, is an express warranty. *Garbark v. Newman* 188

4. Where rescission of a sale of goods is based on a false representation of quality, condition, or matter affecting its value, the purchaser must show that the representation was material and that he was misled thereby to his damage. *Garbark v. Newman* 188

5. If a misrepresentation is likely to affect the conduct of a reasonable person with reference to a transaction, it is generally material to the contract and it will be assumed, in the absence of contrary

showing, that a person deceived thereby was induced to act by the misrepresentation. *Garbark v. Newman* 188

6. A person is justified in relying upon a representation made to him if it is a positive statement of fact and if an investigation would be required to discover the truth. *Garbark v. Newman* 188

7. Where it is sought to set aside a written instrument on account of fraud, the presumptions of validity and regularity attaching to such a document require clear and convincing evidence to preponderate against them. The formal instrument furnishes proof of the most cogent and solemn character, and to outweigh this proof requires a higher quality of evidence than in a case where there are no such presumptions to overcome. *Johnston v. Johnston* 222

8. In an action based on fraud, the existence of a confidential or fiduciary relationship does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may have the effect of placing the burden of going forward with the evidence upon the party charged with fraud. *Johnston v. Johnston* 222

9. Marriage is a civil contract which, if procured by fraud, may, under certain conditions, be set aside. *Zutavern v. Zutavern* 395

10. Fraud sufficient to vitiate a marriage must go to the essence of the marriage relation. *Zutavern v. Zutavern* 395

11. The fraud that vitiates a marriage contract does not lend itself to definitive statement automatically resolving every case. *Zutavern v. Zutavern* 395

12. In absence of ratification, a man induced to marry a woman upon false representations that he is father of a child with which she is pregnant may have marriage annulled for fraud. *Zutavern v. Zutavern* 395

13. If one under no duty to speak does so, he must tell the truth and not suppress or materially qualify facts within his knowledge affecting the subject of his disclosure. Fraudulent representations may consist of half-truths. A representation literally true is fraudulent if used to create an impression substantially false. A slight imposition may terminate the privilege of silence. *Johnson v. Richards* 552

14. Extrinsic fraud is that practiced in the act of obtaining an adjudication in the course of litigation.

It consists of something done by the successful party that prevents the unsuccessful party from presenting his case or defense so that there was not a real contest in or actual litigation of the issue of the case. *Johnson v. Richards* 552

15. The equity powers are ample, independently of statute, to set aside a probate procured by fraud. *Johnson v. Richards* 552

16. In an original suit to annul a judgment on the ground that it was fraudulently obtained, the plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision of the issues was not attributable to his own carelessness or inaction. *Glissmann v. Grabow* 690

Frauds, Statute of.

1. The statute of frauds does not apply to a constructive trust. *Wiskocil v. Kliment* 103

2. Oral agreements for the sale of lands are void on their face as within the statute of frauds because not in writing unless there has been part performance by the promisee which is solely referable to the contract sought to be established and not such as might be referable to any other contract or situation. *Dingwerth v. Assendrop* 343

3. Burden and elements of proof stated where party seeks specific performance of an oral contract for the conveyance of land of a deceased person. *Nelson v. Glidewell* 372

Guardian and Ward.

1. A proceeding for the appointment of a guardian is in this state a probate matter. *Cass v. Pense* 792

2. The authority to appoint a guardian for an adult person depends upon statute and unless the requisites thereof are shown to exist the court is without power to make an appointment. *Cass v. Pense* 792

3. The examination at the trial of an application for the appointment of a guardian for an adult person should be directed to such inquiries as have for their object the finding and determination of the mental condition of the person alleged to be mentally ill or mentally incompetent. *Cass v. Pense* 792

4. In the statute prescribing the requisites for the appointment of a guardian for an adult person, mentally ill is one cause, and mentally incompetent by

reason of old age or other cause to have charge and management of property is another. *Cass v. Pense* 792

5. The statute providing for the appointment of a conservator is for the benefit of any adult who is not a spendthrift, mentally ill, or mentally incompetent, but who considers himself unfit by reason of infirmities of age or physical disability to manage his estate. *Cass v. Pense* 792

Habeas Corpus.

1. In general, 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. *Lung v. Frandsen* 255
2. A petition for a writ of habeas corpus must state the facts which it is contended constitute the illegal restraint. *Stapleman v. Hann* 410
3. A petition which states as a conclusion that a petitioner is illegally restrained of his liberty is not sufficient as a basis for the issuance of a writ of habeas corpus. *Stapleman v. Hann* 410
4. It is the duty of the court on presentation of a petition for a writ of habeas corpus to examine it and if it fails to state a cause of action to enter an order denying a writ. *Stapleman v. Hann* 410
Howell v. Hann 698

Health.

1. Osteopathy may, in general terms, be defined as the treatment of human ills by means of manipulative therapy as distinguished from the treatment of such ills through the use of drugs and operative surgery by physicians and surgeons. *Morgan v. State* 247
2. The practice of osteopathy is recognized by law as a lawful occupation in the public interest. It may not be arbitrarily limited or discriminated against, and its advocates may lawfully operate property and facilities for the treatment, according to its tenets, of patients seeking its aid, subject only to reasonable regulations under the police power relating to the public health and welfare. *Morgan v. State* 247
3. A licensed osteopath in this state is authorized to practice osteopathy in all of its branches as taught in osteopathic colleges recognized by the American Osteopathic Association; to perform surgery as it

is taught and used as a part of the osteopathic system, but not including operative surgery with surgical instruments; and to practice obstetrics and use anesthetics. *Morgan v. State* 247

Highways.

1. To establish a highway by prescription there must be a user by the general public under a claim of right, adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of ten years. *State ex rel. Weinberger v. Gormley* 242
2. The establishment of highways, the building of bridges, or the making of local improvements is a discretionary power entrusted to public and municipal corporations, and, when the proper authorities have in good faith decided, mandamus will not issue to compel them to a different course. *State ex rel. Weinberger v. Gormley* 242

Homesteads.

1. Whether one has acquired a homestead, or having acquired it has abandoned it, is a question of fact. *Horn v. Gates* 667
2. The burden rests upon one asserting an abandonment of a homestead to establish such abandonment by a preponderance of the evidence. *Horn v. Gates* 667
3. An intention to abandon and an actual abandonment must concur to establish the abandonment of a homestead interest. *Horn v. Gates* 667
4. Where the owner of a homestead removes therefrom with his family to another home of which he is the owner, it will be presumed that he has abandoned the first home and thereby the homestead right in it. But this, like other presumptions, may be rebutted by evidence to the contrary. *Horn v. Gates* 667
5. A person cannot at the same time have two homesteads, nor can he have two places either of which, at his election, he may claim as his homestead. *Horn v. Gates* 667
6. The term "homestead" means the house and land where the family dwells. *Horn v. Gates* 667
7. Upon the death of a husband the homestead vests immediately in his widow and should not be taken into account in the administration of his estate. *Horn v. Gates* 667

8. If, at the time of the husband's decease, there was a homestead, the widow cannot abandon that homestead and select another out of the estate in lieu thereof. *Horn v. Gates* 667

Hospitals.

A regulation adopted by the Department of Health that all persons admitted to a licensed hospital must be under the care of a person licensed to practice medicine and surgery in Nebraska has no relation to health or public welfare, is unreasonable, discriminatory and capricious, is an unlawful exercise of the police power, and is invalid. *Morgan v. State* 247

Husband and Wife.

1. A postnuptial or separation agreement is valid (1) if it is fair and equitable, (2) if there has been conduct of a party justifying legal separation, (3) if the parties immediately separate, and (4) if the provisions of the agreement are observed by the parties. *Chambers v. Chambers* 160
2. Postnuptial agreements are without validity during the existence of the complete marriage relation. *Chambers v. Chambers* 160
3. A postnuptial or separation agreement validly entered into at the time is invalidated by a resumption of the complete marriage relation. *Chambers v. Chambers* 160
4. Where the legitimacy of a child born in wedlock is in issue, the testimony of the husband and wife is incompetent on the question of access. Neither the husband nor wife should be permitted to testify to collateral facts from which an inference of access or nonaccess might be drawn. *Zutavern v. Zutavern* 395
5. Where the issues in an action for criminal conversation are presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside unless clearly wrong. *Klinginsmith v. Allen* 674
6. Statements made by plaintiff's wife to plaintiff out of the presence of defendant are inadmissible in an action for criminal conversation to prove the alleged wrongful conduct of the defendant. *Klinginsmith v. Allen* 674
7. In an action for criminal conversation, statements made by plaintiff's wife out of the presence of de-

fendant are only admissible where alienation of affections is pleaded by plaintiff as an issue or element of damages and then only when relevant and offered for the limited purpose of showing the wife's state of mind or feelings toward plaintiff. *Klinginsmith v. Allen* 674

8. No resulting trust necessarily arises in favor of a person furnishing the consideration for the purchase of property taken in the name of another, where the parties were sufficiently close so as to give rise to the presumption that a gift was intended. Where the parties are husband and wife, there is a presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift. *Peterson v. Massey* 829

9. An express contract between husband and wife that she shall receive reasonable compensation for extra and unusual services rendered him outside of her domestic duties is valid, and, when established by a preponderance of the evidence, is enforceable as against him or his estate. *Peterson v. Massey* 829

10. Though a wife renders services outside of the ordinary household duties, generally there is no implied obligation on the husband's part to pay her for them. *Peterson v. Massey* 829

Indictments and Informations.

1. An information meets fundamental purposes of information, as well as constitutional requirements, when it fairly enables defendant to prepare a defense and plead the judgment in bar in a subsequent prosecution. *Spreitzer v. State* 70

2. Where an information is filed under the Probation Act charging a violation of an order of probation, the endorsing of the names of witnesses on an information is not mandatory and the failure to do so is not error. *Young v. State* 261

Infants.

1. 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. *Adams v. Welliver* 331

2. The age when an infant may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be

fixed by arbitrary rule, and is generally a question of fact for the jury. *Adams v. Welliver* 331

3. Whether or not an infant between nine and ten years of age may be subject to the defense of contributory negligence is generally a question of fact and not of law. *Adams v. Welliver* 331
4. What is required of an infant is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. *Adams v. Welliver* 331
5. The county court has power to appoint a guardian ad litem to represent an infant who is interested in a matter then pending in that court. *Cass v. Pense* 792

Injunctions.

1. When an injunction is legally granted in a case where the court has jurisdiction of the subject matter and the parties, it must be respected and obeyed until it is set aside by the court allowing it, or it is reversed in the appellate court by some appropriate mode of direct review. *Kuhl v. School District* 357
2. A litigant cannot successfully invoke injunction, the effect of which would be to obtain possession of real estate, unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate. *Stahl v. Allchin* 412
3. Several independent tort-feasors may be joined in an action in equity for an injunction when the petition states but one cause of action against the joint tort-feasors. *Brchan v. The Crete Mills* 505
4. An action for an injunction to restrain or abate a continuing nuisance may be maintained by any person who suffers damage or injury thereby. An injured party may recover such damages in the injunction action as he may have sustained by such wrongful act. *Brchan v. The Crete Mills* 505
5. When bonds or other evidences of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue, equity has jurisdiction to grant an injunction. Where the law requires that the question shall be submitted to popular vote, an issue of bonds without such a vote will be enjoined. *Nacke v. City of Hebron* 739

6. One seeking to restrain an act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it entails an illegal expenditure of public funds or involves an illegal increase in the burden of municipal taxation. *Martin v. City of Lincoln* 845
7. A resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal corporation or the illegal creation of a debt which he, in common with other property holders, may otherwise be compelled to pay. *Martin v. City of Lincoln* 845
8. A resident taxpayer without showing any interest or injury peculiar to himself may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes. *Martin v. City of Lincoln* 845
9. In an action by a taxpayer to enjoin municipal authorities from making illegal purchases the seller is not a necessary party. *Martin v. City of Lincoln* 845
10. Injunction is the appropriate remedy for the protection of plaintiffs' rights herein. *Bussell v. McClellan* 875

Insane Persons.

1. Mentally incompetent means that the mind is so affected as to have lost control of itself to such a degree as to deprive the person affected of sane and normal action. *Cass v. Pense* 792
2. Mental incompetency exists when there is definite privation of reasoning faculties to the extent that the person affected is incapable of understanding and acting with reasonable discretion in the ordinary affairs of life. *Cass v. Pense* 792

Intoxicating Liquors.

1. The Liquor Control Act is to be liberally construed. *Allen v. Tobin* 212
2. A petition signed by the electors of any city or village of such number as shall equal twenty percent of the votes cast at the last general municipal election held therein is sufficient to comply with provision of Liquor Control Act requiring calling of election. *Allen v. Tobin* 212
3. When a petition meets the requirements of the Liquor Control Act to submit to the electorate of any city or village the proposition of sale of alcoholic

liquors by the drink, except beer, such petition vests jurisdiction in the proper city officials to call an election for such purpose. *Allen v. Tobin* 212
4. Under the provisions of the Liquor Control Act liquor may be sold by the drink in any city or village where the people thereof authorize it. *Allen v. Tobin* 212

Joint Adventures.
1. To constitute joint adventure, there must be a community of interest and common purpose in performance. Each of the parties must have equal voice in the manner of its performance and control over the agencies used therein, though one may entrust performance to the other. *Rossbach v. Bilby* 575
Peterson v. Massey 829
2. More convincing evidence is required to prove existence of a joint adventure where alleged joint adventurers are the only litigants than where the controversy is between a third party and the joint adventurers. *Rossbach v. Bilby* 575
3. Evidence was insufficient to establish a joint adventure. *Rossbach v. Bilby* 575
4. A joint adventure is in the nature of a partnership, but may exist where persons embark on an undertaking without entering on the prosecution of a business as partners strictly but engage in a common enterprise for their mutual benefit. *Peterson v. Massey* 829
5. The burden of establishing the existence of either a joint enterprise or a partnership is upon the party asserting that the relationship exists. *Peterson v. Massey* 829

Judgments.
1. All matters in issue in a former action and judicially determined are conclusively put at rest by a judgment therein and may not again be litigated in a subsequent action. *Anderson v. Anderson* 1
Glissmann v. Grabow 690
2. Except in special cases, the plea of res judicata applies, not only to points upon which the court was required by the parties to pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties might have brought forward therein. *Anderson v. Anderson* 1

3. A litigant may not present an issue for determination and avoid the effect of an adjudication or estoppel by withholding proof thereof. *Anderson v. Anderson* 1
4. A judgment on the merits constitutes an effective bar and estoppel in a subsequent action upon the same claim or demand, not only as to every matter offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for such purpose. *Webber v. City of Scottsbluff* 60
5. A judgment is not res judicata as to any fact at issue in subsequent actions where neither issues nor parties are the same. *Kuhl v. School District* 357
6. An action under the Uniform Declaratory Judgments Act should be dismissed without prejudice whenever all parties whose rights would be adjudicated by the action have not been impleaded. *Stahl v. Allchin* 412
7. The equity powers are ample, independently of statute, to set aside a probate procured by fraud. *Johnson v. Richards* 552
8. The requisite conditions precedent of obtaining relief by a declaratory judgment proceeding are stated. *Schroder v. City of Lincoln* 599
9. If the evidence given on a former trial is not contained in the record under review, the court cannot determine whether the judgment rendered on such trial was the result of false testimony. *Glissmann v. Grabow* 690
10. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate the judgment except for the reasons stated and within the time limited by statute. *Gasper v. Mazur* 856

Juries.

1. Proof of misconduct on the part of a jury to avoid a verdict must be of such a character that prejudice may be presumed. Evidence of misconduct which is to the advantage of the party complaining does not afford a basis for a new trial. *Pope v. Tapelt* 10
2. Matters of supposition or opinion on the part of jurors while deliberating inhere in the jury's verdict and are not competent to be shown in an attempted impeachment of a verdict. *Pope v. Tapelt* 10

3. It is not the province of the Supreme Court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury. *Spreitzer v. State* 70
4. No affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict. *Spreitzer v. State* 70
5. An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the instructions, is incompetent. *Spreitzer v. State* 70
6. In a law action, the denial over objection of a jury trial, while error, is not in all cases prejudicial. *Garbark v. Newman* 188
7. The length of time devoted to meals cannot be shown for the purpose of proving that the jury did not deliberate for the prescribed length of time provided by law. *Cartwright and Wilson Constr. Co. v. Smith* 431
8. If the voir dire examination of a juror considered as a whole does not show incompetency, a challenge upon that ground is properly overruled, although during his examination statements are made which, if unexplained, might be ground for challenge. *May v. State* 786

Larceny.

In a prosecution for larceny, proof of the value of the property stolen must be made by at least one witness affirmatively shown to possess knowledge of the value concerning which he is called upon to give evidence. *Spreitzer v. State* 70

Liens.

1. One holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles. *Bank of Keystone v. Kayton* 79
2. Under the act relating to certificates of title to motor vehicles, no valid lien can be asserted against a motor vehicle unless it is disclosed by a valid certificate of title regularly issued by the county clerk

of the county in which the applicant resides. *Bank of Keystone v. Kayton* 79

Mandamus.

1. A court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency. *State ex rel. Bintz v. State Board of Examiners* 99
2. A finding of fact in a mandamus proceeding will not be disturbed on appeal unless it is clearly wrong. *State ex rel. Weinberger v. Gormley* 242
3. The establishment of highways, the building of bridges, or the making of local improvements is a discretionary power entrusted to public and municipal corporations, and, when the proper authorities have in good faith decided, mandamus will not issue to compel them to a different course. *State ex rel. Weinberger v. Gormley* 242

Marriage.

1. Marriage is a civil contract which, if procured by fraud, may, under certain conditions, be set aside. *Zutavern v. Zutavern* 395
2. Fraud sufficient to vitiate a marriage must go to the essence of the marriage relation. *Zutavern v. Zutavern* 395
3. The fraud that vitiates a marriage contract does not lend itself to definitive statement automatically resolving every case. *Zutavern v. Zutavern* 395
4. In absence of ratification, a man induced to marry a woman upon false representations that he is father of a child with which she is pregnant may have marriage annulled for fraud. *Zutavern v. Zutavern* 395

Master and Servant.

1. The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties. *In re Estate of Bingaman* 24
2. A person in the relationship of a fellow employee to another is not liable for negligent acts committed under the direction and control of the employer except for misfeasance or positive wrong. *In re Estate of Bingaman* 24
3. The fact than an employee is the general servant of one employer does not, as a matter of law, prevent

him from becoming the particular servant of another, who may become liable for his acts. *Kessler v. Bates & Rogers Construction Co.* 40

4. The right of control determines if the relation of master and servant exists between the employee and his general employer, or whether he has become a special employee of another person. *Kessler v. Bates & Rogers Construction Co.* 40

Mechanics' Liens.

1. Although a mechanic's lien when filed attaches only to an equitable estate, it may be enforced against the fee after the equitable and legal titles have merged. *Central Construction Co. v. Highsmith* 113
2. Since the object of the mechanic's lien law is to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction. *Central Construction Co. v. Highsmith* 113
   Rosebud Lumber and Coal Company v. Holms 459
3. Where a claimant, either by gross carelessness or by design, puts upon record an erroneous statement, the law will not aid him in enforcing his lien. If the errors are trifling and immaterial, the recovery of a just debt will not be denied where nothing but fair dealing was intended. *Central Construction Co. v. Highsmith* 113
4. Mechanic's lien statutes should receive a liberal construction so as to effectuate their objects and purposes. *Rosebud Lumber and Coal Company v. Holms* 459
5. A subcontractor can acquire a lien under the mechanic's lien law for such materials only as were delivered at the building for use therein or were actually used in the construction thereof. *Rosebud Lumber and Coal Company v. Holms* 459
6. A mechanic's lien is given not upon the ground that a contract was made by the owner with such subcontractor, but because the material furnished was used in the erection of the building. *Rosebud Lumber and Coal Company v. Holms* 459
7. The sworn statement of a subcontractor for a mechanic's lien must contain a description of the premises on which the improvement was erected. Such a description is not insufficient if it renders the location of the property susceptible of ready ascer-

tainment by the aid of extrinsic evidence. *Rosebud Lumber and Coal Company v. Holms* 459
8. An overstatement of the amount due and sought to be recovered under a mechanic's lien does not, in the absence of a dishonest intention on the part of the claimant, invalidate the lien. *Rosebud Lumber and Coal Company v. Holms* 459

Mortgages.
A deed is not to be held a mortgage unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase and not a mortgage. *Dingwerth v. Assendrop* 343

Motor Carriers.
1. Willful failure, as used in the Motor Carrier Act, is such behavior as justifies a belief that there was an intent entering into and characterizing the failure complained of. A failure to perform an act for a long period of time, which is required by law to be performed, generally constitutes a willful failure to perform. *Safeway Cabs, Inc. v. Honer* 418
2. The Motor Carrier Act defines a motor carrier to mean any person owning, controlling, managing, operating, or causing to be operated, any motor-propelled vehicle used in transporting passengers or property for hire over any public highway in this state. *Safeway Cabs, Inc. v. Honer* 418
3. The term motor carrier, as defined in the Motor Carrier Act, is a term inclusive of both a common carrier and a contract carrier. *Safeway Cabs, Inc. v. Honer* 418
4. The term motor carrier is intended to include those who have or are required to have either a certificate of public convenience and necessity as a common carrier or a permit as a contract carrier. *Safeway Cabs, Inc. v. Honer* 418
5. A majority stockholder of a corporate motor carrier is not a motor carrier within the definition of motor carrier in the Motor Carrier Act. *Safeway Cabs, Inc. v. Honer* 418

Municipal Corporations.
1. The streets of a municipality in this state belong to the public. An unauthorized obstruction or en-

cumbrance of them by a structure or otherwise constitutes a public nuisance. *Schroder v. City of Lincoln* 599

2. The title of or right to hold the offices of city councilmen cannot be collaterally attacked as a ground for enjoining the enforcement of a city ordinance enacted by them. *Freeman v. City of Neligh* 651
3. The method prescribed by statute granting to cities of the second class power to pave or otherwise improve their streets is mandatory and jurisdictional, but when the governing boards of such municipalities act within the prescribed limitations thereof, they have power and authority to act thereunder. *Freeman v. City of Neligh* 651
4. Detachment of land from a city may be denied where to detach would enhance the difficulties of city administration and would lessen the availability of contiguous urban areas for urban use. *Swanson v. City of Fairfield* 682
5. The exercise of police power delegated to a municipal corporation cannot be invoked by it on purely aesthetic grounds. *City of Scottsbluff v. Winters Creek Canal Co.* 732
6. In the exercise of police power, it is generally for the municipal authorities to determine what ordinances are required for the health, safety, and welfare of the people, but their action is not final and is subject to scrutiny of courts. *City of Scottsbluff v. Winters Creek Canal Co.* 732
7. The test of the validity of a municipal police regulation in such cases is whether the ordinance in question is a bona fide exercise of police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation. *City of Scottsbluff v. Winters Creek Canal Co.* 732
8. A legal presumption exists in favor of validity of a municipal police regulation. Unless the contrary appears upon the face of an ordinance, the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence that the regulation imposed is so arbitrary, unreasonable, or confiscatory as to amount to a denial of due process of law. *City of Scottsbluff v. Winters Creek Canal Co.* 732
9. A municipal ordinance enacted in the exercise of police power is not necessarily invalid because it infringes on private rights or property, but such in-

fringement should not be arbitrary, unreasonable, or confiscatory. *City of Scottsbluff v. Winters Creek Canal Co.* 732

10. In passing upon the reasonableness of municipal ordinances, courts may consider the character of the regulation, the object to be accomplished, the means for its accomplishment, and all the relevant facts and circumstances of each particular case. *City of Scottsbluff v. Winters Creek Canal Co.* 732

11. The exercise of police power by municipal corporations must be directed toward and have a rational relation to protection of a basic interest of society rather than the mere advantage of particular individuals, and must be reasonable and free from arbitrariness. *City of Scottsbluff v. Winters Creek Canal Co.* 732

12. An ordinance which declares to be a nuisance that which is not but which may become such under certain circumstances should be directed against the circumstances which are harmful, and not against a particular type of property which, in itself and aside from the harmful circumstances, is not harmful. *City of Scottsbluff v. Winters Creek Canal Co.* 732

13. The general power of a city to declare, prevent, or abate nuisances does not include the power to declare anything a nuisance which is not one in fact or per se. *City of Scottsbluff v. Winters Creek Canal Co.* 732

14. A city may not, without an authorizing election, issue revenue bonds to secure funds to pay for the construction of a complete electric light and power plant when it does not own such a plant and has not for many years owned or operated such a plant, but does own transmission lines and a distribution system. *Nacke v. City of Hebron* 739

15. When bonds or other evidences of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue, equity has jurisdiction to grant an injunction. Where the law requires that the question shall be submitted to popular vote, an issue of bonds without such a vote will be enjoined. *Nacke v. City of Hebron* 739

16. One seeking to restrain an act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it entails an illegal expenditure of public funds or involves an illegal increase in the

burden of municipal taxation. *Martin v. City of Lincoln* 845

17. A resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal corporation or the illegal creation of a debt which he, in common with other property holders, may otherwise be compelled to pay. *Martin v. City of Lincoln* 845
18. A resident taxpayer without showing any interest or injury peculiar to himself may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes. *Martin v. City of Lincoln* 845
19. In an action by a taxpayer to enjoin municipal authorities from making illegal purchases the seller is not a necessary party. *Martin v. City of Lincoln* 845

Negligence.

1. A litigant injured in an accident who has placed himself in a position of peril is not entitled to an instruction under the last clear chance doctrine where it appears that he had the means at hand up to the time of the accident to have avoided injury. *Pope v. Tapelt* 10
2. An action based on negligence for personal injuries may be prosecuted against the estate of a decedent. *In re Estate of Bingaman* 24
3. An action for personal injury does not abate by reason of the death of the wrongdoer before the action is brought. *In re Estate of Bingaman* 24
4. A person in the relationship of a fellow employee to another is not liable for negligent acts committed under the direction and control of the employer except for misfeasance or positive wrong. *In re Estate of Bingaman* 24
5. Negligence is never presumed and cannot be inferred from the mere fact that an accident happened. *In re Estate of Bingaman* 24
6. Gross negligence means negligence in a very high degree, or the absence of even slight care in the performance of a duty. *Sautter v. Poss* 62
Johnson v. Jastram 376
Pavlicek v. Cacak 454
7. The duty of a guest riding in an automobile is to use ordinary care. Ordinarily, the guest need not watch the road or advise the driver in the management of the car. *Sautter v. Poss* 62

8. When an action under the guest statute is based on gross negligence, the comparative negligence statute is applicable. *Sautter v. Poss* 62

9. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of duty which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause. *Sautter v. Poss* 62

10. The burden is upon defendant to prove the defense of contributory negligence and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect. *Sautter v. Poss* 62
Murray v. Pearson Appliance Store 860

11. The age when an infant may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by arbitrary rule, and is generally a question of fact for the jury. *Adams v. Welliver* 331

12. Whether or not an infant between nine and ten years of age may be subject to the defense of contributory negligence is generally a question of fact and not of law. *Adams v. Welliver* 331

13. What is required of an infant is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. *Adams v. Welliver* 331

14. The existence of gross negligence depends upon the facts and circumstances of each particular case. *Johnson v. Jastram* 376

15. 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. *Johnson v. Jastram* 376

16. A pedestrian is required to exercise a greater degree of care between intersections than at a crosswalk where protection is afforded by giving the pedestrian the right-of-way. *Wilson v. Wiggins* 382

17. One who crosses a street between intersections is required to keep a constant lookout in all directions

from which danger should reasonably be anticipated. *Wilson v. Wiggins* 382

18. One who attempts to cross a street between intersections without looking is guilty of such negligence as would bar a recovery as a matter of law. *Wilson v. Wiggins* 382

19. Unless some reasonable excuse is shown, one who is obligated to keep a lookout is required to see that which is in plain sight. Where he fails to do so, his negligence is sufficient to defeat a recovery. *Wilson v. Wiggins* 382

20. Rules applicable stated under statute providing that every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, crosswalk, or intersection shall yield the right-of-way to vehicles upon the highway. *Wilson v. Wiggins* 382

21. In an action under the automobile guest statute a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence. *Pavlicek v. Cacak* 454

22. The question of the existence of gross negligence must be determined from the facts and circumstances in each case. *Pavlicek v. Cacak* 454

23. In the absence of statute, the ordinary rules of negligence obtain in respect to the maintenance and inspection of aircraft before flight by a private carrier when under agreement to carry a fare-paying passenger. *Scarborough v. Aeroservice, Inc.* 749

24. Ordinary care is such care as the danger of the situation and the consequences that may follow an accident demand. It may be a high degree of care under some circumstances and a slight degree of care under other circumstances. *Scarborough v. Aeroservice, Inc.* 749

25. Failure to exercise care in a situation which reasonably may be regarded as hazardous is negligence, notwithstanding the act or omission involved would not in all cases, or even ordinarily, be productive of injurious consequences. *Scarborough v. Aeroservice, Inc.* 749

26. In determining the existence of the duty to exercise care, the risk reasonably to be perceived defines the duty to be obeyed. *Scarborough v. Aeroservice, Inc.* 749

27. A plaintiff is only required to satisfy the jury, by a preponderance of the evidence, that the injury occurred in the manner claimed and is not required to exclude other possibilities. *Scarborough v. Aeroservice, Inc.* 749

28. Users of the highway are required to exercise reasonable care. What is reasonable care must, in each case, be determined by its own peculiar facts and circumstances. *Murray v. Pearson Appliance Store* 860

29. The presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to exercise a degree of care commensurate with surrounding circumstances. *Murray v. Pearson Appliance Store* 860

30. Negligence is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do. *Murray v. Pearson Appliance Store* 860
Bussell v. McClellan 875

31. Rule with respect to duty of driver of motor vehicle to keep a proper lookout stated. *Murray v. Pearson Appliance Store* 860

32. As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. *Murray v. Pearson Appliance Store* 860

33. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause. *Murray v. Pearson Appliance Store* 860

34. The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred. *Murray v. Pearson Appliance Store* 860

35. Under the comparative negligence law the words "slight" and "gross" as therein used are comparative terms. The intent of the statute is that the negligence of the parties will be compared one with the other in determining questions of slight and gross negligence. *Murray v. Pearson Appliance Store* 860

New Trial.

1. The ruling on a motion for a new trial for misconduct of the jury will not be disturbed on appeal where there is evidence to support it and the finding thereon is not clearly wrong. *Pope v. Tapelt* 10
2. Proof of misconduct on the part of a jury to avoid a verdict must be of such a character that prejudice may be presumed. Evidence of misconduct which is to the advantage of the party complaining does not afford a basis for a new trial. *Pope v. Tapelt* 10
3. An order granting a new trial will be scrutinized in Supreme Court with the same care as one denying a new trial. *Sautter v. Poss* 62
4. There is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented. *Sautter v. Poss* 62
5. If the trial court gave reasons for the granting of a new trial, the duty rests upon the appellant to present those reasons and in appropriate manner support his contentions. The appellee has then the duty, if he desires, of meeting those contentions, and has the right to submit additional reasons to sustain the trial court's judgment. *Sautter v. Poss* 62
6. In order to review errors of law which allegedly occurred during the trial of a workmen's compensation case, a motion for a new trial must be timely filed assigning such errors therein. The errors must also be subsequently assigned and discussed in the brief filed in the Supreme Court on appeal, or they will not ordinarily be considered. *Peek v. Ayres Auto Supply* 233
7. A motion for new trial is not a necessary prerequisite in a workmen's compensation case in order for the Supreme Court to search the record, try the case de novo thereon, and render such judgment as should have been rendered. *Peek v. Ayres Auto Supply* 233
8. Affidavits in support of a motion for new trial which are not embodied in a bill of exceptions will not be

considered on appeal. *Nebraska Methodist Hospital v. McCloud* 500

9. An exception to a group of instructions collectively in a motion for a new trial are deemed for the purpose of review in Supreme Court as a separate exception to each instruction included within the group. *Danielson v. State* 890
10. The exceptions taken to a group of instructions in a petition in error need be no more specific than required in a motion for a new trial. *Danielson v. State* 890
11. Whether a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown. *Schreiner v. State* 894

Nuisances.

1. An action for an injunction to restrain or abate a continuing nuisance may be maintained by any person who suffers damage or injury thereby. An injured party may recover such damages in the injunction action as he may have sustained by such wrongful act. *Brchan v. The Crete Mills* 505
2. The streets of a municipality in this state belong to the public. An unauthorized obstruction or encumbrance of them by a structure or otherwise constitutes a public nuisance. *Schroder v. City of Lincoln* 599
3. A private individual may not maintain an action to enjoin a public nuisance unless he will or has sustained some special injury therefrom distinct and different in kind from that which he will or does suffer in common with the rest of the public. *Schroder v. City of Lincoln* 599
4. A public nuisance, if committed without authority, can be remedied by a public prosecution or other available proceedings instituted by the proper officer on behalf of the people. *Schroder v. City of Lincoln* 599
5. An ordinance which declares to be a nuisance that which is not but which may become such under certain circumstances should be directed against the circumstances which are harmful, and not against a particular type of property which, in itself and aside from the harmful circumstances, is not harmful. *City of Scottsbluff v. Winters Creek Canal Co.* 732

6. The general power of a city to declare, prevent, or abate nuisances does not include the power to declare anything a nuisance which is not one in fact or per se. *City of Scottsbluff v. Winters Creek Canal Co.* 732

7. Where an irrigation canal or ditch has been constructed and operated in conformity with law, it is not a nuisance in fact or per se, and can only become one by reason of the manner in which it is maintained and operated. The mere fact that a municipality subsequently includes the same within its city limits does not convert such canal or ditch into a nuisance. *City of Scottsbluff v. Winters Creek Canal Co.* 732

Officers.

1. When an increase or decrease in compensation occurs during an officer's term because of a change in population after his election, such increase or decrease in compensation does not violate the constitutional provision that the compensation of a public officer shall not be increased or diminished during his term. *Hamilton v. Foster* 89

2. A citizen who is actually called into service by the sheriff under statutory authority and assists him as a deputy under color of an appointment is an officer de facto, although his appointment was not made with the formalities required by statute. *Anderson v. Bituminous Casualty Co.* 590

3. Where there has been an expenditure of the funds of a Class II school district which expenditure was unlawful for want of power, the officers or members of the board who by their act or acts gave efficacy to the expenditure are liable therefor to the district. *Fulk v. School District* 630

4. Offices are created for the benefit of the public and for the good order and peace of society. The authority of officers is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. *Freeman v. City of Neligh* 651

5. The title of or right to hold the offices of city councilmen cannot be collaterally attacked as a ground for enjoining the enforcement of a city ordinance enacted by them. *Freeman v. City of Neligh* 651

Parent and Child.

1. Parents have a natural right to the custody of their children unless they are affirmatively shown to be unfit. *Lung v. Frandsen* 255
2. The courts may not properly deprive the parents of the custody of their children unless it be shown that they are unfit to perform the duties imposed by the relation or that they have forfeited that right. *Lung v. Frandsen* 255
3. The amount which a defendant in a paternity proceeding will be required to pay for the support of his child is in the discretion of the district court. The award will not be disturbed unless discretion has been abused and it is manifestly excessive. *Race v. Mrsny* 679

Partnership.

1. Partnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions. *Peterson v. Massey* 829
2. The burden of establishing the existence of either a joint enterprise or a partnership is upon the party asserting that the relationship exists. *Peterson v. Massey* 829

Physicians and Surgeons.

1. Osteopathy may, in general terms, be defined as the treatment of human ills by means of manipulative therapy as distinguished from the treatment of such ills through the use of drugs and operative surgery by physicians and surgeons. *Morgan v. State* 247
2. A licensed osteopath in this state is authorized to practice osteopathy in all of its branches as taught in osteopathic colleges recognized by the American Osteopathic Association; to perform surgery as it is taught and used as a part of the osteopathic system, but not including operative surgery with surgical instruments; and to practice obstetrics and use anesthetics. *Morgan v. State* 247

Pleading.

1. A motion for judgment on the pleadings admits the facts well pleaded by the adversary and all reasonable inferences resulting from them, but does not

admit conclusions. Allegations controverted are not admitted. *Anderson v. Anderson* 1
2. Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or a matter to avoid, will be treated as admitted, though the answer also contains his general denial. *Anderson v. Anderson* 1
3. When a plaintiff pleads a fact which is material to the issue being tried, he thereby assumes the burden of proving the existence of such fact. *Hammer v. Estate of Hammer* 303
4. Where by statute plaintiff is authorized to plead general performance of all conditions precedent in a contract, defendant must, if he relies upon the fact that any of the conditions precedent have not been performed, set out specifically the condition and the breach. *Cartwright and Wilson Constr. Co. v. Smith* 431
5. A general demurrer admits the truth of all alleged material facts and the reasonable inferences to be drawn therefrom. *Martin v. City of Lincoln* 845

Process.

1. Publication of a notice in a newspaper three weeks successively is accomplished by publication on one day of each of three weeks, that is, three successive weekly publications. *Johnson v. Richards* 552
2. Publication of notice three weeks successively is complete upon the distribution of the last issue of the paper containing the notice though three full weeks did not elapse after the first publication. *Johnson v. Richards* 552
3. Supreme Court's construction of the statute providing for notice of the time and place of proving a will was not changed or affected by statute defining "week." *Johnson v. Richards* 552
4. Statute regulating publication of legal notices does not refer to the period during which a notice or legal publication must be published but it was intended to and does limit the number of issues in which the notice must appear when the medium of publication has more than one regular issue each week. *Johnson v. Richards* 552

Property.

1. The word "possessions" may include real estate if so intended, although such is not its technical meaning. *Jacobsen v. Farnham* 776

2. The words "all my worldly possessions" are ordinarily sufficient, if not qualified, to mean real estate; but it is otherwise if it appears from the context that personal estate only was in contemplation of the testator. *Jacobsen v. Farnham* 776

Public Service Commissions.

1. A final order of the railway commission granting or denying a railroad company permission to discontinue an agency at a particular station is unreasonable and arbitrary unless its findings and conclusions conform to the law and are supported by the evidence. *Chicago, B. & Q. R. R. Co. v. Order of Railroad Telegraphers* 387
Chicago, B. & Q. R. R. Co. v. Village of Bingham 392
2. It is arbitrary and unreasonable to require the maintenance of a full-time agency the year around at a station where the principal business is seasonal carload shipments, and the cost of such service is out of proportion to the revenue derived from that portion of the public benefited thereby. *Chicago, B. & Q. R. R. Co. v. Order of Railroad Telegraphers* 387
Chicago, B. & Q. R. R. Co. v. Village of Bingham 392
3. On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. *Safeway Cabs, Inc. v. Honer* 418
4. Willful failure, as used in the Motor Carrier Act, is such behavior as justifies a belief that there was an intent entering into and characterizing the failure complained of. A failure to perform an act for a long period of time, which is required by law to be performed, generally constitutes a willful failure to perform. *Safeway Cabs, Inc. v. Honer* 418

Quieting Title.

In actions to quiet title and to enforce legacies, the district court has jurisdiction to construe a will. *Jacobsen v. Farnham* 776

Quo Warranto.

1. Quo warranto or a proceeding in the nature thereof lies only against one who is in possession and user

of the office or who had been admitted thereto. *State ex rel. Larson v. Morrison* 309

2. When it is claimed that a school district has no existence as such because not created in the manner required by statute, the cause must proceed against the individuals who are usurping its franchises. *State ex rel. Larson v. Morrison* 309

3. Quo warranto is a proper remedy whereby to test the legal entity of a school district and the status of its officers. *State ex rel. Larson v. Morrison* 309

Railroads.

1. A final order of the railway commission granting or denying a railroad company permission to discontinue an agency at a particular station is unreasonable and arbitrary unless its findings and conclusions conform to the law and are supported by the evidence. *Chicago, B. & Q. R. R. Co. v. Order of Railroad Telegraphers* 387
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Chicago, B. & Q. R. R. Co. v. Village of Bingham 392

Rape.

In a prosecution for assault with intent to commit rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. *Schreiner v. State* 894

Reformation of Instruments.

1. Formal reformation of a written instrument is unnecessary in order to enforce it or have the advantage of it as a defense as it should have been expressed in the writing. *Garbark v. Newman* 188

2. In order to warrant the reformation of a written instrument, the evidence must be clear, convincing, and satisfactory, and until overcome by such proof, the terms of the instrument must stand. *Lovenburg v. Justice* 406
3. Reformation of an instrument to correct a mistake will not be accorded unless the intent and agreement which it will express as reformed were concurrent in the minds of the parties to and including the time of its execution. *Lovenburg v. Justice* 406

Release.

Misrepresentation of a material fact made by a person representing a releasor and relied and acted upon by him does not constitute a basis for avoidance of the release of a claim for personal injuries unless the misrepresentation was also made on the authority or with the knowledge of the releasee. *Wagoun v. Chicago, B. & Q. R. R.* 132

Replevin.

1. The gist of a replevin action is the unlawful detention of the property at the inception of the suit and the rights of the parties with respect to possession of the property at that time. *Bank of Keystone v. Kayton* 79
2. The burden is on the plaintiff in replevin to establish facts necessary for him to recover, and these must be shown to have existed at the time the action was commenced. *Bank of Keystone v. Kayton* 79
3. A plaintiff in a replevin case must recover on the strength of his right in or to the property and not upon any weakness of the interest of the defendant therein. *Bank of Keystone v. Kayton* 79

Sales.

1. A positive statement of a seller of the condition of personal property indicating his intention to be bound for the truth thereof, and which was so understood and relied upon by the other party, is an express warranty. *Garbark v. Newman* 188
2. Where rescission of a sale of goods is based on a false representation of quality, condition, or matter affecting its value, the purhcaser must show that the representation was material and that he was misled thereby to his damage. *Garbark v. Newman* 188

3. Generally rescission of a sale of a chattel must be made by the seller giving notice to the buyer of his election to rescind and a return of or offer to return the property to him at the place where it was received by the seller. *Garbark v. Newman* 188
4. If a buyer of a chattel is entitled to rescind the sale and elects to do so, and if the seller refuses to accept an offer of the buyer to return the goods, the buyer is thereafter presumed to hold the goods as bailee for the seller subject to a lien to secure the repayment of the price paid. *Garbark v. Newman* 188
5. Under the Uniform Sales Act, if a buyer of an automobile for legal cause rescinds the purchase and the seller refuses the offer of return of the vehicle, the buyer becomes a bailee for hire of the property, subject to a lien to secure repayment of the price paid, and is entitled to reasonable compensation from the seller for its care and protection. The buyer may in such a situation place the property in storage, and if he does, the seller is liable for and may be required to pay the reasonable storage charges as a prerequisite of his securing possession of the property. *Garbark v. Newman* 188
6. The provision of the Uniform Sales Act that the buyer or seller may recover special damages in any case permitted by law authorizes the recovery of special damages without regard to whether the transaction to which they are incidental has been rescinded or affirmed. *Garbark v. Newman* 188
7. Generally if a buyer sues for general damages for breach of the contract of sale, he affirms the contract and cannot thereafter disaffirm it. An exception to, or a situation without the operation of, this rule may exist if one expends money or furnishes material in the improvement of property before discovering the fraud by which he was induced to purchase it. In such a case the buyer may rescind the contract of sale and also recover the reasonable cost of improving the property or of the repairs made thereon. *Garbark v. Newman* 188

Schools and School Districts.

1. When it is claimed that a school district has no existence as such because not created in the manner required by statute, the cause must proceed against the individuals who are usurping its franchises. *State ex rel. Larson v. Morrison* 309

2. Quo warranto is a proper remedy whereby to test the legal entity of a school district and the status of its officers. *State ex rel. Larson v. Morrison* 309
3. The statute prescribing the method of changing the boundaries of a school district is mandatory and jurisdictional. *State ex rel. Larson v. Morrison* 309
4. Any signer of a petition to create a new school district from other districts or to change the boundary of any district may withdraw his signature therefrom at any time before the county superintendent has affirmatively acted upon such petition by authoritatively declaring the district created or change made. *State ex rel. Larson v. Morrison* 309
5. A contract to teach entered into by a school board with a teacher who does not qualify by certificate as required by law to teach in the particular type of district involved is invalid and unenforceable. *Kuhl v. School District* 357
6. School boards of Class II school districts are creatures of statute with power to bind the district only within the limits fixed by the Legislature. *Fulk v. School District* 630
7. A Class II school district is a creature of statute possessing no powers to contract beyond those granted by the Legislature. *Fulk v. School District* 630
8. In case a Class II school district enters into a contract without the power granted by the Legislature such contract may be declared void and invalidated in an appropriate action. *Fulk v. School District* 630
9. Power of a Class II school district may not flow from emergency, but only from a statutory grant. *Fulk v. School District* 630
10. Within the meaning of the statutes governing Class II school districts the purchase of a residence for the superintendent of schools does not come within the powers granted. *Fulk v. School District* 630
11. Where action of a school district is illegal and void not for lack of power but for failure to properly exercise power which exists, the district is bound to the extent that it has received the benefits of the action. *Fulk v. School District* 630
12. Where action of a school district is ultra vires and there is no power to act in the premises at all no liability may be imposed upon the district. *Fulk v. School District* 630

13. Where a sale of real estate has been made to a Class II school district which was void for the reason that the district was without power to make the purchase the seller is under a legal obligation to restore the consideration received to the district. *Fulk v. School District* 630

14. Where there has been an expenditure of the funds of a Class II school district which expenditure was unlawful for want of power, the officers or members of the board who by their act or acts gave efficacy to the expenditure are liable therefor to the district. *Fulk v. School District* 630

15. To authorize issuance of bonds for the purpose of building a new school building and securing the necessary furniture and apparatus for same, the vote of 55 percent of all qualified electors of the school district voting on the proposition in favor thereof is required. *Greathouse v. School Distrit* 883

16. Under School Bond Issue Act, requiring a proposal for the issuance of school bonds to be adopted by 55 percent of the ballots cast at the election by qualified electors of the school district on the question, ballots improperly cast or rejected for illegality cannot be counted in determining the vote cast. *Greathouse v. School District* 883

17. In the absence of statutory provision to the contrary, ballots which have been cast in a school district election which are entitled by law to be counted in declaring the result of the election shall alone be counted in determining the vote cast. *Greathouse v. School District* 883

Sheriffs and Constables.

1. A sheriff is given authority to call a private citizen into the service of the county to aid him in law enforcement. *Anderson v. Bituminous Casualty Co.* 590

2. When a private citizen is impressed into service by the sheriff, a contract of employment with the county results. The county so employing a citizen becomes liable to him for the reasonable value of the services he renders at the direction of the sheriff. *Anderson v. Bituminous Casualty Co.* 590

Specific Performance.

Burden and elements of proof stated where party seeks specific performance of an oral contract for

the conveyance of land of a deceased person. *Nelson v. Glidewell* 372

Statutes.

1. Statutes prescribing proceedings for the condemnation of property must be strictly construed against the condemnor and in favor of the landowner. *Webber v. City of Scottsbluff* 48
2. Eminent domain statute should not be so strictly construed as to defeat the purpose sought to be accomplished. *Webber v. City of Scottsbluff* 48
3. Existing statutes and laws with reference to which a contract is made enter into and become part thereof, subject to appropriate legislative limitations subsequently enacted under the police power of the state, and such principle embraces alike those which affect its validity, construction, discharge, and enforcement. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141
4. When a statute prescribes a duty and a contract is made involving performance of that duty, such statute becomes a part of the contract. Where the law authorizes the regulation of service rendered the public, such law becomes a part of and controls contracts providing for the public service. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141
5. Under the County Budget Act, the prohibition against creating indebtedness does not relate to the condition of the budget at the time a claim is filed or acted on by the board but to the time the contract is entered into or liability incurred for any of the purposes for which provision is made in the budget. *Becker v. County of Platte* 180
6. In construing statutes, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found. The intent so deduced from the whole will prevail over that of a particular part considered separately. *Allen v. Tobin* 212
7. The fundamental principle of statutory construction is to ascertain the intent of the Legislature and to discover that intent from the language of the act itself. It is not the court's duty nor within its province to read a meaning into a statute that is not warranted by legislative language. *Allen v. Tobin* 212

8. The Liquor Control Act is to be liberally construed. *Allen v. Tobin* 212
9. In construing a statute, effect must be given, if possible, to every word, clause, and sentence, so that no part of its provisions will be inoperative, superfluous, void, or insignificant. *Safeway Cabs, Inc. v. Honer* 418
10. When a statute is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness, or unequal operation and the other of which avoids such a result, the latter should be adopted. *Safeway Cabs, Inc. v. Honer* 418
11. Statutes are not to be understood as effecting any change in the common law beyond that which is clearly indicated. *Strauel v. Peterson* 448
12. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning. *Franzen v. Blakley* 621
13. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. *Franzen v. Blakley* 621
14. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. *Franzen v. Blakley* 621
15. It is not within the province of a court to read plain, direct, and unambiguous language out of a statute. *Franzen v. Blakley* 621
16. If possible, the entire statute is to be applied as written. *Franzen v. Blakley* 621
17. If the words used in a legislative act had, at the time used, received a settled construction, the Supreme Court will presume that the Legislature adopted them in that sense. *Franzen v. Blakley* 621
18. It is to be presumed that the Legislature in using language in a statute will give it the same significance that has already been accorded it by the Constitution and laws of the state, unless a different meaning is provided in the enactment itself or must be drawn from its context. *Franzen v. Blakley* 621
19. In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account, in order to determine the legislative will. *Nacke v. City of Hebron* 739

20. Sections 4 and 5 of the Blanket Mill Tax Levy Act are unconstitutional because of lack of uniformity. *Peterson v. Hancock* 801
21. Invalid portions of Blanket Mill Tax Levy Act are so connected with remainder that entire act is unconstitutional. *Peterson v. Hancock* 801
22. Blanket Mill Tax Levy Act is not unconstitutional for defect of title. *Peterson v. Hancock* 801

Tender.

The law does not require vain things, and a formal tender of property is not required if it appears that it would have been futile. *Garbark v. Newman* 188

Time.

1. Supreme Court's construction of the statute providing for notice of the time and place of proving a will was not changed or affected by statute defining "week." *Johnson v. Richards* 552
2. Statute regulating publication of legal notices does not refer to the period during which a notice or legal publication must be published but it was intended to and does limit the number of issues in which the notice must appear when the medium of publication has more than one regular issue each week. *Johnson v. Richards* 552

Trial.

1. A motion for judgment on the pleadings admits the facts well pleaded by the adversary and all reasonable inferences resulting from them, but does not admit conclusions. Allegations controverted are not admitted. *Anderson v. Anderson* 1
2. A litigant may withdraw his motion for a mistrial because of the admission of prejudicial evidence at any time prior to the court's ruling thereon. *Pope v. Tapelt* 10
3. Matters of supposition or opinion on the part of jurors while deliberating inhere in the jury's verdict and are not competent to be shown in an attempted impeachment of a verdict. *Pope v. Tapelt* 10
4. Circumstantial evidence is insufficient to sustain a verdict or to require submission of a case to a jury unless the circumstances proved by the evidence are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom. *In re Estate of Bingaman* 24

5. A motion for judgment notwithstanding the verdict requires the trial court to re-examine the legal sufficiency of the entire evidence to sustain the verdict and judgment, and if it is found insufficient, to render a proper judgment notwithstanding the verdict and judgment previously rendered. *In re Estate of Bingaman* 24

6. It is the duty of the district court to direct a verdict and render a judgment thereon if but one conclusion can reasonably be deduced from all the evidence in the case. *Kessler v. Bates & Rogers Construction Co.* 40

7. The burden is upon defendant to prove the defense of contributory negligence and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect. *Sautter v. Poss* 62

8. The test to be applied in determining the validity of a quotient verdict is whether the jury agreed beforehand to be bound by the result reached. *Spreitzer v. State* 70

9. No affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict. *Spreitzer v. State* 70

10. An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the instructions, is incompetent. *Spreitzer v. State* 70

11. It is proper to charge, and error to refuse to charge, that a reasonable doubt may arise either from the evidence or from a want of evidence, and that the absence of sufficiently satisfying evidence may be a ground for a reasonable doubt of defendant's guilt. *Spreitzer v. State* 70

12. In passing upon the validity of part of an instruction, it must be considered not only in the light of all the language used in the particular instruction of which it is a part, but also all other instructions given by the trial court. *Spreitzer v. State* 70

13. Where during the trial of a cause both parties treat an affirmative defense as denied, it will be so considered in the Supreme Court although the plaintiff filed no reply either before or after judgment. *Central Construction Co. v. Highsmith* 113

14. Action of the district court in making findings of fact not pleaded and basing judgment thereon is prejudicially erroneous. *Miller v. City of Scottsbluff* 185

15. Findings of court in a law action in which a jury is waived have the effect of the verdict of a jury, and judgment entered thereon will not be disturbed unless clearly wrong. In a non-jury law action, the findings of the court have the effect of a verdict of a jury and will not be disturbed unless clearly wrong. *Cotner College v. Estate of Hester* 279

16. In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. *Stolting v. Everett* 292
Pavlicek v. Cacak 454

17. Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony. *Stolting v. Everett* 292

18. Where the evidence is insufficient to sustain a verdict in favor of plaintiff, the trial court may give a peremptory instruction in favor of defendant or excuse the jury and enter a nonsuit. *Hammer v. Estate of Hammer* 303
McLeod v. Andrew Murphy & Son, Inc. 318

19. The instructions to the jury, when considered and construed together, fairly stated the law applicable to the issues raised by the pleadings and proofs. *Adams v. Welliver* 331
Cartwright and Wilson Constr. Co. v. Smith 431

20. If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion, to set aside the verdict, and to render judgment pursuant to the motion for directed verdict. *Pavlicek v. Cacak* 454

21. In ruling on a defendant's motion to dismiss at the conclusion of the plaintiff's case, the evidence will be considered by the court in the light most favorable to the plaintiff. Controverted facts will be resolved in his favor, and he is entitled to the benefit of every inference that can be reasonably deduced therefrom. *Rosebud Lumber and Coal Company v. Holms* 459

22. In an equity suit where a motion to dismiss at the conclusion of plaintiff's evidence was improperly sustained, the cause should be remanded for a new trial. *Rosebud Lumber and Coal Company v. Holms* 459
23. A litigant cannot trifle with the processes of the court by asserting under oath at different times the truth of each of two or more contradictory versions of an event or events in controversy according to the necessities of the particular occasion presenting itself. *Rahfeldt v. Swanson* 482
24. In a will contest on the ground of mental incompetency and undue influence, the trial court should withdraw both issues from the jury and direct a verdict or discharge the jury and render judgment for proponents where the evidence is insufficient to sustain a verdict upon neither of such issues in favor of contestants. *Nebraska Methodist Hospital v. McCloud* 500
25. Where instructions are asked which are not applicable to any controverted issue presented by the pleadings and evidence, they should be refused. *Klinginsmith v. Allen* 674
26. A party must, in preparing for trial, proceed on the assumption that his adversary will produce evidence to support his contention. *Glissmann v. Grabow* 690
27. A motion for a directed verdict admits for the purpose of decision the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can be reasonably deduced from the facts in evidence. *Scarborough v. Aeroservice, Inc.* 749
28. Circumstantial evidence can be sufficient to sustain a verdict depending solely thereon for support if the circumstances are such that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom. *Scarborough v. Aeroservice, Inc.* 749
29. The meaning of an instruction, not the phraseology, is the important consideration. A claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear. *Scarborough v. Aeroservice, Inc.* 749
30. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and

the other instructions, and the true meaning thereof will be determined by a consideration of all that is said on the subject. *Scarborough v. Aeroservice, Inc.* 749

31. It is not error to refuse requested instructions when the substance of them is given by the court in its instructions to the jury. *May v. State* 786

32. Generally in the initial instructions it is not necessary to instruct the jurors as to their right to disagree. *May v. State* 786

33. It is not error to refuse an instruction which has the effect to withdraw from the consideration of the jury competent material evidence in the case. *May v. State* 786

34. A defendant is entitled to test the sufficiency of plaintiff's evidence without the risk of penalizing himself. *Peterson v. Massey* 829

35. When a defendant demurs to the evidence or moves for a dismissal at the close of plaintiff's evidence, he thereby admits plaintiff's testimony to be true together with every conclusion which may be reasonably drawn therefrom. *Peterson v. Massey* 829

36. When a demurrer to the evidence is sustained the case is ready for judgment. *Peterson v. Massey* 829

37. If, on appeal, it is determined that the trial court erroneously sustained either a demurrer to the evidence or a motion to dismiss, both parties are entitled to be placed in the same position they were in before the error occurred. *Peterson v. Massey* 829

38. In the trial of an action at law where a jury is waived the findings of fact have the same effect as the verdict of a jury. *Flaherty v. Carskadon* 853

39. The findings of fact in a law action where a jury has been waived will not be disturbed unless they are clearly wrong. *Flaherty v. Carskadon* 853

40. A trial court may properly refuse tendered instructions which are covered by instructions given on its own motion. *Danielson v. State* 890

41. The correctness of the ruling of a district court in giving or refusing instructions cannot be considered in Supreme Court unless such ruling is first challenged by motion for a new trial. *Schreiner v. State* 894

42. An oral statement or communication by the court to the jury, which is rather in the nature of a cautionary direction, and not fairly and strictly a direction or instruction upon some question or rule of

law involved in or applicable to the trial, need not be in writing. *Schreiner v. State* 894

Trusts.

1. The burden of proof is upon one seeking to establish and enforce a constructive trust to establish the same by a preponderance of evidence, clear, satisfactory, and convincing in character. *Wiskocil v. Kliment* 103
2. Where one employed to act as agent for another in the purchose of real estate becomes the purchaser himself, he will be considered in equity as holding the property for his principal as upon a constructive trust, although he purchased with his own money subject to reimbursement for his proper expenditures in that behalf. *Wiskocil v. Kliment* 103
3. The statute of frauds does not apply to a constructive trust. *Wiskocil v. Kliment* 103
4. Where property is transferred to another subject to the payment of a certain sum to a third person, an equitable charge and not a trust is created. Where property is transferred to another with direction to pay to a third person a certain sum out of the property or its proceeds, a trust and not an equitable charge is created. *Dahlke v. Dahlke* 169
5. In the case of an equitable charge, the person having title to property holds it subject to an equitable interest in another person, and the equitable encumbrancer has an equitable lien thereon. The person who holds subject to the charge is the owner of the property, subject only to the lien. *Dahlke v. Dahlke* 169
6. If, by the terms of a trust, an interest passes to the beneficiary during the life of the settlor, although the interest does not take effect in enjoyment or possession before the death of the settlor, the trust is not ordinarily a testamentary trust, the disposition is not testamentary, and the intended trust is valid. *Dahlke v. Dahlke* 169
7. It is the duty of a trustee to fully inform the cestui que trust of all facts relating to the subject matter of the trust which come to the knowledge of the trustee and which are material to the cestui que trust to know for the protection of his interests. *Johnson v. Richards* 552
8. Every violation by a trustee of a duty required of him by law, whether willful and fraudulent, or done through negligence, or arising through mere over-

sight or forgetfulness, is a breach of trust. *Johnson v. Richards* 552

9. The burden of establishing a constructive trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing. *Peterson v. Massey* 829

10. No resulting trust necessarily arises in favor of a person furnishing the consideration for the purchase of property taken in the name of another, where the parties were sufficiently close so as to give rise to the presumption that a gift was intended. Where the parties are husband and wife, there is a presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift. *Peterson v. Massey* 829

11. An express contract between husband and wife that she shall receive reasonable compensation for extra and unusual services rendered him outside of her domestic duties is valid, and, when established by a preponderance of the evidence, is enforceable as against him or his estate. *Peterson v. Massey* 829

Usury.

A loan made at a place of business in violation of the Small Loan Act is void and uncollectible. *Grand Island Finance Co. v. Eacker* 546

Vendor and Purchaser.

In the construction of every instrument for the conveyance of real estate or any interest therein, it is the duty of courts to carry into effect the true intent of the parties so far as such intent can be ascertained from the whole instrument and it is consistent with rules of law. *Dahlke v. Dahlke* 169

Waters.

1. The right to use water for irrigation purposes may be acquired by contract with a common carrier irrigation corporation, and such contracts are generally governed by the same rules which pertain to other contracts. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141

2. A construction conferring a right in perpetuity will be avoided unless compelled by unequivocal language of the contract. A contract will not be construed as imposing a perpetual obligation when to

do so would be adverse to public interests. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141

3. A purchaser of land is not personally liable for a maintenance fee provided for in a water right contract between the grantor and an irrigation company, and, for want of privity of estate, an action cannot be maintained against him to recover a personal judgment therefor. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141

4. An agreement to pay an irrigation corporation maintenance charges as consideration for the right to use irrigation water upon land is not a covenant running with the land in the absence of privity of estate. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141

5. An irrigation corporation does not become the owner or proprietor of the water that it conveys as a public commodity. It is only the servant of the public to carry it to the land for which it has been appropriated, and in such respect stands on the same footing as a common carrier. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141

6. No private estate can be created in property belonging to the public or devoted to a public use. A consumer of irrigation water cannot have a water right in the sense that it is a private freehold interest in the real estate of the distributing irrigation corporation. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141

7. The exercise and enjoyment of a right of service do not create an easement in the property. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141

8. A contract with an irrigation corporation for the use of water is executed with reference to the statutes and laws prescribing its authority, which become a part of the contract. The subsequent purchase of such corporation by a public power and irrigation district does not of itself make the statutes and laws under which it was authorized to organize and operate a part of the original contract. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141

9. An original action in equity is an appropriate and permissible remedy to exclude or detach land unlawfully included in the area of an irrigation district. *Smith v. Frenchman-Cambridge Irrigation Dist.* 270

10. Land, provided with water by pump for its irrigation, may not be included in an irrigation district except upon written application or consent of the owner thereof. *Smith v. Frenchman-Cambridge Irrigation Dist.* 270

11. Whether or not land is provided with water by pump for its irrigation is a question which may be investigated and determined at any time in a proper case. *Smith v. Frenchman-Cambridge Irrigation Dist.* 270

12. If land is nonirrigable because of natural causes, it cannot lawfully be included or held in an irrigation district and taxed to support an irrigation system. *Smith v. Frenchman-Cambridge Irrigation Dist.* 270

13. Whether or not land, from some natural cause, cannot be irrigated is a question which may be put in issue and determined at any time in a proper case. *Smith v. Frenchman-Cambridge Irrigation Dist.* 270

14. Whether land cannot from any natural cause be irrigated must be determined from the facts in each case. No general and invariable rule to determine that fact can be stated. *Smith v. Frenchman-Cambridge Irrigation Dist.* 270

15. A riparian owner may not embank against the overflow of running streams when the effect is to cause an increased volume of water on the land of another riparian owner to his injury, and if he does so he is answerable in damages. *Stolting v. Everett* 292

16. In an action for damages by floodwaters of a stream allegedly caused by the negligent construction of jetties and a dike, the burden of proof is on the plaintiffs to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto, together with the nature and extent of the increased overflow, if any, and the amount of damages caused thereby. *Stolting v. Everett* 292

17. Where an irrigation canal or ditch has been constructed and operated in conformity with law, it is not a nuisance in fact or per se, and can only become one by reason of the manner in which it is maintained and operated. The mere fact that a municipality subsequently includes the same within its city limits does not convert such canal or ditch into

a nuisance. *City of Scottsbluff v. Winters Creek Canal Co.* 732

18. Statutory exemption from liability is limited to the owner of the land whereon an open ditch or tile drain may be discharged into a natural watercourse or natural depression or draw. *Bussell v. McClellan* 875

19. A proprietor of real estate may fight surface waters as he deems best. In fighting them an upper proprietor may not (1) accumulate them into a ditch or drain, increase the flow, and discharge them in volume on a lower or servient estate; or (2) divert them in a different direction to the damage of the lower or servient estate. *Bussell v. McClellan* 875

20. Where surface water flows in a well-defined course, whether the course be ditch, swale, or drain in its primitive condition, the flow cannot be arrested or interfered with to the injury of neighboring proprietors. *Bussell v. McClellan* 875

Wills.

1. In construing a will a court is required to give effect to the true intent of the testator insofar as it can be collected from the whole instrument, if such intent is consistent with applicable rules of law. *Dumond v. Dumond* 204
Jacobsen v. Farnham 776

2. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. *Dumond v. Dumond* 204

3. A patent ambiguity in a will is one which appears upon the face of it. Such an ambiguity must be removed by interpretation according to legal principles and not by evidence, and the intention of the testator must be found within the four corners of the will. *Dumond v. Dumond* 204
Jacobsen v. Farnham 776

4. The intention of the testator by a devise of "one undivided half one half interest in my farms" was to vest an undivided one-half interest in the lands described in each of two specifically named devisees. *Dumond v. Dumond* 204

5. An attorney may testify to factual matters relating to the execution of a will but anything in the nature of a communication is privileged and inadmissible unless waived. *Nelson v. Glidewell* 372

6. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon neither of such issues in favor of the contestants, the trial court should withdraw both issues from the jury and direct a verdict or discharge the jury and render judgment for proponents. *Nebraska Methodist Hospital v. McCloud* 500
7. In actions to quiet title and to enforce legacies, the district court has jurisdiction to construe a will. *Jacobsen v. Farnham* 776
8. In determining a testator's intention, the court must examine a will in its entirety, giving consideration to every provision, giving words used their commonly and generally accepted meaning, and indulging the presumption that testator understood the meaning of the words used. *Jacobsen v. Farnham* 776
9. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will where a claimed ambiguity is patent and not latent. *Jacobsen v. Farnham* 776
10. When an instrument consists partly of written form, whether in script or typewriting, and partly of printed form, the former controls the latter where the two are inconsistent. *Jacobsen v. Farnham* 776
11. Any technical distinction between the words "devise" and "bequeath" will not be permitted to defeat the purpose of a testator, since they may be construed interchangeably or applied indifferently to either real or personal property if the context shows that such was the intent of the testator. *Jacobsen v. Farnham* 776
12. The word "possessions" may include real estate if so intended, although such is not its technical meaning. *Jacobsen v. Farnham* 776
13. The words "all my worldly possessions" are ordinarily sufficient, if not qualified, to mean real estate; but it is otherwise if it appears from the context that personal estate only was in contemplation of the testator. *Jacobsen v. Farnham* 776
14. It is a natural presumption that a testator making his will intended to dispose of his whole estate and not to die intestate as to any part of it. In construing doubtful expressions this presumption has weight, but it cannot supply the actual intent of

the testator to be derived from the language of the will. *Jacobsen v. Farnham* 776
15. The presumption that a testator intended by his will to fully dispose of his estate will not overcome the rule requiring express provision or necessary implication to disinherit an heir. *Jacobsen v. Farnham* 776
16. Real estate not disposed of by will becomes intestate property and descends to the heirs at law of the testator. *Jacobsen v. Farnham* 776

Witnesses.

1. A witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a special contract, entitled only to the statutory fee. *Peek v. Ayres Auto Supply* 233
2. When two or more persons employ the same attorney in relation to the same business their communications are not privileged between themselves where the disclosures are made in the presence of all parties concerned or are intended for the information of all parties. *Nelson v. Glidewell* 372
3. The credibility of witnesses and the weight of their testimony are for the jury to determine. *May v. State* 786

Work and Labor.

1. Where action of a school district is illegal and void not for lack of power but for failure to properly exercise power which exists, the district is bound to the extent that it has received the benefits of the action. *Fulk v. School District* 630
2. Where action of a school district is ultra vires and there is no power to act in the premises at all no liability may be imposed upon the district. *Fulk v. School District* 630

Workmen's Compensation.

1. Mere exertion, which is not greater than that ordinarily incident to the employment, which combined with pre-existing disease produces disability, does not constitute a compensable accidental injury. *Foster v. Atlas Lumber Co.* 129
2. A workmen's compensation case is a civil action equitable in character and so triable by the Supreme Court on appeal. *Peek v. Ayres Auto Supply* 233

3. All of the provisions of the Civil Code are applicable and controlling in a workmen's compensation case as they are in any other civil action equitable in nature. *Peek v Ayres Auto Supply* 233
4. The filing of a motion for new trial is not necessary in order to obtain review of a workmen's compensation case upon the merits in the Supreme Court. *Peek v. Ayres Auto Supply* 233
5. The compensation for disability partial in character is sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but the compensation awarded cannot exceed the maximum provided by statute. *Peek v. Ayres Auto Supply* 233
6. Where further medical, hospital, and surgical services would not definitely improve the condition of an injured employee, and where such improvement would be conjectural, the employer's liability to furnish reasonable medical and hospital services and medicines, as and when needed, ceases. *Peek v. Ayres Auto Supply* 233
7. The right of recovery in a workmen's compensation case is statutory. The burden is on the claimant to establish the facts essential to an award. *Rahfeldt v. Swanson* 482
8. An appeal in a workmen's compensation case will be considered by the Supreme Court de novo upon the record. *Rahfeldt v. Swanson* 482
Myszkowski v. Wilson and Company, Inc. 714
9. An award of compensation under the workmen's compensation act may not be based on possibilities, probabilities, or conjectural or speculative evidence. *Rahfeldt v. Swanson* 482
10. In a workmen's compensation case if the evidence is in irreconcilable conflict the Supreme Court may upon a trial de novo consider the fact that the district court gave credence to testimony of some witnesses rather than contradictory testimony of other witnesses. *Rahfeldt v. Swanson* 482
11. In a workmen's compensation case the insurance carrier is bound by a judgment against the insured whether the carrier is a party to the action or not. *Ramsey v. Kramer Motors, Inc.* 584
12. Under workmen's compensation law, insurance carrier is a proper party defendant in an action to recover benefits. *Ramsey v. Kramer Motors, Inc.* 584

13. Any citizen called into service by a sheriff who receives an injury which arises out of and in the course of the employment is entitled to compensation under the provisions of the workmen's compensation law. *Anderson v. Bituminous Casualty Co.* 590
14. Where an employer appeals to the Supreme Court from an award of the district court in a workmen's compensation case and fails to obtain any reduction in the amount of such award, the Supreme Court should allow the employee a reasonable sum for attorney's fee for the proceedings in the Supreme Court. *Anderson v. Bituminous Casualty Co.* 590
15. To permit an award of compensation under the Second Injury Fund a claimant must in fact have a permanent total disability. *Franzen v. Blakley* 621
16. The Nebraska Workmen's Compensation Act is to be construed liberally so that its beneficent purposes may not be thwarted by technical refinement of interpretation. *Franzen v. Blakley* 621
17. For workmen's compensation purposes, total disability does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. *Franzen v. Blakley* 621
18. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law. *Franzen v. Blakley* 621
19. An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted. *Franzen v. Blakley* 621
20. The right to tax attorney's fees in compensation cases is purely statutory. No other authority to allow an attorney's fee is authorized. *Franzen v. Blakley* 621

21. Statute authorizing attorney's fee relates to an "employer" appealing and failing to reduce the amount of the award and to the taxing of an attorney's fee as costs against the "employer." *Franzen v. Blakley* 621
22. An employee is entitled to recover compensation under the workmen's compensation law when he suffers injury as the result of an accident arising out of and in the course of his employment. *Myszkowski v. Wilson and Company, Inc.* 714
23. The burden is upon the employee to establish a right of recovery by a preponderance of the evidence. *Myszkowski v. Wilson and Company, Inc.* 714
24. There must be a causal connection between the employment and the injury before recovery can be allowed. *Myszkowski v. Wilson and Company, Inc.* 714
25. Whether an accident arises out of and in the course of employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. *Myszkowski v. Wilson and Company, Inc.* 714
26. Under the Workmen's Compensation Act the words "arising in the course of the employment" relate to the time, place, and circumstances under which an accidental injury occurs, and the term "arising out of the employment" refers to the origin or cause of the accidental injury. *Myszkowski v. Wilson and Company, Inc.* 714
27. An assault is an "accident" within the meaning of the Workmen's Compensation Act when from the point of view of the workman who suffers from it it is unexpected and without design on his part, although intentionally caused by another. *Myszkowski v. Wilson and Company, Inc.* 714
28. Where the peculiar conditions of the employment are such as to expose a worker to a wrongful act by another worker, such an act may reasonably be said to "arise out of the employment." *Myszkowski v. Wilson and Company, Inc.* 714
29. Where a disagreement arises out of the employer's work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment. *Myszkowski v. Wilson and Company, Inc.* 714